AS TO THE ADMISSIBILITY OF

Application No. 18902/91
by H.N.
against Italy

The European Commission of Human Rights (First Chamber) sitting in private on 27 October 1998, the following members being present:

MM	M.P. PELLONPÄÄ, President
	E. BUSUTTIL
	A. WEITZEL
	C.L. ROZAKIS
Mrs	J. LIDDY
MM	L. LOUCAIDES
	B. MARXER
	B. CONFORTI
	I. BÉKÉS
	G. RESS
	A. PERENIČ
	C. BÎRSAN
	M. VILA AMIGÓ
Mrs	M. HION
Mr	R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 31 July 1991 by H.N. against Italy and registered on 4 October 1991 under file No. 18902/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to:

- the observations submitted by the respondent Government on 19 February 1993 and the observations in reply submitted by the applicant on 19 May 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian national born in 1940 and residing in Graz (Austria). He is the editor of a periodical in Graz.

Before the Commission he is represented by Mr. Gernot Kusatz, a lawyer practising in Wels (Austria).

The facts of the case, as they have been submitted by the parties, may be summarised as follows.

a) The particular circumstances of the case

In October 1987, B., the President of the Bolzano/Bozen Provincial Council, filed a criminal complaint for defamation with the Bolzano/Bozen Public Prosecutor, following the publication of an article in the issue of 2 June 1987 of the magazine "Der Tiroler", headlined "Die Praktiken eines Faschistengesindels". In that article it was stated inter alia that in B.'s birthplace people said that he was a fascist and that after the war he had made profit by selling Army goods. B. was referred to as a "merchant" ("spartigiano", a pun on the word "partigiano", i.e. partisan). It was further stated that he had cooperated with the pro-fascist newspaper "Alto Adige", which had favoured the restoration of a repressive regime of a fascist character in Alto Adige. In particular, B. was reproached for having made the fascists in Alto Adige to be regarded as respectable persons.

On an unspecified later date, L. also filed a criminal complaint with the same Public Prosecutor following the publication of another article in the same issue of the magazine "Der Tiroler", headlined "Spitzer! Provokateur, Attentaeter?" ("Spy! Provoker, Terrorist?") in which it was stated that he had been a spy, an undercover agent and an "agent provocateur" of the secret services and had stolen money from his then employer, thus behaving like a louse ("pidocchio").

The issue of 2 June of the magazine indicated as its editor the "Association of former Sud Tirol fighters for liberation, P.O. Box 210143, Nurnberg". It further indicated the following: ""Der Tiroler" is a three-monthly magazine set up by a community of workers composed of different associations for the protection of South Tirol. Editor: R.D., P.O. BOX 1252, Stein. When the name of the author is indicated, the latter is responsible for the article. Austria: Tirol Patriotic League (President: Herwig Nachtmann, Innstrasse 51, Innsbruck)".

The applicant and R.D. were identified as the authors of the said articles and the editors of the magazine.

Criminal proceedings were subsequently brought against the applicant and R.D. before the Bolzano/Bozen Court.

On 26 April 1988 the Bolzano/Bozen Public Prosecutor issued the official notification that criminal proceedings had been opened against the applicant for defamation (Articles 595 and 596 bis of the Criminal Code and Article 13 of Law 47/48) to the detriment of B. and L. and for publication and distribution of underground press lacking in particular the indication of the place of publication (Articles 5 and 16 of Law 47/48), with the invitation for the applicant to indicate or elect an address for service in Italy and to appoint a defence lawyer within five days of the notification, failing which Mr. A.V. would be officially assigned to act as his lawyer.

This act was notified to the applicant on 9 November 1989 by registered mail to his official address in Graz (Messendorferstrasse 61) pursuant to Article 177 bis of the old Code of Criminal Procedure; it was however returned undelivered to the Public Prosecutor's Office with the annotation that it had not been claimed by the addressee. The searches carried out by the Italian police showed that the applicant was still officially resident at that address in Graz. Accordingly, the applicant was declared as untraceable ("irreperibile"). Notifications were subsequently carried out pursuant to Article 170 of the former Code of Criminal Procedure.

The proceedings against the applicant and his co-accused followed an abridged procedure ("giudizio direttissimo").

