EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 24833/94

Denise Matthews

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 29 October 1997)

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I. INTRODUCTION

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

A. The application

2. The applicant is a British citizen, born in 1975 and resident in Gibraltar. She was represented before the Commission by Mr M. Llamas, barrister and avocat at the Court of Paris.

3. The application is directed against the United Kingdom. The respondent Government were represented by Mr M. Eaton, Agent of the Government of the United Kingdom.

4. The case concerns the applicant's complaints that she was not entitled to vote in the 1994 elections to the European Parliament. The applicant invokes Article 3 of Protocol No. 1 to the Convention.

B. The proceedings

5. The application was introduced on 18 April 1994 and registered on 5 August 1994.

6. On 10 January 1995 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 22 May 1995 after two extensions of the time-limit fixed for this purpose. The applicant replied on 10 July 1995. On 26 May 1995 the Commission granted the applicant legal aid for the representation of her case.

8. On 27 November 1995 the Commission decided to hold a hearing of the parties. The hearing was held on 16 April 1996. The Government were represented by MM Martin Eaton, Agent of the Government, David Anderson, Counsel and Donald Macrae, Cabinet Office Legal Adviser and Robert Gwynn, Foreign and Commonwealth Office, Advisers. The applicant was represented by Mr Michael Llamas, Barrister, Ms Jill Keohane, Legal Draftsman to the Gibraltar Government and MM Lewis Baglietto and Fabian Picardo, Barristers.

9. On 16 April 1996 the Commission declared the application admissible.

10. The text of the Commission's decision on admissibility was sent to the parties on 24 April 1996 and they were invited to submit such further information or observations on the merits as they wished. The Government submitted observations on 20 June 1996, to which the

applicant replied on 8 July 1996.

11. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

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

MM S. TRECHSEL, President
E. BUSUTTIL
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
B. CONFORTI
N. BRATZA
J. MUCHA
C. BÎRSAN
P. LORENZEN
K. HERNDL

13. The text of this Report was adopted on 29 October 1997 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

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

(i) to establish the facts, and

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

15. The Commission's decision on the admissibility of the application is annexed hereto.

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

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17. The applicant applied on 12 April 1994 to the Electoral Registration Officer for Gibraltar to be registered as a voter at the elections to the European Parliament. The Electoral Registration Officer replied on 25 April 1994 that:

"The provisions of Annex II of the EC Act on Direct Elections of 1976 limit the franchise for European Parliamentary Elections to the United Kingdom. This act was agreed by all member states and has treaty status. This means that Gibraltar will not be

included in the franchise for the European Parliamentary Elections."

B. Relevant non-Convention law

18. Gibraltar is a dependent territory of the United Kingdom. It is largely self-governing. The Gibraltar Constitution Order 1969 provides for a Governor, who is the representative of the sovereign in the territory. He has very wide powers, executive authority is vested in him, and he is directly responsible for external affairs, defence and internal security. Certain "defined domestic matters" are allocated to the locally elected chief minister and his ministers (called "the Government", although there are in fact two separate bodies, the Gibraltar Council and the Council of Ministers). These domestic matters include public utilities, social services and matters clearly affecting the economy of Gibraltar, such as tourism, trade and commerce. The Gibraltar House of Assembly is allowed to make laws on defined domestic matters, but may not consider a Bill which is not a "defined domestic matter" without the consent of the Governor, who in all cases retains power to refuse assent to legislation passed by the House of Assembly. The United Kingdom Parliament retains ultimate power to legislate in Gibraltar, and the United Kingdom Government has residual power to legislate by Order in Council.

19. European Community legislation which requires transposition into domestic law before it can take effect enters Gibraltar law in one of three ways. Section 23 of the Interpretation and General Clauses Ordinance 1984 enables the Government of Gibraltar to make regulations for transposition without recourse to the House of Assembly. According to the applicant, this is the most common method of transposition. Community legislation can be also transposed by Ordinance of the Gibraltar Government. Acts on Accession of new member states have been transposed in this way. The third manner of giving effect to Community legislation is under the European Communities Ordinance 1972, which gives the Governor power to make regulations subject to the approval of the House of Assembly. According to the Government, this is the method of transposition generally used to give effect to Community legislation.

20. Gibraltar is part of the territory of the European Union because the United Kingdom is responsible for its external relations within the meaning of Article 227 (4) of the EC Treaty. EC law is therefore applicable in Gibraltar. Certain areas of EC law, such as the rules on the Common Agricultural Policy, the Common Commercial Policy, and Value Added Tax, do not apply.

21. The EC Act on Direct Elections of 1976 is annexed to Council Decision 76/787/ ECSC, EEC, Euratom. The Council Decision itself is signed by the President of the Council and by the Ministers representing the Member States as members of the Council. The Decision recommends States to adopt the provisions of the Act in accordance with their respective constitutional requirements, and requires them to notify the Council when the procedures have been completed. The Act, signed on behalf of the Member States, declares that the representatives of the States shall be elected by direct universal suffrage, and creates the framework for direct elections to the European Parliament. Annex II, which is stated in the Act to be an integral part thereof, declares "The United Kingdom will apply the provisions of the Act only in respect of the United Kingdom". Its provisions were enacted into United Kingdom domestic law by the European Parliamentary Elections Act 1978.

22. The Treaty on European Union (TEU) entered into force on 1 November 1993. The following matters are of particular relevance in the present case (references to TEU are to the provisions which were introduced by that Treaty; references to the EC Treaty are to pre-existing provisions).

1. Article 138b TEU entitles the European Parliament formally to request the Commission for appropriate proposals on "matters on which it considers that a Community act is required ...".

2. Article 189 TEU lists as the bodies which make regulations and issue directives the European Parliament acting jointly with the Council, the Council acting alone, and the Commission.

3. Article 189b TEU provides for an increased role for the Parliament in the passing of certain types of legislation. Under Article 189b the Parliament has a genuine power of co-decision with the Council: that is, both Parliament and Council must agree before an act may come into being under Article 189b. Any act passed under Article 189b is signed by the President of the Parliament and the President of the Council.

   Article 189b applies where "reference is made in this Treaty to this Article for the adoption of an act". In the context of legislative measures, the Article 189b procedure is used mainly for acts relating to the completion of the internal market.

4. Article 189c TEU provides for an increased role for the European Parliament in connection with other types of legislation. Under Article 189c, if the European Parliament rejects a common position (adopted by the Council after a procedure involving the Commission), the Council may ultimately only adopt the act by unanimity. The full text of Article 189c is set out in the Annex to the present decision. Article 189c applies where "reference is made in this Treaty to this Article for the adoption of an act". The Article 189c procedure is used as a consultation and co-operation mechanism in connection with, for example, certain transport matters (Article 75 TEU), the implementation of the Social Fund (Article 125 TEU) and certain environmental measures (Article 130s TEU).