By a judgment by default delivered on 14 June 1989 and filed with the Registry on 26 June 1989, the Bolzano/Bozen Court convicted the applicant and his co-accused of defamation and of publication and distribution of underground press and sentenced them to 13 months' imprisonment on probation and to the payment of a fine of 600.000 lire each. The sentence was suspended. The Court pointed out that, despite the complex investigations carried out by the Italian, German and Austrian police, it had not been possible to establish where exactly the periodical was prepared and printed. However, as it was directed mainly to the people residing in Süd Tirol, it could be considered as "distributed" on the Italian territory and could thus be assimilated to an Italian periodical.

The Court found in particular that the magazine "Der Tiroler" was run as a means of fight by terrorist organizations (to which absconding terrorists and neo-nazi extremists belonged) which did not hesitate to defame and slander in order to assert their own ideas and fight their alleged enemies. It further held that, given that it was impossible to distinguish the owner from the editor on account of the failure by the said persons to respect the applicable legal provisions about press, all those who, like the applicant, had contributed to the publishing of the magazine at issue had to be held responsible. The Court further pointed out that the indications concerning the editor and the seat given in the magazine at issue were insufficient and in breach of the applicable legislation.

The Court found, in respect of the charge of defamation, that in the articles at issue B. and L. had been accused of specific acts of which however there was no

evidence whatsoever, particularly insofar as L. was concerned. It considered that the content of the articles had undoubtedly jeopardized B.'s and L.'s reputation.

In respect of the charge of publication of underground press, the Court pointed out the lack of a clear indication of the place of print and of publication, which ought to be indicated in pursuance of the applicable legislation in order to allow the identification of the responsible persons and the possible institution of defamation actions.

On 17 June 1989 both the Public Prosecutor and the applicant's and his co-accused's court-appointed defence lawyer appealed against the said judgment.

On 29 June 1989 an extract from the judgment was notified to the applicant pursuant to Article 170 of the former Code of Criminal Procedure.

The Public Prosecutor withdrew his appeal on 13 July 1989.

By a decision (ordinanza) of 18 July 1989, the Bolzano/Bozen Court rejected the appeal. An extract from this decision was notified to the applicant on 22 July 1989.

On 21 July 1989 the applicant's defence lawyer lodged an appeal on points of law before the Court of Cassation on behalf of the applicant and his co-accused.

The appeal on points of law was rejected by a decision of 3 December 1991, which was filed with the Registry on the same day.

On 7 December 1991 the judgment of the Bolzano/Bozen Court of 14 June 1989 thus became final.

The applicant alleges to have learned about his conviction only on 20 June 1991, when he received a letter which had been sent to him on 18 June 1991 by the Austrian Federal Ministry for Foreign Affairs. Reference was made in this letter to a previous letter of 5 June 1991 whereby the applicant had apparently requested the Federal Ministry of Foreign Affairs to enquire about the criminal procedure against him before the Bolzano/Bozen Court. The Minister informed the applicant that, insofar as it could be gathered from two articles recently published in the Italian press concerning the applicant's conviction by the Bolzano/Bozen Court, he had been convicted of defamation and publication of underground press and sentenced to thirteen months' imprisonment and to the payment of a fine. The Minister pointed out inter alia that the question of the legality of the notification to him of the information about the proceedings would be addressed in the future by the Federal Ministry of Justice.

On 18 November 1992 the Austrian Federal Ministry for Foreign Affairs delivered to the applicant a copy of the judgment and further decisions.

b) Relevant domestic law

Article 170 of the former italian Code of Criminal Procedure, insofar as relevant, reads as follows:

"Se non è possibile eseguire le notificazioni (...) l'ufficiale giudiziario ne fa relazione al giudice (...) o al pubblico ministero... (Questi) dopo aver disposto nuove ricerche (...) emette decreto con il quale, nominato un difensore all'imputato (...), ordina che le notificazioni (...) siano eseguite mediante deposito nella cancelleria (...). Di ogni deposito deve essere dato avviso senza ritardo al difensore."

<Translation>

"When it is not possible to carry out a notification, the bailiff informs the judge or the public prosecutor.

The latter, after directing that further searches be conducted, shall issue an order that notifications be effected by means of lodging the relevant documents in the registry. The defence lawyer shall be informed without delay of any such notification."