5. Article 158 (2) TEU increases the European Parliament's influence and powers in the appointment of the President and members of the Commission; the power to pass a motion of censure (Article 144 EC Treaty) is retained, and in addition to its power to put questions to members of the Commission (Article 140 EC Treaty), the European Parliament may now set up Commissions of Inquiry (Article 138c TEU).

6. The TEU does not affect the powers of financial control of the European Parliament over the other organs of the European Union.

23. It appears that in 1994 some 21 Regulations and Directives were adopted pursuant to Article 189b, of which nine were applicable to Gibraltar, including Directives relating to vehicle emissions and credit institutions. In 1995, some 10 Regulations and Directives were adopted pursuant to Article 189b, of which five were applicable to Gibraltar, including Directives relating to insurance, noise emission and data protection. In the first half of 1996, two Regulations and Directives were adopted pursuant to Article 189b (relating to credit institutions and the legal protection of data bases) both of which were applicable to Gibraltar. According to information provided by the parties, in 1994 there were a total of 3385 (or 3373) Regulations adopted by the Council and Commission and published in the Official Journal of the European Communities. The equivalent figure in 1995 was 3096 (or 3082) and, in the first half of 1996, 1116.

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

24. The Commission has declared admissible the applicant's complaints

concerning her inability to vote in elections to the European Parliament elections from Gibraltar.

B. Points at issue

25. Accordingly the points at issue in the present case are:

- whether there has been a violation of Article 3 of Protocol No. 1 (P1-3) to the Convention, and

- whether there has been a violation of Article 14 of the Convention, taken together with Article 3 of Protocol No. 1 (Art. 14+P1-3).

C. As regards Article 3 of Protocol No. 1 (P1-3) to the Convention

26. Article 3 of Protocol No. 1 (P1-3) provides as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

27. The Government contend that the Commission has no jurisdiction to entertain the present application and, in the alternative, that the applicant's claim falls outside the scope of Article 3 of Protocol No. 1 (P1-3). Three principal grounds are relied on by the Government for their contention.

28. (a) The Government's first principal objection is that the Act which gave rise to the direct elections to the European Parliament, and the Annex which limited its applicability to the United Kingdom, fall within the European Community legal order and are therefore not subject to review by the Convention organs.

29. As to Annex II, the Government point out that the Annex is an integral part of the Act, unlike the German declaration to the Act which was unilateral and could be (and was) unilaterally amended by Germany, and that any amendment to the Annex would have to be agreed by all member states of the Union. The exclusion of Gibraltar from the European Parliament elections therefore derives from an act for which the United Kingdom has no responsibility under the Convention.

30. As to the Act itself, the Government underline that although the Act was annexed to a Council decision and has equivalent status to a Community treaty, it is a treaty of a special nature. This special nature stems both from the origin of the treaty - the obligation in Article 138 (3) EC to lay down appropriate provisions for elections to the European Parliament - and from the requirement in the Decision to which the Act is annexed that the Council is to be notified of the procedures for its adoption. The Act itself is therefore not an ordinary international treaty for which the United Kingdom may be responsible under the Convention, but is part of European Community law, a distinct legal order for which the United Kingdom cannot bear responsibility under the Convention.

31. In the Government's submission, the Commission's inability to consider these matters is underscored by the debate on Community accession to the Convention: it is because Community acts are not subject to scrutiny by the Convention organs that Community accession is being considered. Until such accession, Community acts cannot be considered by the Convention organs.

32. In this connection, the Government add that there is no doubt that at the time of the EC Act on Direct Elections, the European Parliament (or Assembly, as it then was) was not a legislature within

the meaning of Article 3 of Protocol No. 1 (P1-3), and even on the applicant's analysis, the Government have not taken any specific step since then which could give rise to the responsibility of the United Kingdom under the Convention.

33. (b) The Government's second principal contention is that the European Parliament is not a "legislature" within the meaning of Article 3 of Protocol No. 1 (P1-3) to the Convention, so that the provision does not apply in any event.

34. The Government suggest, as a working definition of what is a "legislature", that a legislature may normally be said to have two particular characteristics: the power to initiate legislation, and the power to adopt it. In the Community legal order, the Council of Ministers corresponds most closely to a legislature as it is understood at national level.

35. For the Government, the European Parliament's only legislative powers in the strict sense are the powers contained in Article 95 (3) of the European Coal and Steel Community Treaty, which provides for the Parliament to adopt, on its own and by a majority of three quarters of the votes cast, certain minor amendments to the powers of the Commission in the field of coal and steel. The powers have apparently not been used since 1960, and were regarded as negligible by the Commission in the Alliance des Belges case (No. 8612/79, Dec. 10.5.79, D.R. 15, p. 259).

36. Article 138b of the EC treaty defines the role of the Parliament as being "to participate in the process leading up to the adoption of Community Acts", which participation amounts to neither a right to initiate nor a power to enact legislation on its own account.

37. As to the right to initiate legislation, the Government point out that Article 138b provides only that the European Parliament may request the European Commission to submit a proposal on a matter on which it considers a Community Act is required. Such a provision merely emphasises the paramount role of the Commission in proposing new legislation.

38. As to the right to enact legislation, the Government recall that there are large areas of European Union activity in which the European Parliament plays no significant part at all: in particular, it plays no part in the implementation of the common commercial policy and a marginal role only is ascribed to the Parliament in the field of economic and monetary union. Further, the European Parliament never has any independent power to adopt legislation, but rather, at most, can have an influence on, or block, the content of legislation. Only the Article 189b procedure is new since the last time the Commission considered questions relating to the European Parliament in the case of Tête v. France (No. 11123/84, Dec. 9.12.87, D.R. 54, p. 52). The Article 189b procedure merely expands what was a veto power which could only be exercised with any one member state in the Council, into a unilateral veto. However, the Article 189b procedure itself is only used in limited fields, and it is used relatively rarely.

39. (c) The Government contend that the European Parliament does not in any event in Convention terms form the "legislature" or part of it in Gibraltar because the term "legislature" in Article 3 of Protocol No. 1 (P1-3) must be taken to mean the national legislature of the Contracting Parties, and not the organs of supranational organisations such as the Community.

40. The Government consider that the question of whether the European Parliament is capable of forming part of the national legislature (and thus rendering applicable Article 3 of Protocol No. 1 (P1-3)) has always been left open by the Commission in the case-law. They add that it cannot be said that the member states have delegated their powers

to legislate to the European Parliament since the European Parliament, as an institution of the Community, operates within the Community legal order, and not that of the member states.

41. Further, Gibraltar falls outside the scope of considerable areas of the law of the European Communities: it does not form part of the customs territory; it is treated as a third country for the purposes of the Common Commercial Policy; it is excluded from the common market in agriculture and trade in agricultural products; and it is exempt from Community rules of value added and other turnover taxes. In addition, Gibraltar makes no financial contribution to the Community's finances. In these circumstances, the Government regard it as even more difficult to conceive of the European Parliament as part of the legislature in Gibraltar than it would be in, for example, the United Kingdom or France.

42. The applicant contests each of these submissions made by the Government.

43. (a) The applicant does not agree that the EC Act on Direct Elections with Annex II falls outside the scope of the Convention organs' jurisdiction. She agrees with the Government that the Act is a treaty, but does not accept that it has any special status. For her, it is a treaty like any other treaty and if a State, having become a party to the Convention, subsequently concludes a treaty which disables it from performing its obligations under the Convention, it is answerable for any resulting breach of its obligations under the Convention. She refers to Convention case-law to this effect (No. 235/56, Dec. 10.6.58; the above-mentioned Tête decision).

44. As to Annex II to the Act, the applicant underlines that the Annex was included in the Act as a result of the unilateral wish of the United Kingdom, that the United Kingdom was under no obligation to add Annex II, that the real aim of Annex II was to exclude the Channel Isles and the Isle of Man from the scope of EC elections (because the Channel Isles do not form part of the EU, unlike Gibraltar) and moreover, that nothing required the United Kingdom to interpret, or continue to interpret, Annex II in such a way as to exclude Gibraltar from the application of the Act on Direct Elections.

45. The applicant recalls that Gibraltar is the United Kingdom's responsibility in the European Community, and in signing the treaty of direct elections, the United Kingdom had the power, and the obligation, to provide for the enfranchisement of citizens of the Union who live in Gibraltar.

46. The applicant argues that, when she applied for registration as a voter in the 1994 elections to the European Parliament, the European Parliament had become part of the legislature in Gibraltar by virtue of the accretions of power to that body culminating in the Treaty on European Union, and that the United Kingdom is responsible for the ensuing breach of Article 3 of Protocol No. 1 (P1-3) because of its declaration extending the scope of the Convention to Gibraltar. She does not accept that the fact that the European Parliament was not a legislature in 1976, the date of the EC Act on Direct Elections, can affect the Government's responsibility under the Convention, pointing out that the assembly of the Flemish Region and Community had likewise not existed when Belgium ratified Protocol No. 1 (Eur. Court HR, Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A no. 113).

47. (b) In contesting the Government's second principal submission, the applicant again relies on the case-law of the Convention organs. She underlines that, whilst the Commission has left open the question of whether the European Parliament is a "legislature" within the meaning of Article 3 of Protocol No. 1 (P1-3), it has consistently referred to the European Parliament as "not yet" constituting a

legislature. Further, the Commission has repeated that it "cannot ... be accepted that by means of transfers of competence the High Contracting Parties may at the same time exclude matters normally covered by the Convention from the guarantees enshrined therein" (above mentioned Tête decision). In the light of this case-law, she considers that the Commission itself has acknowledged the possibility that the European Parliament may, if it acquires sufficient powers, become a "legislature" within the meaning of Article 3 of Protocol No. 1 (P1-3). The applicant submits that, whether or not the Commission was correct in concluding that, even after the entry into force of the Single European Act, the European Parliament was still not yet a "legislature", the matter was put beyond doubt by the fundamental changes to the powers of the Parliament made by the Treaty on European Union.

48. (c) The applicant submits that it is particularly clear that the European Parliament is, or is part of, "the legislature" of Gibraltar for the purposes of Article 3 of Protocol No. 1 (P1-3).

49. The applicant has calculated that, in 1995, approximately one third of all legislation adopted by the Gibraltar authorities was as a direct consequence of Gibraltar's membership of the European Union, a proportion which is especially large because there is relatively little domestic legislation in a small community like Gibraltar.

50. With specific reference to the procedure under Article 189b of the Treaty on European Union, the applicant points, by way of example, to directives on insurance (which increase the potential for Gibraltar authorised insurers to have access to the European market), on deposit guarantee schemes (which increase investor confidence in credit institutions authorised in Gibraltar), on data protection, on recreational craft (two new businesses have started in the field) and on standards on the supply of petrol.

51. The Commission first recalls that the Convention applies to Gibraltar by virtue of declarations made by the United Kingdom under Article 63 of the Convention, the most recent on 3 April 1984. Protocol No. 1 (P1) to the Convention applies to Gibraltar by virtue of a declaration made by the United Kingdom on 25 February 1988 under Article 4 of Protocol No. 1 (P1-4). Individual petitions are permitted in connection with Protocol No. 1 (P1) by virtue of the United Kingdom's declarations under Article 25 (Art. 25) of the Convention, which apply to the Protocol pursuant to its Article 5 (Art. 5). The Commission is therefore competent to consider individual complaints under Protocol No. 1 against the United Kingdom in respect of Gibraltar.

52. It is convenient to examine first the question whether the European Parliament can be considered a "legislature" within the meaning of Article 3 of Protocol No. 1 (P1-3) and, if so, whether it is properly to be regarded as "the legislature" of Gibraltar for the purposes of that provision.

53. The Commission recalls that the status of the European Parliament in terms of Article 3 of the Protocol (P1-3) has been the subject of consideration in the Commission's earlier case-law.

54. In Lindsay v. the United Kingdom (No. 8364/78, Dec. 8.3.1979, D.R. 15, p. 247), which was concerned with the voting system laid down in the European Assembly Elections Act 1978 for Northern Ireland which differed from that provided for in the rest of the United Kingdom, the Commission noted that the wording of Article 3 (Art. 3) showed that the national legislature was meant by the drafters of the Convention when the Article was adopted. Nevertheless, the Commission went on to say that this did not exclude the possibility that developments in the structure of the European Communities would require the High Contracting Parties to grant the right protected under Article 3 (Art. 3) "in respect of new representative organs partly assuming the powers and functions of national legislatures." The Commission however found (without finally deciding the point) that at that time (1979) the European Parliament had no legislative power in the strict sense except for Article 95 para. 3 of the ECSC Treaty: it was in the view of the Commission an advisory organ as to legislation, enjoying certain budgetary and control powers.

55. In Alliance des Belges de la Communauté Européene v. Belgium (No. 8612/79, Dec. 10.5.1979, D.R. 15, p. 259), decided two months later in May 1979, the Commission in a case concerning residence requirements for voting in the direct elections for the European Parliament again found that the Parliament had no legislative powers in the strict sense, but concluded that in any event the residence requirements were not inconsistent with Article 3 (Art. 3).

56. In Tête v. France (11123/84, Dec. 9.12.1987, D.R. 54, p. 52) and Fournier v. France (No. 11406/85, Dec. 10.3.1988, D.R. 55, p. 130), which were both decided after the coming into effect of the Single European Act which conferred additional powers on the European Parliament, the Commission was concerned with the compatibility with Article 3 of the Protocol of various provisions of French law governing the election of French representatives to the European Parliament. After referring to its decision and reasoning in the Alliance des Belges case, the Commission observed that the Parliament's role had

increased since that decision, particularly as a result of the entry into force of the Single European Act. The Commission nevertheless found that the European Parliament did not yet constitute a "legislature" within the ordinary meaning of the term, although it went on to declare the application inadmissible on different grounds. In André v. France (No. 27759/95, Dec. 18.10.95, unpublished), the Commission left open the question of the status of the European Parliament as the application was inadmissible on other grounds.