Article 177 bis of the former Code of Criminal Procedure reads as follows:

"Se risulta dagli atti del procedimento notizia precisa del luogo ove dimora all'estero l'imputato, il pubblico ministero o il pretore trasmette, mediante lettera raccomandata, avviso del procedimento iniziato a suo carico con invito a dichiarare o eleggere domicilio per la notificazione degli atti.

Nel caso che non si conosca la dimora all'estero o che l'imputato non proceda alla dichiarazione o elezione di domicilio ovvero se queste sono insufficienti o inidonee, il giudice emette il decreto preveduto all'articolo 170 (4)".

< Translation >

"Where there is precise information in the documents in the proceedings as to the place where the accused resides abroad, the Public Prosecutor or trial judge shall send him by registered letter notification of the proceedings against him with an invitation to declare or elect an address for service.

Where the accused's address abroad is unknown, or where he has not declared or elected an address for service or if the information provided by him is insufficient or inadequate, the judge shall issue the order provided for in Article 170 of the Code of Criminal Procedure."

Article 21 of the Italian Constitution, insofar as relevant, provides as follows:

"Tutti hanno diritto di manifestare liberamente il proprio pensiero con (...) lo scritto e ogni altro mezzo di diffusione.

La stampa non puo' essere soggetta ad autorizzazioni o censure. (...)"

< translation >

"Everybody has the right to express freely his opinion in writing or by any other means of diffusion.

The press cannot be the subject of authorisations or censorship."

Article 2 of Law no. 47 of 8 February 1948, published in the Law Gazette No. 43 of 20 February 1948, the Press Act, as far as relevant reads as follows:

"Indicazioni obbligatorie sugli stampati. (...) I giornali (...) e i periodici di qualsiasi altro genere devono recare l'indicazione:
del luogo e della data della pubblicazione;
del nome e del domicilio dello stampatore;
del nome del proprietario e del direttore o vice direttore."

< Translation >

"Obligatory indications in the press. Newspapers (...) and any other periodical must bear the indication:
of the place and date of publication;
of the name and address of the publishing house;
of the name of the owner and of the editor-in-chief or his deputy (...)."

Article 5, insofar as relevant, reads as follows:

"Registrazione. Nessun giornale o periodico puo' essere pubblicato se non sia stato registrato presso la cancelleria del tribunale nella cui circoscrizione la pubblicazione deve effettuarsi.
Per la registrazione occorre che siano depositati nella cancelleria:
1) una dichiarazione, con le firme autenticate del proprietario e del direttore o vice direttore responsabile, dalla quale risultino il nome e il domicilio di essi e della persona che esercita l'impresa giornalistica, se questa è diversa dal proprietario, nonché il titolo e la natura della pubblicazione; (...)
Il presidente del tribunale o giudice da lui delegato, verificata la regolarità dei documenti presentati, ordina entro quindici giorni l'iscrizione del giornale o periodico in apposito registro tenuto dalla cancelleria."

< Translation >

"Registration. No newspaper or periodical can be published unless it has been registered with the Registry of the court in whose area of jurisdiction the publication is to be effected (...). In order to proceed with the registration, the following documents must be filed with the Registry:

1. a declaration signed by the owner and by the editor-in-chief or his deputy, whose signature must be authenticated, containing their name and address and those of the person who carries out the journalistic activity, if different from the owner, and the title and nature of the publication; (...)

The president of the court or a judge appointed for this purpose orders, if he is satisfied that the documents submitted are regular, that the newspaper or periodical be inscribed in the register kept in the Registry"

Article 13 reads as follows:

"Nel caso di diffamazione commessa col mezzo della stampa, consistente nell'attribuzione di un fatto determinato, si applica la pena della reclusione da uno a sei anni e quella della multa (...)"

< Translation >

"If the offence of defamation is committed through the press and consists in attributing a specific fact, the author shall be liable to imprisonment of not less than one and no more than six years and a fine (...)"

Article 16 reads as follows:

"Stampa Clandestina. Chiunque intraprende la pubblicazione di un giornale o altro periodico senza che sia stata eseguita la registrazione prescritta all'articolo 5, è punito con la reclusione fino a due anni o con la multa (...)"

< Translation >

"Underground press. Whoever proceeds with the publication of a newspaper or other periodical without prior registration in accordance with Article 5, shall be liable to imprisonment not exceeding two years or a fine (...)"

Articles 595 and 596bis of the Criminal Code insofar as relevant read as follows:

"Diffamazione. Chiunque (...) comunicando con più persone, offende l'altrui reputazione è punito con la reclusione fino a un anno o con la multa (...). (...) Se l'offesa è recata col mezzo della stampa (...) la pena è della reclusione sa dei mesi a tre anni o della multa (...)"

"Diffamazione col mezzo della stampa. Se il delitto di diffamazione è commesso col mezzo della stampa, le disposizioni dell'articolo precedente si applicano anche al direttore o vice-direttore responsabile, all'editore o allo stampatore (...)"

< Translation >

"Defamation. Whoever (...) by communicating to third persons, jeopardises someone's reputation shall be liable to imprisonment not exceeding twelve months or a fine (...) If this offence is committed in a printed document (...) the author shall be liable to a term of imprisonment of not less than six months and not more than three years or a fine (...)"

"Defamation through the press. If the offence of defamation is committed through the press, the preceding provisions shall be applicable also to the editor or his responsible deputy, the publisher or the printer (...)"

COMPLAINTS

1. The applicant complains that he was never aware of the existence of criminal proceedings against him, so that he did not have the benefit of a fair trial by an independent and impartial tribunal, nor of an oral hearing or oral delivery of the judgment. He therefore alleges that he was not promptly informed in a language which he understands and in detail of the accusation brought against him, that he could not be assisted by a lawyer of his choosing and that he has not been able to defend himself and to summon witnesses on his behalf.

In his opinion, the Italian authorities - which notified the summons to appear as well as all other documents directly at his address in Austria - should have forwarded them to him through either the Austrian Foreign Office or the Austrian Ministry of Justice.

He further alleges a breach of the principle of the presumption of innocence, given that his guilt was never established.

He invokes Articles 6 and 7 of the Convention.

2. The applicant further complains of having been convicted of distribution of underground press, which did not constitute a criminal offence at the time when it was committed. He claims in particular that the Italian authorities forbid the sale of the periodical "Der Tiroler", which is contrary to the regulations of the European Union.

3. The applicant also complains that his rights under Article 9 of the Convention were violated on account of his conviction of defamation and publication of underground press, and that his right of freedom of expression under Article 10 of the Convention was violated on account of his conviction of publication of underground press.

4. The applicant finally complains under Article 16 of the Convention that the Italian authorities consider the distribution of the periodical "Der Tiroler" as an act of illicit propaganda.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 31 July 1991 and registered on 4 October 1991.

On 1 July 1992 the Commission decided to communicate the application.

The Government's written observations were submitted on 19 February 1993, after an extension of the time-limit fixed for that purpose. The applicant replied on 19 May 1993.

THE LAW

1. The applicant complains in the first place about his conviction in absentia without his knowledge of the existence of proceedings against him through no fault of his own.

He invokes Articles 6 and 7 of the Convention.

The Commission considers that this complaint falls to be examined under Article 6 paras. 1 and 3 (a) and (c) of the Convention. Given that the requirements of paragraph 3 of Article 6 represent particular aspects of the right to a fair trial guaranteed in paragraph 1, the Commission will examine the applicant's complaint from the point of view of these two provisions taken together (see Eur. Court HR, Daud v. Portugal judgment of 21 April 1998, Reports of Judgments and Decisions 1998-II, p. 749, para. 33).

Article 6, insofar as relevant, provides:

"1. In the determination of (...) any criminal charge against him, everyone is entitled to a fair (...) hearing (...) by [a] tribunal (...).

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him ;

(c) to defend himself in person or through legal assistance of his own choosing (...)."

The applicant argues that the notification should have been effected to him personally through the Austrian Ministry of Justice; had the authorities done so, it would not have been possible for an employee of the Post to stamp the indication "unclaimed" on the envelope and he would have been informed of the proceedings against him. He

further claims that at that time he could have been on a long journey abroad. He argues that the Government's allegation that he voluntarily omitted to collect the envelope containing the judicial act at issue is unsubstantiated and ill-founded.

The applicant further points out that the former Italian Code of Criminal Procedure dates back to the fascist period and actually made it possible to build up the fascist regime, in particular by allowing judgments against opponents to be issued in absentia. He claims that the provisions at issue are contrary to the Convention. The applicant thus considers that the Government's allegation that the notification was effected in pursuance of the applicable legal provisions is not acceptable, given that the legal provisions at issue were themselves flawed and a means of building up a dictatorship.