57. Since the Commission last considered the question of the status of the European Parliament, the Treaty on European Union has entered into force. That Treaty has given the European Parliament new competences. In particular, the Treaty not only repealed the words "advisory and supervisory" which previously qualified the reference to the powers of the Parliament in Article 137 of the EC Treaty but enacted the new procedure in Article 189b of the Treaty, which conferred on the Parliament a power of co-decision in addition to its pre-existing powers under the basic or consultative procedure and co-operation procedure.

58. The Government claim that the provisions of Article 189b represent only a modest incremental development from the co-operation procedure which was considered by the Commission in Tête v. France, merely extending the Parliament's power of veto. It is argued that the new procedure does not give the Parliament the sole right to adopt legislation, nor even to compel the Council to adopt a measure that the Council does not want. Nor, it is argued, does the Article 189b procedure give the Parliament any opportunity to initiate legislation itself. It is, moreover, emphasised that the European Parliament plays no role or a very limited role in certain of the most important areas of the Community Treaties, notably the common commercial policy and the field of economic and monetary union.

59. The applicant claims that the arguments of the Government understate the impact and importance of the additional legislative powers conferred on the Parliament by the Treaty of European Union. As the applicant points out, the Article 189b procedure is applicable in fourteen areas of EC legislation, including internal market harmonisation, the right of establishment and the freedom to provide services. Within the field of legislation covered by Article 189b the European Parliament is not only given an effective and unilateral power of veto against which not even a unanimous Council can prevail: the procedure envisages the full participation of the Parliament in the elaboration of EC legislation and in determining the content both directly and through the new Conciliation Committee on which the Parliament is equally represented with the Council. In addition, as pointed out by the applicant, the European Parliament enjoys certain other powers (notably, control over the adoption and implementation of the budget and over the appointment and dismissal of the Commission) which are common attributes of national legislatures.

60. The Commission considers that the introduction of a formal right of co-decision in important areas of legislation, in addition to the powers formerly enjoyed by the European Parliament, represents a significant development in the powers of the Parliament. However, for reasons which appear below the Commission is not required finally to decide whether the European Parliament is yet endowed with sufficient of the powers and functions of national legislatures to be regarded as a legislature within the ordinary meaning of that term.

61. Although, as noted above, the Commission has in several previous decisions examined the powers and functions of the European Parliament in the context of a complaint under Article 3 of Protocol No. 1, it has never finally decided the question whether the expression "the legislature" in that Article is capable of extending beyond national legislative bodies to include supra-national bodies which exercise functions in a legislative process having a direct impact within the

State concerned. In the present case - which concerns a complaint relating to a complete absence of elections to the European Parliament, rather than the manner in which such elections are held - this central question falls to be answered.

62. It is true, as pointed out by the applicant, that in its previous decisions the Commission, while finding that the European Parliament had not yet acquired sufficient legislative powers to amount to a legislature, contemplated that Article 3 might become applicable to the Parliament in the event of its assuming the powers and functions of a national legislature. However, the Commission further observed that the wording of Article 3 showed that national legislative bodies were intended to be referred to by the drafters of the Convention when the Article was adopted. The Commission finds confirmation for this interpretation in the Travaux Préparatoires to the Convention. In particular, the Commission recalls that the Court in the above-mentioned Mathieu-Mohin case noted, by reference to the Travaux, that the provision applies "only to the election of the 'legislature', or at least one of its chambers if it has two or more" (p. 23, para. 53). It thus appears that Article 3 does not require more than one level of elected assembly, although if the domestic constitution divides legislative competence between regional and central assemblies, the provision applies to elections to both organs.

63. On reviewing its earlier dicta, the Commission considers that to hold Article 3 of Protocol No. 1 to be applicable to supra-national representative organs would be to extend the scope of Article 3 beyond what was intended by the drafters of the Convention and beyond the object and purpose of the provision. The Commission considers that the role of Article 3 is to ensure that elections take place at regular intervals to the national or local legislative assembly - that is, in the case of Gibraltar, to the House of Assembly. While the Commission accepts that the legislation emanating from the different institutions of the European Union, including the European Parliament, has an increasingly important impact on Gibraltar and that such legislation may be transposed into the domestic law of the territory without recourse to the House of Assembly, the Commission does not consider that such non-national institutions are properly to be regarded as, or forming part of, "the legislature" of Gibraltar for the purposes of Article 3 of Protocol No. 1. Accordingly, the Commission finds that Article 3 of Protocol No. 1 is inapplicable in the present case.

CONCLUSION

64. The Commission concludes by 11 votes to 6 that in the present case there has been no violation of Article 3 of Protocol No. 1 to the Convention.

D. As regards Article 14 of the Convention, taken together with Article 3 of Protocol No. 1

65. Article 14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

66. The applicant claims that, because of her status as a Gibraltarian, she is deprived of the right to vote in European elections. She also alleges a violation of Article 14 in this connection as, pursuant to EC Council Directive 93/109/EC, she is entitled to vote in European Parliament elections in any territory in the European Union in which she resides save Gibraltar. She sees discrimination between citizens of Gibraltar in this respect.

67. The Commission recalls that it has found that the European Parliament does not fall within the scope of Article 3 of Protocol No. 1 and that, accordingly, Article 3 of the Protocol is inapplicable in the present case. In these circumstances, Article 14 which guarantees the enjoyment without discrimination of the rights and freedoms set forth in the Convention is similarly inapplicable in the present case.

CONCLUSION

68. The Commission concludes by 12 votes to 5 that in the present case there has been no violation of Article 14 of the Convention, taken together with Article 3 of Protocol No. I.

E. Recapitulation

69. The Commission concludes by 11 votes to 6 that in the present case there has been no violation of Article 3 of Protocol No. 1 to the Convention (para. 64).

70. The Commission concludes by 12 votes to 5 that in the present case there has been no violation of Article 14 of the Convention, taken together with Article 3 of Protocol No. I (para. 68).

M. de SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

CONCURRING OPINION OF Mr E. BUSUTTIL

I concur with the decision of the majority of the Commission that there has been no violation of Article 3 of Protocol No. 1 in the present case but would base the decision on the following reasoning in preference to that adopted by the majority.

While the Commission is competent to consider individual applications under Protocol No. 1 against the United Kingdom in respect of Gibraltar by virtue of declarations made by the United Kingdom under Article 63 para. 1 of the Convention and Article 4 of Protocol No. 1, the Convention and Protocol must be applied in Gibraltar with due regard to "local requirements". Indeed, the territory is nowadays to be considered as something of an anachronism, and the "legislature" in Gibraltar must be interpreted in the light of the particular constitutional structure there operative.