The Government claim that the applicant voluntarily escaped justice. They point out that the address of which the authorities had knowledge was the applicant's official address, which is proved by the fact that the Austrian postal service did not indicate that the applicant was not resident there, but only that he had failed to claim the envelope which contained the official notification of the existence of criminal proceedings against him, translated into German, and which bore the indication that the sender was the Bolzano/Bozen Public Prosecutor. The Government claim that the applicant failed to do so on purpose. The Government therefore argue, referring to para. 26 of the judgment of the European Court in the case of Hennings v. Germany, that the applicant's complaint under Articles 6 and 7 of the Convention relating to his conviction in absentia is manifestly ill-founded.

The Government point out that the circumstances of the present case significantly differ from those in the Colozza case, in that there the Court found that the judicial authorities had failed to carry out diligent searches of the applicant's new address, whereas in this case the police had diligently found the applicant's correct address. The Government have enclosed a report of the Bolzano/Bozen police dated 14 December 1992 according to which the applicant was still resident in Messendorferstrasse 61 in Graz, which address was also the seat of the periodical "Aula, Das freiheitliche Magazin", of whose editorial staff he was the head, and a report of the "carabinieri" of Trentino Alto-Adige, also dated 14 December 1992, confirming that on 11 November 1988 the applicant was officially resident at that address.

The Commission recalls that Article 6 para. 3 (a) of the Convention is of fundamental importance in preparing the defence and that its scope must be understood in relation to Article 6 para. 3 (b), which guarantees to everyone the right to have adequate time and facilities for the preparation of his defence, and in the light of the more general right to a fair trial secured by Article 6 para. 1 of the Convention (cf. Gea Catalán v. Spain, Comm. Report 30.11.93, para 28, Eur. Court HR, Series A no. 309, p. 13).

Article 6 para. 3 (c) prohibits criminal proceedings from taking place without the defence having had the opportunity to put its case adequately. Its purpose is to secure the right to a proper defence, whether defence in person or by a barrister. In criminal

proceedings, the defending lawyer can never wholly replace the accused. It is indeed unthinkable that an accused should have legal assistance without there being any possibility of contact between the accused and his defending lawyer. These considerations apply particularly in trial courts, where factors such as the circumstances in which the offence was committed, the evidence and the personality of the accused are of crucial importance in determining the accused's guilt and the degree of it, and where in particular there is the possibility that the court may impose heavy prison sentences (see Colozza and Rubinat v. Italy, Comm. Report 5.5.83, paras. 115-117, Eur. Court HR, Series A no. 89, p. 29).

The Commission further recalls that, with regard to proceedings at first instance, it flows from the notion of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present at the trial hearing (see Eur. Court HR, Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, p. 12, para. 25).

Waiver of the exercise of a right guaranteed by the Convention must be established in an equivocal manner (see Eur. Court HR, Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 19, para. 35).

In the present case, the Commission must thus examine whether it was reasonable for the Italian authorities to consider that the applicant had waived his rights under Article 6 of the Convention.

The Commission observes that the authorities sent the notification of the opening of criminal proceedings against the applicant to his official address. The act was returned undelivered as "unclaimed". Nothing indicated that the applicant had moved from that address; nor did the Austrian postal authorities suggest that the address was incorrect or insufficient. Further enquiries have later confirmed that the applicant officially resided at that address.

The Commission further notes that the applicant has merely complained of not being notified of the proceedings through diplomatic authorities, without however proving or even alleging that he did not reside at that address. In fact, the applicant did not challenge that the address at issue was his official one, but merely claimed that, insofar as the authorities could know, he might have been on a trip abroad. However, he has not even alleged not to have been there when the act was notified to him.

At any rate, the Commission considers that, even assuming that the applicant was in fact absent, he cannot have been unaware of the possible consequences of a prolonged absence from his official address, and should have either sought that somebody collect his mail or enquired upon his return with the postal authorities whether any important mail had remained undelivered or had been returned to sender as unclaimed during his absence. The applicant however failed to do so, despite the particular need for him, as a journalist and
editor-in-chief of a periodical, to be available for the judicial authorities.