The constitutional status of Gibraltar is that of a dependent territory of the United Kingdom. The Governor is vested with executive authority and is directly responsible for external affairs, defence and internal security, on which he is entitled to legislate. The local House of Assembly is permitted to legislate on defined domestic matters, such as public utilities, social services, tourism, trade and commerce, but may not consider matters not defined as domestic without the consent of the Governor, who also retains the power to veto all legislation passed by the House of Assembly. Furthermore, the United Kingdom Parliament retains a concurrent power to legislate for Gibraltar, and the United Kingdom Government has residual power to legislate by Order-in-Council.

In this amorphous framework, where legislative power is so broadly diffused across the constitutional spectrum, the "legislature" of Gibraltar becomes impossible to identify unless Article 3 of Protocol No. 1 is interpreted in the light of the rider inserted in para. 3 of Article 63 of the Convention.

So interpreted, the "legislature" in Gibraltar is the House of

Assembly of Gibraltar, which is essentially a limited and truncated local legislature specifically debarred by the Gibraltar Constitution Order 1969 from considering matters relating to defence and foreign affairs. At the same time the consideration of domestic affairs by the House can be stultified, or otherwise rendered nugatory, by any of the following: (i) the United Kingdom Parliament; (ii) the United Kingdom Government, and (iii) the Governor of Gibraltar.

This constitutional situation, which stems from Gibraltar's status as a dependent territory of the United Kingdom, clearly demonstrates that the electorate in Gibraltar is precluded from participating in external affairs, European or other.

Again, while the Convention organs have so far left open the question whether the term "legislature" in Article 3 extends beyond national legislatures to include supra-national organizations exercising legislative functions within the boundaries of a particular State, the wording of Article 3 of Protocol No. 1 read in conjunction with Article 63 of the Convention would appear to restrict the term "legislature" to the domestic legislatures of the High Contracting Parties as well as of those territories for whose international relations the High Contracting Parties are responsible where an appropriate declaration has been made in accordance with Article 63 para. 1 of the Convention. On this construction, the European Parliament could not be properly regarded as, or as forming part of, the "legislature" in Gibraltar, and Article 3 of Protocol No. 1 is therefore inapplicable to it in the circumstances of the present case.

(Or. French)

OPINION CONCORDANTE DE M. F. MARTINEZ

Je partage les motifs exprimés dans le rapport de la Commission. Toutefois, je voudrais y ajouter ceci.

C'est en raison d'une règle de droit communautaire que l'habitant de Gibraltar ne peut participer aux élections du Parlement européen ; et j'ai beaucoup de difficultés à comprendre comment les organes de la Communauté, en agissant selon leurs compétences, peuvent engager la responsabilité d'un Etat membre au regard de la Convention européenne des Droits de l'Homme.

(Or. English)

CONCURRING OPINION OF Mr L. LOUCAIDES

I agree that in this case there has been no violation of Article 3 of Protocol No. 1 to the Convention but the reasons for my conclusion are different from those of the majority.

The provisions of the Convention were made applicable in respect of Gibraltar by virtue of a notification made under Article 63 of the Convention.

The Government did not express their objections in terms of Article 63 para. 3 of the Convention. But I believe that the Government's arguments are ultimately founded on the consideration that Gibraltar is not, and never has been, part of the United Kingdom, and that its status as a Crown Colony puts it in a different position from domestic territories.

I believe that Article 63, whose aim was to allow extension of the Convention to territories like Gibraltar, could not reasonably have been intended to effect indirectly, through the application of any of its provisions such as the one under consideration, a change of the constitutional status of such territories. In other words the provisions of Article 63 were not meant to effect such radical

political changes of colonial territories through the incidental operation of the Convention rights.

Precisely because in applying the Convention account had to be taken of the special situations, constitutional and other, of the territories in question and relevant adjustments be made, para. 3 of Article 63 provides as follows:

> "The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements".

There is no definition of the term "local requirements". The European Court of Human Rights in one of its judgments (Tyrer v. the United Kingdom, Series A no. 26, p. 19) has pointed out

> "that the system established by Article 63 was primarily designed to meet the fact that, when the Convention was drafted there were still certain colonial territories whose state of civilization did not, it was thought, permit the full application of the Convention".

Independently of whether one agrees or not with this statement I believe it is correct to say that if the term "local requirements" was applied by the jurisprudence with reference to the local state of civilization such term should a fortiori be applicable with reference to the constitutional status of the territories to which the Convention was extended through the machinery provided under Article 63. Therefore, the Convention should be applied to such territories taking into account the requirements of the local constitutional status of these territories with the object of preserving this status.

The European Court of Human Rights has on two occasions found that local requirements were not sufficient to justify what could otherwise be in violation of the Convention (Eur. Court HR, Tyrer v. the United Kingdom, op.cit., pp. 18, 19 and Piermont v. France, Series A no. 314, p. 23). In both those cases, however, there was no link between the special character of the territories concerned and the alleged violation of the convention.

In the present case the applicant is denied the right to participate in European Parliament elections precisely because of the constitutional status of Gibraltar as a Crown Colony: it is because of Gibraltar's constitutional status that it was excluded from the operation of the E.C. Act on Direct Elections by Annex 2 to that Act, and it is because of Gibraltar's constitutional status that Gibraltarians do not vote in elections to the Westminster Parliament which could also act as a form of democratic legitimation for the acts of the European Union.

Accordingly, in the particular circumstances of the present case I find that Article 63 para. 3 requires the Commission to accept that the local requirements in Gibraltar are such that the applicant should not be entitled to vote in elections to the European Parliament.

(Or. English)

DISSENTING OPINION OF MM A. WEITZEL, C.L. ROZAKIS, M.P. PELLONPÄÄ, B. CONFORTI AND N. BRATZA

We regret that we are unable to agree with the majority of the Commission that Article 3 of Protocol No. 1 has no application to supra-national legislative institutions such as the European Parliament or that, by virtue of Article 63 para. 3 of the Convention, the Parliament cannot be regarded as part of "the legislature" of Gibraltar for the purposes of Article 3. In our view, not only is Article 3 of Protocol No. 1 applicable, but the failure of the United Kingdom to provide for elections to the European Parliament for citizens of the

European Union who live in Gibraltar is in violation of the applicant's rights under that Article.

As is indicated in the Report the case gives rise to four principal issues: (1) whether the European Parliament can be considered a "legislature" within the ordinary meaning of that term; (2) if so, whether it is properly to be regarded as "the legislature" of Gibraltar for the purpose of Article 3 of Protocol No. 1; (3) if so, whether State responsibility can, in the particular circumstances of the case, be engaged in respect of the absence of elections to the European Parliament in Gibraltar; and (4) if so, whether such absence of elections constituted a violation of the obligation in Article 3 "to hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

It is convenient to deal with each issue in turn.