In these conditions, the Commission considers that the authorities' presumption that the applicant had waived his rights under Article 6 of the Convention provided a sufficient basis.

The Commission further notes that, although the applicant claims that he learned about the proceedings against him only on 20 June 1991, it appears that he had learned about them at an earlier stage, which is proved by the fact that already on 5 June 1991 he requested information about the same proceedings to the Austrian Federal Ministry for Foreign Affairs.

The Commission observes at any rate that, in June 1991, the proceedings against the applicant were still pending before the Court of Cassation so that it would have been possible for the applicant to intervene in them. However, the applicant failed to enquire about the stage of the proceedings, or appoint a defence lawyer or contact his officially appointed counsel, which appears to support the Government's argument that the applicant did not wish to participate in the proceedings at issue.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant alleges that his conviction of distribution of underground press is in breach of Article 7 of the Convention, as distribution of underground press did not constitute a criminal offence at the time when it was committed. He claims in particular that the

Italian authorities forbade the sale of the periodical "Der Tiroler", which is contrary to the regulations of the European Union.

Article 7 of the Convention, insofar as relevant, reads as follows:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

The Government argue in the first place that all the applicant's complaints other than that under Article 6 of the Convention should be declared inadmissible for non exhaustion of domestic remedies, the applicant having failed to raise in form and in substance before the domestic courts the complaints raised before the Commission. The Government recall in this respect that the Convention is directly applicable in Italy.

However, the Commission considers that it is not necessary to address the Government's objection, the applicant's complaints being at any rate inadmissible for the following reasons.

The Government consider the applicant's complaint under Article 7 of the Convention as clearly manifestly ill-founded, given that the applicant was convicted on the basis of the Press Act, which entered into force long before the time when the applicant committed the acts in question.

The Commission observes that the applicant was convicted of a breach of Articles 5 and 16 of the Press Act, which dates back to 8 February 1948, in relation to two articles which he published in 1987.

The Commission therefore finds no appearance of a violation of Article 7 of the Convention. This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. The applicant further complains under Article 9 about his conviction of defamation and publication of underground press. He further complains under Article 10 of the Convention that his conviction of publication of underground press amounted to a violation of his right to freedom of expression.

The Commission considers that these complaints fall to be examined only under Article 10 of the Convention, which, insofar as relevant, reads as follows:

"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 (...).

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions and penalties as are prescribed by Law and are necessary in a democratic society (...) for the protection of the reputation or rights of others (...)."

a) The applicant's conviction of defamation

The Government consider that the applicant did not complain under Article 10 of the Convention as regards his conviction of defamation but only as regards his conviction of publication of underground press. At any rate, in respect of the conviction of defamation they consider that the interference with the applicant's right to freedom of expression was aimed at protecting the defamed person's rights, was in accordance with the applicable legislation and was proportionate to the aim pursued.

The Commission notes in the first place that, if it is true that the applicant did not explicitly invoke Article 10 in relation to his conviction of defamation, he did complain

about it, though under Article 9. The Commission will therefore examine the applicant's substantive complaint, as stated above, exclusively in the context of Article 10 of the Convention.

The Commission finds that the applicant's conviction of defamation by the Bolzano/Bozen Court constitutes an interference with the exercise of his freedom of expression. Such interference is in breach of Article 10, unless it is prescribed by law and necessary in a democratic society for one of the aims mentioned in paragraph 2 of this provision.

The Commission notes that the applicant's conviction of defamation was based on Articles 595 and 596 bis of the Criminal Code and Article 13 of Law 47/48, and thus prescribed by Italian law. The Commission also considers that the interference was aimed at protecting "the reputation or rights of others", namely the President of the Bolzano/Bozen Provincial Council and L., which is a legitimate aim under Article 10 para. 2.

As to the question whether the interference at issue was "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention, the Commission recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of a particular importance (cf. Eur. Court HR, Jersild v. Denmark judgment of 23_September 1994, Series_A no._298, p._23, para._31; Eur. Court HR Worms v. Austria judgment of 29 August 1997, Reports of Judgments and Decisions 1997-V, pp. 1550, 1551, para. 47).

Subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" and "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (Eur. Court HR, Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, para. 41). Journalistic freedom in particular also covers possible recourse to a degree of exaggeration, or even provocation (Eur. Court HR, Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, para. 38).