(1) The earlier case-law of the Commission in which the status of the European Parliament has been examined under Article 3 of the Protocol is summarised in paragraphs 54 - 56 of the Commission's Report. As appears from that summary, the Commission, while acknowledging that the wording of Article 3 showed that the national legislature was meant by the drafters of the Convention, nevertheless did not exclude the possibility that developments in the structure of the European Communities would require the High Contracting Parties to grant the right protected under Article 3 to supra-national representative organs "partly assuming the powers and functions of national legislatures". The sole ground on which, in the cases of Lindsay, Alliance des Belges, Tête and Fournier, the Commission found that the European Parliament did not fall within the provisions of Article 3 was that the Parliament did not enjoy legislative powers in the strict sense and thus did not constitute a "legislature" within the ordinary meaning of the term.

As pointed out in the Report, since the Commission last considered the question of the status of the European Parliament, the Treaty on European Union has entered into force, conferring new powers on the Parliament. The Treaty not only repealed the words "advisory and supervisory" which previously qualified the reference to the powers of the Parliament in Article 137 of the EC Treaty, but introduced the new procedure in Article 189b of the Treaty, conferring on the Parliament a genuine power of co-decision in addition to its pre-existing powers under the basic or consultative procedure and co-operation procedure.

The Government assert that the provisions of Article 189b represent only a modest incremental development of the existing co-operation procedure and, in effect, merely extend the Parliament's powers of veto. It is additionally pointed out that the European Parliament plays a very limited role in certain of the most important areas of the Community Treaties, notably the common commercial policy and the field of economic and monetary union.

In our view, the arguments of the Government, while not without force, understate the impact and importance of the additional legislative powers conferred on the Parliament by the Treaty on European Union. As the applicant points out, the Article 189b procedure is applicable in fourteen areas of EC legislation, including internal market harmonisation, the right of establishment and the freedom to provide services. Within the field of legislation covered by Article 189b the European Parliament is not merely given an effective and unilateral power of veto against which not even a unanimous Council can prevail: the procedure envisages the full participation of the Parliament in the elaboration of EC legislation and in determining its content, both directly and through the new Conciliation Committee on which the Parliament is equally represented with the Council.

It is true, as emphasised by the Government, that the Parliament has no unilateral power to adopt legislation, its powers being jointly exercised with the Council. It is also true that the Parliament has no independent power to initiate legislation. However, these limitations are not in our view sufficient to say that the Parliament exercises no legislative powers. As to the absence of a unilateral power to decide, the joint sharing of legislative powers is a feature which is to be found in certain national legislatures and is of itself not inconsistent with the notion of a legislature. As to the absence of the power to initiate legislation, we note that in many national legislatures the effective power to initiate legislation lies not with the legislature itself or with its members, but with the Executive. In addition, as is pointed out by the applicant, Article 138b of the Treaty expressly confers powers on the Parliament to request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing the Treaty.

We further note that the European Parliament enjoys certain other powers which are common attributes of national legislatures. In particular, the Parliament has control over the adoption and implementation of the budget, with power to amend and to reject the draft budget. In addition, the Parliament is granted powers of control over the appointment of the Commission (Article 158) as well as powers to compel the Commission to resign as a body by means of a notice of censure (Article 144). Indeed, compared to several national Parliaments, the powers of the European Parliament are already considerable and will become further strengthened when the Treaty of Amsterdam enters into force.

In these circumstances the European Parliament is in our view capable of being regarded as the representative organ of the Union, which assumes at least in part the powers and functions of national legislative bodies.

(2) The further question remains whether the European Parliament is to be regarded as "the legislature" of Gibraltar for the purposes of Article 3 of Protocol No. 1.

We recall that the aim and purpose of Article 3 of Protocol No. 1 is to contribute to the "effective political democracy" referred to in the Preamble to the Convention. It is certainly not the function of the Convention organs to prescribe the roles of the different institutions of domestic constitutions, but rather they must look to the existing constitutional structures to ascertain whether, in a given situation, an organ is, or is not within the scope of the term "the legislature" (see, e.g., Eur. Court HR, Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A No. 113, p. 23, para. 53, where regional authorities shared competence powers with the central authorities in such a way that Article 3 of Protocol No. 1 applied to elections to the regional authorities; and see also No. 7008/75 v. Austria, Dec. 12.7.76, D.R. 6 p. 120. In No. 8873/80 v. the United Kingdom (Dec. 13.5.82, D.R. 28 p. 99) the Commission accepted that the possibility for the United Kingdom Parliament to legislate for Jersey was not sufficient for it to be part of "the legislature" in the island, and in Booth-Clibborn and others v. the United Kingdom (No. 11391/85), Dec. 5.7.85, D.R. 43 p. 236) the Commission considered that metropolitan county councils in the United Kingdom were not legislative bodies. For a further, recent example of this approach to whether a body is part of "the legislature", see Lindsay v. the United Kingdom, No. 31699/96, Dec. 17.1.97, concerning elections under the Northern Ireland (Entry to Negotiations, etc.) Act 1996.

The question whether the expression "the legislature" in Article 3 is capable of extending beyond national legislative bodies,

so as to include supra-national institutions which exercise legislative functions having a direct impact within the State concerned, is one of some difficulty. It is correct, as pointed out by the Government, that the question has never been addressed by the Court and that, while the issue has been discussed by the Commission, it has not been finally resolved. It is also correct that, as pointed out by the majority, the Commission has previously accepted that the wording of Article 3 shows that national legislative bodies were meant by the drafters of the Convention when the Article was adopted. However, the Commission has also clearly accepted in its earlier case-law that there is nothing in principle to exclude the application of the Article 3 of the Protocol to institutions - even those of a supra-national nature - which have been created or developed after the coming into force of the Convention and which exercise legislative functions directly affecting the State or territory concerned. We see no reason to depart from this view. It has constantly been emphasised by the Court and Commission that the Convention is a living instrument which must be interpreted in the light of present day conditions. This principle is in our view of special relevance in the present case, concerned as it is with an institution which did not even exist at the time when the Convention was drafted. We can find nothing in the Travaux Préparatoires to suggest that it would be contrary to the intention of the drafters to exclude from the scope of Article 3 any new legislative body of a supra-national character. Nor can we agree with the majority of the Commission that to hold Article 3 to be applicable to such a representative institution would be to extend the scope of the Article beyond the object and purpose of the provision.

Whether in any particular case the institution concerned is to be considered as forming part of "the legislature" of a State or territory will depend on an examination of the constitutional and legislative structures existing within the State or territory in question.

As noted in the Report, Gibraltar is not part of the United Kingdom but is a Crown colony, the Governor of which retains direct responsibility for all matters primarily concerned with external affairs, defence and internal security. The Gibraltar House of Assembly has the right to make laws for the peace, order and good government of Gibraltar, although it may not except with the consent of the Governor proceed upon any Bill which is not a defined domestic matter". While the scope of the House of Assembly's powers to legislate is thus limited, we consider that the House of Assembly, to which elections are held every five years, may be regarded as the domestic "legislature" of Gibraltar for the purposes of Article 3 of the Protocol.

In Gibraltar, as in the other parts of the European territory subject to European Community law, the impact of that law has steadily increased over the years. Applicable EC legislation is generally given force in Gibraltar under the 1972 European Communities Ordinance, under which primary or secondary legislation is enacted in Gibraltar to give effect to EC legislation there, the exceptions being EC Regulations which are directly applicable in Gibraltar as in all other parts of the European Union.

In terms of numbers alone, approximately one-third of all legislation currently adopted in Gibraltar is as a direct consequence of Gibraltar's membership of the European Union. Admittedly, in purely numerical terms the number of legislative acts adopted under Article 189b and applied in Gibraltar in 1994, 1995 and the first half of 1996 is small. However, even assuming that it is appropriate to confine attention to acts adopted under this procedure, we note that the acts in question relate to such areas as data protection, insurance, deposit guarantee schemes and environmental matters, with an increasingly important impact on a small territory such as Gibraltar.

We consider that, notwithstanding the exclusion of Gibraltar from significant parts of the EC Treaty, the impact of Community legislation in Gibraltar, including that emanating from the European Parliament under the co-decision procedures in Article 189b, is such that the Parliament can be regarded as sharing at least in part the powers and functions of the national legislature and as forming part of "the legislature" of Gibraltar for the purposes of Article 3 of Protocol No. 1.

We note in this regard that in two of the concurring opinions reliance is placed on the provisions of Article 63 para. 3 of the Convention, it being argued that the local requirements of a colonial territory such as Gibraltar, and, in particular, its special constitutional structure, are such that the European Parliament cannot be regarded as "the legislature" of the territory for the purposes of Article 3 of the Convention.

We are not persuaded by this view. While we accept that the constitutional structure of Gibraltar has special features, the fact remains that the impact of legislation emanating from the institutions of the European Union, including the Parliament, on citizens of the Union living within Gibraltar is considerable. Even assuming that the term "local requirements" in Article 63 para. 3 of the Convention is to be interpreted as including the constitutional structure within a territory (which we doubt), we can see no reason why those "local requirements" should be interpreted as requiring the exclusion of the European Parliament from the term "the legislature" in Article 3. We are reinforced in this view by the fact that, in the extensive submissions filed on their behalf, the Government have at no stage invoked Article 63 para. 3 or suggested that the provision had any relevance to the issues raised.

(3) The further issue remains whether the absence of elections to the European Parliament in Gibraltar is capable of engaging the responsibility of the United Kingdom and, if so, whether there has been a violation of that Article.

We observe at the outset that the 1976 Act, which by Annex II confined the application of its provisions to the United Kingdom, is not as such a Community act, the signatories to the Act being the Governments of the Member States and the Act having the status of a Community treaty. It is true that the Act was itself annexed to a Council Decision but, as pointed out by the applicant, the Decision is itself not a typical Community act, being signed not merely by the President of the Council but by the Ministers of each of the Member State in their capacity as Members of the Council. Further, in contrast to an ordinary Council decision, the 1976 Decision did not oblige the Member States to do anything. Consistently with the provisions of Article 138 (3) under which it was made, the Decision laid down provisions which it "recommends to the Member States for adoption in accordance with their respective constitutional requirements": the Decision did not require the exclusion of Gibraltar from the right of direct franchise.

The Government rely on the case-law of the Commission in support of their contention that the absence of elections does not engage the responsibility of the United Kingdom, in particular the decisions of the Commission in CFDT v. the European Communities and their Member States (No. 8030/77, Dec. 10.7.1978, D.R. 13, p. 231), Dufay v. the European Communities and their Member States (No. 13539/89, Dec. 19.1.1989) and M. and Co. v. Germany (No. 13258/87, Dec 9.2.1990, D.R. 64, p. 138).

We note that in the first two decisions relied on, the complaints were lodged against, inter alia, the European Communities themselves and concerned what were indisputably Community acts. However, the case

of M. and Co. v. Germany presents more difficulty. In that case the Commission was concerned with a writ of execution issued against the applicant company to give effect to a judgment of the Court of Justice of the European Communities (hereinafter referred to as "the European Court of Justice") fining the company for breaching the anti-trust provisions of the Treaty. The applicant company complained that the proceedings before the European Court of Justice were unfair and that, by giving effect to the judgment by issuing a writ of execution, the Federal Republic had violated Article 6 of the Convention. The Commission, having recalled that it was not competent to review decisions of organs of the Community, stressed that this did not mean that, by granting executory power to a judgment of the European Court of Justice, the German authorities acted as a Community organ or that they were to that extent beyond the scope of control exercised by the Convention organs. In the Commission's view the issue raised by the application was whether by giving effect to a judgment that allegedly violated Article 6 the Federal Republic incurred responsibility under the Convention on account of the fact that the proceedings against the applicants were only possible because the Federal Republic had transferred its powers in the anti-trust sphere to the European Communities. The Commission observed that the Convention did not prohibit a Member State from transferring powers to international organisations. Nevertheless, the Commission held that if a State contracted treaty obligations and subsequently concluded another international agreement which disabled it from performing its obligations under the first treaty, it would be answerable for any resulting breach of its obligations under the earlier treaty:

> "The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (cf. Eur. Court HR, Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 34, para. 87). Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection" (D.R. 64, p. 145).

In rejecting the application as inadmissible, the Commission found that the legal system of the European Communities not only secured fundamental rights but also provided for a control of their observance. In particular, the European Court of Justice had developed case-law according to which it was called on to control Community acts on the basis of fundamental rights, including those enshrined in the Convention.

We agree with the applicant that the decision of M. and Co. is not directly applicable to the present case, since the Act on Direct Elections did not involve the transfer of powers to the institutions of the Community and since, in any event, the rights guaranteed by Article 3 of the Protocol did not receive an equivalent protection, the European Court of Justice having no power to examine the legality of the Act or of the exclusion of Gibraltar from its ambit.

Nevertheless, the question remains whether, having excluded residents in Gibraltar from the right of direct elections to the European Parliament (or Assembly) in 1976, at a time when the Parliament was unquestionably not a "legislature" for the purposes of Article 3 of Protocol No. 1, the United Kingdom may be held in violation of the Article when, as a result of structural developments occurring within the Union, the European Parliament is endowed with sufficient powers to be regarded as a legislature.