The Commission further recalls that the press plays a pre-eminent role in a State governed by the rule of law. It is incumbent on it to impart - in a way consistent with its duties and responsibilities - information and ideas on matters of public interest. At the same time it must not overstep certain bounds set, inter alia, for the protection of the reputation of others (cf. Eur. Court HR, Prager and Oberschlick v. Austria judgment, loc. cit., p. 17, para. 34). The limits of permissible criticism are narrower in relation to a private citizen than in relation to politicians or Governments (cf. Eur. Court HR, Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 46; and Incal v. Turkey judgment of 9 June 1998, para. 54, to be published in Reports of Judgments and Decisions 1998).

The adjective "necessary" within the meaning of Article 10 para. 2 implies the existence of a "pressing social need" which must be convincingly established. In this matter as in others, it is primarily for the national authorities to determine the need for an interference with the exercise of freedom of expression. What they may do in this connection is, however, subject to a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (cf. Eur. Court HR, De Haes and Gijsels v. Belgium judgment of 24 February 1997, Reports of Judgments and Decisions 1997-I, pp. 233-234, para. 37; Worm v. Austria judgment of 29 August 1997, Reports of Judgments and Decisions 1997-V, pp. 1550-1551, para. 47).

The Convention organs' task, in exercising their supervisory function, is not to take the place of the national authorities but rather to review under Article_10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Convention organs must look at the "interference" complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (cf. Eur. Court HR, Worm v. Austria judgment of 29 August 1997, loc. cit., pp. 1550-1551, para. 47).

Factors to be analyzed in this respect, in a case of a journalist convicted for defamation, may include the seriousness and the breadth of the accusations made by the journalist, the question whether there had been adequate previous research and factual basis for the accusations, the journalist's good faith and respect for the ethics of journalism (cf. Eur. Court HR, Prager and Oberschlick v. Austria judgment of 26 April 1995, loc. cit., p. 18, para. 37; and Fressoz and Roire v. France, Comm. Report 13.1.98, para. 74, currently pending before the Court).

The Commission observes that, in the articles at issue, the applicant referred to an alleged "public knowledge" about B.'s fascist activities and opinions, and, in offensive terms, accused L. of offenses of which he had never been convicted.

In the subsequent proceedings before the domestic courts, no substantiation was found of the said accusations. Nor does the applicant offer any argument to the contrary.

Even assuming that the subject of both articles related to matters of general interest, and having regard to the fact that the applicant disseminated the articles through underground press - i.e. without clearly indicating either his name and address as the responsible person or the place of publication, thus making it more difficult for the public to react to a possible defamatory content of the articles themselves - the Commission finds that the applicant's interest in disseminating his opinions does not outweigh B.'s and L.'s right to have their reputation protected.

In these circumstances, the interference at issue namely the applicant's conviction of defamation, can be regarded as "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention.

Accordingly, there is no appearance of a violation of the applicant's rights under Article 10 in this respect, and this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

b) The applicant's conviction of publication of underground press

The respondent Government point out in the first place that the applicant's conviction of publication of underground press was based on Articles 5 and 16 of Law 47/48, and was thus prescribed by law. They point out that the need for registering a periodical constitutes one of the "formalities and conditions" within the meaning of Article 10.

They further point out that the registration of a periodical, unlike an authorization, is not a discretionary act, and must be effected whenever the legal requirements are met. No examination of the content of the periodical is effected. In this respect, it is fully compatible with Article 21 of the Italian Constitution, which forbids authorizations (i.e. permissions prior to the publication) or censorship (approval of the content of an article prior to its publication) of the press.

The formalities at issue thus do not interfere at all with the freedom of the press.

At any rate, the Government point out that the interferences with the freedom of expression are described in great detail in Article 10 of the Convention, whereas those with the rights guaranteed by Articles 8, 9, 11 and 1 of Protocol No. 1 are far more general. In the Government's opinion, it is so because Article 10 is meant to provide on the one hand the broadest scope of protection to the freedom of expression, and on the other hand to make sure that certain formalities and conditions - like the ones at issue - be permitted.

They argue that the imposition of the said formalities is aimed at allowing the identification of the responsible persons of possible offenses committed through the press thus avoiding the risks of abuse of the freedom of the press. It thus pursues all the legitimate aims listed in Article 10.