As a general principle, a State, which creates new legislative bodies for the first time after the entry into force of the Convention or which confers on an existing body sufficient powers to be regarded as forming part of "the legislature" of the State concerned, must grant the right of direct election to such body and any failure to do so will engage the responsibility of the State concerned under Article 3 of Protocol No. 1.

We have considered whether the position may be different where, as here, the Commission is concerned with a supra-national body to which, at the time the territory in question was by international treaty excluded from the right of election, the Protocol was inapplicable and to which the State responsible cannot by amendment of the Treaty unilaterally extend the right of election once the body has acquired sufficient powers to be regarded as a "legislature".

However, we do not find it necessary to decide this question, since we consider that the United Kingdom could in any event unilaterally and consistently with its treaty obligations extend the right of franchise to Gibraltarians. The United Kingdom clearly could not unilaterally amend the provisions of Annex II to the Act on Direct Elections; nor are we able to accept the applicant's argument that the application of the Act on Direct Elections could be extended to Gibraltar by the United Kingdom without the need for any amendment to Annex II. However, we consider that the United Kingdom could, unilaterally and consistently with its international treaty obligations, extend the right of franchise to Gibraltar by integrating the Gibraltarian vote in the vote of a European Parliamentary constituency in the United Kingdom.

The Government do not dispute that it would be possible to extend the right of franchise to Gibraltarians in this way but contend that such a course would not be consistent with the proper operation of the simple majority system applied in the United Kingdom for elections to the European Parliament.

While we accept that there may exist practical objections to extending the right of franchise to Gibraltarians, we cannot accept that such objections could suffice to relieve the United Kingdom of State responsibility under Article 3 of Protocol No. 1 in respect of the absence of elections.

(4) Assuming that State responsibility is engaged, did the failure to grant the right to Gibraltarians the right of election to the European Parliament violate the rights of the applicant guaranteed under that Article?

In submitting that there was no violation, the Government refer to the margin of appreciation permitted to States in the performance of their Convention obligations, to the difficulties in creating a new constituency for Gibraltar in the European Parliament and to the traditional separation of the Gibraltarian and the United Kingdom.

It is well established that the rights implicit in Article 3 of Protocol No. 1 are not absolute, but may be subject to implied limitations. States have a wide margin of appreciation, but it is nevertheless for the Convention organs to determine in the last resort whether the requirements of the provisions have been complied with. As the Court has pointed out, the conditions must not curtail the rights to such an extent as to impair their very essence and deprive them of their effectiveness. Any conditions imposed must pursue a legitimate aim and the means employed must not be disproportionate to that aim. In particular, such conditions must not thwart "the free expression of the opinion of the people in the choice of the legislature" (see the above-mentioned Mathieu-Mohin and Clerfayt judgment, p. 23, para. 52).

The Convention organs have, on several occasions, found that various exclusions from the right to vote are compatible with Article 3 of Protocol No. 1 (No. 8987/80, Dec. 6.5.81, D.R. 23 p. 192 with further reference). The present case is, however different from a case involving residence conditions. Residence conditions on voting are acceptable because states are permitted to regulate the manner in which elections take place, and one of the regulations is, commonly, a condition that a person vote from within the country. In Gibraltar, however, no Gibraltarians are entitled to vote in elections to the European Parliament in Gibraltar at all.

The Government claim that it would be difficult, if not impossible, to arrange for Gibraltarians to vote in elections to the European Parliament because of the electoral system in the United Kingdom which, by using a simple majority system with a single member for each constituency creates strong links between the electors and the elected. Gibraltar has very different needs and interests from the United Kingdom, and could not be readily included in a mainland constituency. It is pointed out, in particular, that were Gibraltarians to be included in a mainland constituency, their vote may have a decisive and unjustifiable effect on the result of the election.

We do not underestimate the value in the United Kingdom electoral system of the close links which exist between Members of Parliament and the constituency which they represent, and which can strengthen effective political democracy in very real ways. Nor do we disregard the Government's argument as to the risk of Gibraltarian voters having a decisive impact on the result of the election in a particular mainland constituency, although we note in this regard that the total population of Gibraltar is small by comparison with the size of the average European Parliament constituency in the United Kingdom. However, given the impact of European Community legislation in the Gibraltar, and the complete absence of any democratic accountability for the people of Gibraltar in respect of that legislation, we consider that the total exclusion of the applicant from elections to the European Parliament is not compatible with Article 3 of Protocol No. 1 to the Convention.

We have, accordingly, concluded that in the present case there has been a violation of Article 3 of Protocol No. 1 to the Convention.

In view of this finding we have not found it necessary to examine the applicant's further complaints under Article 14 of the Convention.

(Or. English)

DISSENTING OPINION OF Mr H.G. SCHERMERS

I agree with the dissenting opinion of Mr. Weitzel and others. However, in my opinion, the paragraph on M. and Co. should be stronger. I disagree with the applicant that M. and Co. is not relevant to the present case. In the present case, the United Kingdom Government submitted that the act which gave rise to the direct elections to the European Parliament, and the Annex which limited its applicability to the United Kingdom, fall within the European Community legal order and are therefore not subject to review by the Convention organs. In M. and Co. the German Government also submitted that the complaint in fact concerned an act which fell within the European Community legal order and which, therefore, could not be subject to review by the Convention organs. To that extent, I see no fundamental difference between the two cases. In my opinion, therefore, the answer of the Commission to this argument in M. and Co. is indeed relevant to the present case.

Essential in the passage quoted from M. and Co. in Mr. Weitzel's dissenting opinion is the last part of the last sentence: "Therefore,

the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection" (M. and Co. v. Germany, No. 13258/87, Dec 9.2.1990, D.R. 64, pp. 138-146 at p. 145). Only when an equivalent protection of human rights is guaranteed, may the Commission dispense a High Contracting Party from its obligation to guarantee the rights of the Convention to everyone within its jurisdiction. Otherwise the guarantees of the Convention could wantonly be limited or excluded by the creation of an international organisation. In the case of M. and Co. the EC treaty applied. Because of the way the Court of Justice of the European communities interprets that treaty sufficient guarantees are offered. In M. and Co., the Commission noted that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance. This is different in the present case. The act at stake is signed and ratified in the same way as a treaty. This means that the Court of Justice has no power to examine the legality of the act or of the exclusion of Gibraltar from its ambit. In my opinion, therefore, the proviso mentioned in M. and Co. is not met in the present case. There are insufficient guarantees that the European Union will apply the rights incorporated in Article 3 of Protocol No. 1 to the citizens of Gibraltar. The United Kingdom was not entitled to transfer legislative powers to the Community without protecting or obliging the Community to protect the rights of Article 3 of Protocol No. 1, also for the citizens of Gibraltar.

At the present stage of European and international development, where increasingly governmental powers are transferred to European or international organs, I consider it essential to underline that the Contracting States remain responsible for infringements of human rights if they do not provide for adequate protection of these rights by the institutions to which powers are transferred.