The Government conclude that the interference is proportionate to these aims, in the light of the margin of appreciation of the authorities and of the lenient sentence which was imposed on the applicant (a suspended sentence of thirteen months' imprisonment and the payment of a fine for both charges of publication of underground press and defamation on two occasions).

The Commission recalls that Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication as such. However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and

interest (see Eur. Court HR, Observer and Guardian v. United Kingdom judgment of 26 November 1991, Series A no. 216, p. 30, para. 60).

The Commission considers in the first place that the Italian registration system for periodicals does not amount to a licensing Procedure: the courts can only refuse registration if they establish that the relevant request does not comply with the requirements set out in the Press Act, which requirements are merely formal (indication of the address and personal data concerning the editor-in-chief or his deputy, of the name and address of the person who carries out the journalistic activity, if different from the owner, and of the title and nature of the publication etc.). The courts do not have any discretion in allowing or refusing registration.

In these circumstances, the Commission finds that the necessity of registering periodicals prior to their publication can be regarded as a "formality and condition" within the meaning of Article 10 which does not, of itself, raise an issue under this provision.

However, the applicant having been convicted of publishing a periodical without prior registration, the Commission must examine whether such interference with the exercise of the applicant's freedom of expression was prescribed by law and necessary in a democratic society for one of the aims mentioned in paragraph 2 of this provision.

The Commission observes that the applicant's conviction was based on Articles 5 and 16 of the Press Act, and was thus prescribed by law.

It further considers that it pursued a legitimate aim, the protection of the reputation and rights of others, to the extent that it aimed at keeping the authorities and the public informed of the details concerning the responsible persons of periodicals with a view to allowing possible actions of defamation.

As regards the necessity of the interference, in the present case the requirements of protecting the reputation and rights of others must be weighed against the applicant's freedom of expression, in particular his freedom to publish periodicals without submitting them to prior registration.

The Commission observes that the domestic courts underlined the importance for the public to be able to identify easily the authors of newspaper articles, should the latter have defamatory content.

The Commission observes that in the present case the applicant was convicted not in the light of a theoretical possibility that the periodical of which he was the editor-in-chief might contain defamatory articles without allowing an easy institution of defamation proceedings but on the ground that the periodical "Der Tiroler" had in fact published two articles which jeopardised two individuals' reputation. The lack of the required information concerning the periodical did make it necessary for the authorities to carry out extensive research through the police of three different countries; eventually, it

proved impossible to establish where exactly "Der Tiroler" was published and to distinguish the owner from the editor.

In the light of the above, the Commission finds that the reasons adduced by the national authorities for convicting the applicant of failing to do so were both relevant and sufficient.

In particular, the Commission does not find disproportionate the duty imposed on aspiring publishers to file certain data with the court in order to register the publication in respect of the problems that courts might encounter should they not dispose of the said data.

In these circumstances, the Commission cannot find unreasonable that, after balancing the interests at issue, the domestic courts considered that B.'s and L.'s right to protection of their reputation, i.e. to be put in the position to identify the responsible persons of defamatory articles, should outweigh the applicant's right to freedom of expression. The interference with the applicant's rights under Article 10 can therefore be regarded as "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

4. The applicant finally complains under Article 16 of the Convention that the Italian authorities consider the distribution of the periodical "Der Tiroler" as an act of illicit propaganda.

Article 16 of the Convention reads as follows:

"Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting States from imposing restrictions on the political activity of aliens."

The respondent Government point out that the Italian courts considered the periodical "Der Tiroler" as a domestic periodical on account of the fact that it is published, i.e. distributed in Italy. Accordingly, they consider that the applicant cannot invoke the provision at issue, which only concerns treatment afforded to "aliens".

The Commission observes in the first place that nothing in the file indicates that the authorities considered the distribution of the periodical "Der Tiroler" as an act of illicit propaganda, the applicant having been convicted of failing to file certain data with the competent court prior to publishing the periodical.

At any rate, the Commission considers that, even assuming that the applicant's conviction of publication of underground press can be considered as a restriction on his political activity, nothing indicates that the Italian authorities aimed at interfering with

such activity on the ground of the applicant's foreign nationality. Nor have the Government invoked Article 16 of the Convention.

It follows that this provision is not applicable in the present case, and the complaint must be rejected as being incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber