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

COURT (CHAMBER)

CASE OF KLAAS v. GERMANY

(Application no. 15473/89)

JUDGMENT

STRASBOURG

22 September 1993

In the case of Klaas v. Germany*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr Thór VILHJÁLMSSON,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr A. SPIELMANN,
Mr I. FOIGHEL,
Mr J.M. MORENILLA,
Mr A.B. BAKA,

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

Having deliberated in private on 26 March and 24 August 1993,

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

PROCEDURE

1. The case was referred to the Court by the German Government ("the Government") on 10 August 1992 and by the European Commission of Human Rights ("the Commission") on 11 September 1992, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15473/89) against Germany lodged with the Commission under Article 25 (art. 25) on 11 July 1989 by two German citizens, Mrs Hildegard Klaas and her daughter Monika Klaas, hereinafter referred to as the first and second applicant respectively.

The Government's request referred to Articles 32 and 48 (art. 32, art. 48); the Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and

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* The case is numbered 27/1992/372/446. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3 and 8 (art. 3, art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30). The President gave the lawyer leave to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 September 1992 the President drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr B. Walsh, Mr A. Spielmann, Mr I. Foighel, Mr J.M. Morenilla and Mr A.B. Baka (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Deputy Registrar, consulted the applicants' lawyer, the Agent of the Government and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received, on 7 December 1992, the Government's memorial and, on 19 January 1993, the applicants' observations.

Various documents were produced by the Commission on 4 February 1993 and by the Government on 24 March 1993, at the request of the Registrar. On 9 February 1993 the Registrar was informed that the Delegate would submit his observations at the hearing.

5. In accordance with the decision of the President - who had also given the Agent of the Government leave to plead in German (Rule 27 para. 2) - the hearing took place in public in the Human Rights Building, Strasbourg, on 24 March 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr J. MEYER-LADEWIG, Ministerialdirigent,
  Federal Ministry of Justice, *Agent*;
- for the Commission
  Mr J. FROWEIN, *Delegate*;
- for the applicants
  Mr M. STÜBEN, Rechtsanwalt, *Counsel*.

The Court heard addresses by Mr Meyer-Ladewig for the Government, by Mr Frowein for the Commission and by Mr Stüben for the applicants, as well as replies to its questions and by two of its members individually.

AS TO THE FACTS

6. At about 7.30 p.m. on 28 January 1986, the first applicant, a social worker, drew up outside the back entrance to the block of flats in Lemgo where she lived. She was accompanied by her daughter Monika, who, at the time of the incident that gave rise to the complaint, was eight years old. After she had opened the gate she was stopped by two police officers who had followed her and were standing in the gateway. They accused her of having driven through a red traffic light and of having tried to get away - an allegation denied by the applicant. The police officers claimed to have detected a strong smell of alcohol on her breath when they checked her driving licence. She agreed to be breathalysed. Despite having been shown what to do, she proved unable to provide a specimen of breath satisfactorily and was therefore told that she would have to accompany the police officers to the local hospital in order to have a blood test.

An altercation followed during which Mrs Klaas was arrested. The precise course of the events is disputed by the applicants (see paragraph 7 below) and the police officers (see paragraph 9 below).

She was then driven to the hospital for the blood test, which showed the level of alcohol in her blood to be 0.82 per ml (milligrammes per millilitre). She was subsequently released.

7. According to the applicants, Mrs Klaas agreed to have a blood sample taken, but explained that she wished first to accompany her daughter to a neighbour. One of the police officers refused to allow this and dragged her to the police car. She was warned that she could be charged with obstructing a public officer in the execution of his duties (Widerstand gegen die Staatsgewalt). When she called her daughter, the police officers said that they would look after the child. Thereupon she took her daughter by the hand, went to the back door, rang her neighbour’s doorbell and opened the door. At that moment one of the police officers grabbed her, twisted her left arm behind her back and her head knocked against the corner of the window- ledge. The police officers then handcuffed her. She lost consciousness for a short while. When she came round, she found herself by the police car and noticed severe pain in her left shoulder, which was being pressed towards her back by one of the police officers. She was subsequently able to get into the police car and was driven to the hospital.

8. The first applicant underwent two medical examinations. On 11 February 1986, Dr Schwering certified that he had examined the applicant on 29 January and noticed bruises which were about 10cm long on her right arm, considerable problems in moving her left shoulder, and bruises on that shoulder. He also stated that she would suffer long-term problems, in particular with her left shoulder. She was put on sick-leave until 8 February 1986. Furthermore, on 10 February 1986, Dr Krauspe, the chief surgeon at

the local hospital, certified that he had examined the first applicant on 30 January 1986 and had reached an almost identical diagnosis.

I. THE CRIMINAL PROCEEDINGS INSTITUTED AGAINST THE FIRST APPLICANT

9. On 29 January 1986, Police Constable (Polizeimeister) Bolte laid an information against the first applicant. She was charged with obstructing a public officer in the execution of his duties contrary to Article 113 of the German Criminal Code (Strafgesetzbuch), and of driving while under the influence of alcohol contrary to Article 316 of the said code.

Police Constable Bolte stated in his report that after Mrs Klaas had been informed that she had to undergo a blood test, she had attempted to escape into the darkness of the back-yard, whereupon he had grabbed her arm and stopped her.

The applicant had been very aggressive. When informed that she was to be arrested, she had suddenly calmed down and declared that she would come along when she had taken her daughter, whom he had assumed to be about twelve years old, to a neighbour. The police officers had agreed in order to avoid a further escalation of the events. They had followed the applicants to the back door of the house.

The first applicant had been about to follow her daughter into the house. She tried to close the door behind her but Police Constable Wildschut blocked the door open and Police Constable Bolte grabbed the first applicant's right arm and pulled her outside. The child went upstairs.

According to the report, Mrs Klaas struggled, struck out and tried to free herself from the police officer's grip. Police Constable Wildschut took her left arm and twisted it behind her back, whilst Police Constable Bolte kept a tight grip on her right arm.

With great difficulty the officers managed to control the applicant, who was putting up a fight. They handcuffed her in order to avoid further criminal offences being committed, in particular injury to the person. On their way to the police car she had attempted to throw herself to the ground, and he and his colleague had had to hold her arms. At that point another police car arrived. However, by that time, the applicant's neighbour had already offered to take care of the child.

The officers noted on arrival at Lemgo Hospital that Mrs Klaas had a graze on her right temple.

10. On 22 April 1986 the criminal proceedings against the first applicant were discontinued by the public prosecutor's office (Staatsanwaltschaft) at the Detmold Regional Court (Landgericht) for two different reasons, namely that the offence of driving while under the influence of alcohol was not proven and that the applicant's guilt in resisting the police officers had been minimal (gering) and there was no public interest in prosecuting.

In November 1986 the competent administrative authority imposed an administrative fine of DM 500 for having committed the "regulatory offence" (Ordnungswidrigkeit) of driving with a blood alcohol content level of 0.82 per ml when 0.80 per ml was the legal limit. A driving ban of one month was also imposed.

The Lemgo District Court (Amtsgericht) confirmed this decision. The first applicant's subsequent appeal to the Hamm Court of Appeal (Oberlandesgericht) and to the Federal Constitutional Court (Bundesverfassungsgericht) were dismissed.

II. PROCEEDINGS BROUGHT BY THE FIRST APPLICANT AGAINST THE POLICE OFFICERS

11. On 24 April 1986 the first applicant laid an information against the police officers concerned. She alleged that they had assaulted her contrary to Articles 223 and 230 of the Criminal Code. In her pleadings of 24 April and 13 May 1986, Mrs Klaas claimed that the police officers had used a disproportionate amount of force, causing injuries to her head, left shoulder and upper right arm.

On 10 July 1986, following a telephone conversation between her lawyer and an official of the public prosecutor's office in which Mrs Klaas' allegations were withdrawn - allegedly after a warning that criminal proceedings against her would otherwise be continued - the proceedings against the police officers were discontinued.

12. On 18 July 1986, the first applicant filed a complaint (Dienstaufsichtsbeschwerde) with the Head of the Detmold District Administration (Oberkreisdirektor) against the police officers involved in the arrest. She stated that she had wanted to wait for her neighbour to come to the door but that she had not been able to as the bearded police officer had twisted her arm behind her back and her head knocked against the brick window-ledge. Subsequently she was forcibly taken to the police car where she was held with her back up against the rear of the car. The bearded man continued to pull her left shoulder back at regular intervals. At some point she was dazed.

She maintained that the blood test showed the level of alcohol to be 0.80 per ml. It was argued that the degree of force used against an unarmed woman was incomprehensible on an objective or subjective analysis; the mildest means of achieving the objective should have been employed.

13. On 18 September 1986, the Head of the Detmold District Administration, acting as the Police Department authority (Kreispolizeibehörde), dismissed her complaint. In the decision, it was stated in particular that after she had been informed that she would have to give a blood sample, she had attempted to run away. However, one of the police officers seized her arm and told her that she was under arrest. Her

request to take her daughter to a neighbour's first was granted. When the first applicant opened the door and tried to enter with her daughter, one of the police officers held her right arm fast, whereupon she started to kick and to hit out with her left hand. When the police officers held her tight she tried to escape. She had to be handcuffed. It was not accepted that her head knocked against the window-ledge at any moment in the course of the arrest. He concluded that the use of force had been justified and was not disproportionate to the aim pursued, namely the taking of a blood test.

III. THE FIRST APPLICANT'S PROCEEDINGS FOR COMPENSATION UNDER CIVIL LAW

14. The first applicant instituted civil proceedings in April 1987 against the Land North-Rhine Westphalia and the police officers concerned. She claimed compensation for the injuries sustained on 28 January 1986.

15. On 10 July 1987 the Detmold Regional Court, in a partial judgment, dismissed her complaint against the police officers on the ground that an official acting in the exercise of his duties does not incur personal liability.

16. On 9 October 1987 the Detmold Regional Court held a hearing in the case.

The applicant's neighbour was the first to give evidence. She said that she had noticed Mrs Klaas's very blotchy and tear-stained face despite the dim light, had seen the blond police officer holding her arms behind her back and had feared that she would collapse at any moment as her knees had given way and she had bent forward suddenly several times. The neighbour stated on further questioning that, judging from the first applicant's behaviour, she must have been in terrible pain. The first applicant complained about the pain in her left shoulder and asked the police officers to remove the handcuffs. This request was repeated by the neighbour but refused by the police officers.

Police Constable Bolte confirmed the facts as set out in his report of 29 January 1986 (see paragraph 9 above). He added that he was not sure whether the first applicant had deliberately not blown into the breathalyser for a sufficient time or whether she had had genuine difficulties. He stated that she had not knocked her head against the wall when she was pulled outside, however he remained unable to account for the injury to her right cheek to which he had referred in the aforementioned report. Upon further questioning he corroborated the neighbour's evidence that Mrs Klaas had requested that the handcuffs be removed and he explained that they had refused this request as they had feared more trouble. He said that she had not complained about any pains in her shoulder and that she had certainly not knocked her head against the wall. However, he acknowledged that she did not have the head injury before they spoke to her and said that he did not know whether she had got the injury to her right cheek during the scuffle

when the handcuffs had been put on. He could not remember who had kept hold of Mrs Klaas until they had put her into the police car, or whether she had bent forward suddenly owing, for instance, to a jerking on her handcuffs and the resulting pain.

Police Constable Wildschut was the next to give evidence. He confirmed the general circumstances of the first applicant's arrest as described by Police Constable Bolte, although he was not prepared to say that she had run away. After the applicant had opened the front door she had attempted to close it behind her but he had held on to it while his colleague kept a tight grip on her. As it was completely dark just outside the door he could not exclude the possibility that she could have knocked her head on the wall or on something else. In any event he did not notice it happening and it was only later that he became aware of her head injury. He stated that Mrs Klaas had vehemently resisted arrest which was why he had taken her left arm and twisted it behind her back and then handcuffed her arms in that position. He could not remember whether she had been handcuffed in the back-yard or whether they had first taken her to the street. He confirmed that she had requested that the handcuffs be removed but did not remember her complaining about any pain - in particular pain in her left shoulder. She continued, without success, to resist accompanying them, but he could not be sure who had been holding on to her while they waited for the second police car.

On further questioning Police Constable Wildschut stated that he did not remember whether she had bent forward suddenly while she was still handcuffed. She had resisted arrest and had been lashing out when he had twisted her arm behind her back, but he assumed that she had not intended to assault either him or his colleague. He denied that he had pushed the first applicant's head against the window-ledge.

Finally, the second applicant, Monika, gave evidence. She stated that she remembered the incident with her mother and the police officers in their back-yard. She said, in particular, that her mother had rung the doorbell and opened the door using a key. Monika had then gone into the house and closed the door behind her. She was not aware that one of the police officers had forcibly kept the door open. Having closed the door behind her, she said that she had managed to see through the plain glass door panel that one of the police officers had pushed her mother's head against the wall. She emphasised that the police officer had repeatedly pushed her mother's head against the wall next to the door using his hand. The officer concerned had blond hair. Her mother and the police officer had been close to the door, approximately one metre away from it. She herself had not been right in front of the glass panel. She had subsequently run upstairs to their neighbour. She further explained that, when her mother had rung the doorbell and opened the door, she had been standing to Monika's right. Her

mother had opened the door only a little bit, and she had just been able to get in. She had then immediately closed the door behind her.

Whilst she did not recognise the police officers involved she thought that the dark-haired police officer had a beard. She confirmed that the light had been poor, but said that it had been light in the staircase. She had not seen either of the police officers twisting her mother's arm behind her back.

17. On 30 October 1987 the Detmold Regional Court dismissed the first applicant's compensation claims against the Land North-Rhine Westphalia. It held as follows:

> "The plaintiff has no claim under Articles 839 and 847 of the Civil Code (Bürgerliches Gesetzbuch) taken together with Article 34 of the Basic Law for breach of official duty to her on the part of Police Constables Bolte and Wildschut.
>
> The Chamber is admittedly convinced that the plaintiff incurred the injuries complained of when she was arrested by the two police officers. In any event the plaintiff ended up with a graze on her temple, contusion of the left shoulder and probably also concussion, as was also confirmed in part by witnesses Bolte and Wildschut and moreover does not seem to be seriously contested by the defendant Land. These injuries were probably sustained by the plaintiff in the context of her arrest.
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> It does not follow, however, that the defendant Land is liable in damages.
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> The arrest itself was not unlawful. Even if the plaintiff had no intention whatsoever to abscond, the situation nevertheless appeared otherwise to the police officers. The plaintiff was under suspicion of having committed a criminal offence, namely driving under the influence of alcohol in road traffic contrary to Article 316 of the Criminal Code, as the police officers had found that the plaintiff's breath smelt of alcohol. On the basis of the credible statements of witnesses Bolte and Wildschut, the Chamber also assumes that the plaintiff's conduct, first after failing to blow satisfactorily into the breathalyser and then later at the front door, gave both witnesses the impression that she intended to evade further investigation, namely the taking of a blood sample, by absconding. The Chamber can understand that the police officers could have foreseen very considerable difficulties if the plaintiff managed to get into the building without the two witnesses. First, the police officers could not know whether the plaintiff would have allowed them access to her flat at all. Secondly, the plaintiff would have had an opportunity of consuming more alcohol or at least claiming that she had done so, thereby making ascertainment of her blood alcohol level impossible or significantly more difficult to obtain.
>
> In the light of these circumstances the arrest does not appear to be disproportionate either, but a perfectly reasonable means of ensuring that the further investigations could be carried out.
>
> It is for the plaintiff to prove that in this initially lawful exercise of their duty the police officers went further than was necessary, by handling the plaintiff too roughly and in so doing injuring her or even by deliberately inflicting the injuries on her. Just as an attacker must prove that a person attacked by him, acting in self-defence, exceeded the limits of necessary self-defence (see Federal Court of Justice - Bundesgerichtshof -, Versicherungsrecht 1971, pp. 629 et seq.), so also, in the

Chamber's opinion, must this apply in a case such as the present one: a person who puts forward claims in respect of injuries suffered during a lawful arrest must prove that the police officers went beyond what was necessary and thereby caused the injuries.

The plaintiff, however, has not succeeded in providing such proof. On the evidence which has been taken, the Chamber is not convinced that the police officers caused the plaintiff's injuries by exceeding what was necessary when arresting her.

With respect to the origin of the graze, the evidence of witness Monika Klaas, the plaintiff's daughter, conflicts with that of witnesses Bolte and Wildschut. Whereas witness Klaas claims to have seen one of the police officers repeatedly knocking the plaintiff's head against the wall by the door, the two police officers deny this. None of these three witnesses can be regarded as not having an interest in these proceedings; the two police officers could certainly expect disciplinary proceedings and a resumption of the criminal investigation if these proved to be the facts, while witness Klaas has a natural interest in supporting her mother's claim and account of the facts. It is not clear to the Chamber which of the statements corresponds to what really happened. Definite findings of fact can therefore not be made in this respect.

The largely disinterested witness Krüger [the neighbour] was unable in her testimony to confirm the plaintiff's assertion that witness Wildschut had pulled her arms upwards while she was handcuffed. Neither can such a conclusion be drawn merely from the fact that according to witness Krüger's statements the plaintiff leant forward jerkily several times while witness Wildschut stood behind her.

Neither the balance of probability nor general experience militate in favour of accepting the plaintiff's version of events. The Chamber considers it by no means improbable that the plaintiff sustained all her injuries when she resisted being handcuffed. In the process her head could easily have knocked against the wall; the shoulder contusion could also have occurred when she struggled while being restrained by the police and when the handcuffs were being put on her.

For these reasons the claim must be dismissed."

18. On 21 September 1988 the Hamm Court of Appeal dismissed the first applicant's appeal. It upheld the decision of the Detmold Regional Court that Mrs Klaas had not proved that excessive force had been used against her by the police officers.

19. On 8 February 1989 a panel of three judges of the Federal Constitutional Court declined to accept for adjudication the first applicant's constitutional complaint on the ground that it did not offer sufficient prospects of success. It considered in particular that the Court of Appeal's assessment of the evidence did not appear arbitrary or otherwise in violation of constitutional law.

PROCEEDINGS BEFORE THE COMMISSION

20. In an application (no. 15473/89) lodged with the Commission on 11 July 1989, Mrs Hildegard Klaas, the first applicant, submitted that, in the presence of her daughter, Monika, she had been subjected in the course of her arrest to inhuman and degrading treatment by the police contrary to Article 3 (art. 3) and that this treatment had violated her right guaranteed under Article 8 (art. 8) to respect for her private and family life. Monika Klaas, the second applicant, contended that the aforementioned treatment of her mother in her presence had violated her right to respect for her private and family life, contrary to Article 8 (art. 8), in addition to subjecting her to inhuman and degrading treatment contrary to Article 3 (art. 3).

21. On 9 July 1991 the Commission declared the applicants' complaints admissible and in its report of 21 May 1992 (Article 31) (art. 31), expressed the opinion:

(a) by ten votes to five that there had been a violation of Article 3 (art. 3) in respect of the first applicant;

(b) by ten votes to five that no separate issue had arisen under Article 8 (art. 8) in respect of the first applicant;

(c) by fourteen votes to one that there had been no violation of Article 3 (art. 3) in respect of the second applicant;

(d) by eight votes to seven that there had been a violation of Article 8 (art. 8) in respect of the second applicant.

The full text of the Commission's opinion and of the various separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

22. The Government in their memorial of 12 November 1992 invited the Court to find "that the applicants did not suffer violations of their rights under Article 3 (art. 3) or Article 8 (art. 8) of the Convention".

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 269 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

I. THE FIRST APPLICANT

A. Alleged violation of article 3 (art. 3)

23. The first applicant, Mrs Klaas, alleged that the treatment to which she had been subjected by the police officers in the course of her arrest constituted inhuman and degrading treatment contrary to Article 3 (art. 3), according to which:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

She maintained that, as a result of the altercation with the police, she had sustained, inter alia, injuries to her head and shoulder. These were supported by medical evidence (see paragraph 8 above) and were also illustrated by the photographs submitted to the Court by the Delegate of the Commission immediately prior to the hearing.

24. The Commission accepted her allegation. In accordance with the view expressed by the national courts, it was of the opinion that her arrest had been lawful (see paragraphs 13, 16 and 18 above). However, even assuming that she had resisted arrest and had been attempting to abscond, it considered that the use of force by police officers resulting in serious injuries had to be seen as inhuman and degrading treatment if it could not be shown by the Government that the force used was necessary in order for the police to accomplish their lawful duties.

According to the Commission, as the first applicant was injured in the course of an arrest, while under police control, it was incumbent on the Government to produce evidence showing facts which cast doubt on the account given by the victim which was supported by photographs and medical evidence. In the absence of any convincing other explanation as to the cause of the injuries suffered during her arrest, her allegations of a disproportionate use of force seemed plausible.

25. The Government argued that the first applicant's left shoulder had been damaged prior to the arrest, but otherwise accepted the fact that as a result she had suffered bruising to her shoulders as well as grazes on her face and her arm. They disagreed, however, with the applicant's account of how the injuries came about and maintained that the injuries were accidental and regrettable consequences of a lawful arrest.

26. The Court notes that the parties to the national proceedings did not dispute the fact that the injuries as shown by medical evidence and illustrated by the photographs actually arose in the course of the arrest.

Indeed, this was not denied by the police officers when they gave evidence before the Detmold Regional Court.

However, differing versions of how those injuries actually came about have been put forward by the applicants and the Government.

Mrs Klaas claimed that she had voluntarily agreed to provide a specimen of breath and that when that had failed she had only asked that her eight year-old daughter could go and stay with her neighbour in order that she could accompany the police officers to the hospital for a blood test. She denied the police officers' allegation that there was any danger of her absconding. She insisted that the police officers were responsible for her head getting knocked against the wall, a fact corroborated by her daughter who claimed to have observed the scene through the plain glass window panel. Furthermore, she argued that the force used by the police officers was disproportionate to the aim of securing the evidence for the offence of driving under the influence of alcohol. It was not necessary for two male police officers, well-trained in dealing with situations of this kind, to have assaulted a woman in this way.

The Government, on the other hand, contested the allegation that the injuries were the result of a greater degree of force being used by the police officers than was necessary in the circumstances. They contended that she had inflicted the injuries upon herself as by resisting arrest and attempting to escape she had provoked the firm and rapid use of physical force against her.

27. The Court recalls that various proceedings have arisen out of this incident, some of which have been abandoned.

First, criminal proceedings were instituted against Mrs Klaas on 29 January 1986 for two separate offences of driving under the influence of drink and resisting arrest, but these were discontinued on 22 April 1986 by the public prosecutor's office at the Detmold Regional Court; she was none the less fined for the regulatory offence of driving with excess alcohol in her blood (see paragraphs 9-10 above).

Secondly, on 24 April 1986, Mrs Klaas laid an information against the police officers alleging that they had assaulted her and caused her injuries. This, however, was withdrawn some weeks later (see paragraph 11 above).

Thirdly, on 18 September 1986 her further complaint of 18 July was dismissed by the Head of the Detmold District Administration, who did not consider it necessary to take disciplinary action (see paragraphs 12-13 above).

28. Exclusively civil proceedings were brought by Mrs Klaas for compensation from the State in April 1987:

(a) the Detmold Regional Court accepted that the said injuries occurred as a result of the incident with the police, but held that they did not give rise to a compensation claim as Mrs Klaas had failed to prove that the police officers had injured her by a use of force disproportionate to the aim of

pursuing the investigations against her. After having heard various witnesses, it found that her version of the events was not very probable and that it did not seem unlikely that she had injured herself while resisting the attempts to handcuff her (see paragraph 17 above);

(b) the Hamm Court of Appeal confirmed this decision (see paragraph 18 above);

(c) a panel of three judges of the Federal Constitutional Court declined to accept for adjudication her constitional complaint. It noted in particular that the Court of Appeal's assessment of the evidence did not appear arbitrary or otherwise in violation of constitutional law (see paragraph 19 above).

29. The Court recalls that under the Convention system, the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 para. 1 and 31) (art. 28-1, art. 31). The Court is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it (see the Stocké v. Germany judgment of 19 March 1991, Series A no. 199, p. 18, para. 53, and the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 29, para. 74).

It is further recalled that it is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them (see, inter alia, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, p. 12, para. 34, and the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, paras. 33-34).

30. The admitted injuries sustained by the first applicant were consistent with either her or the police officers' version of events. The national courts, however, found against her. In reaching the conclusion that she could have injured herself while resisting arrest and that the arresting officers had not used excessive force, the Regional Court, in particular, had the benefit of seeing the various witnesses give their evidence and of evaluating their credibility. No material has been adduced in the course of the Strasbourg proceedings which could call into question the findings of the national courts and add weight to the applicant's allegations either before the Commission or the Court.

The Court would distinguish the present case from that of Tomasi v. France (see the judgment of 27 August 1992, Series A no. 241-A, pp. 40-42, paras. 108-115) where certain inferences could be made from the fact that Mr Tomasi had sustained unexplained injuries during forty-eight hours spent in police custody.

No cogent elements have been provided which could lead the Court to depart from the findings of fact of the national courts.

31. Accordingly no violation of Article 3 (art. 3) can be found to have occurred.

B. Alleged violation of article 8 (art. 8)

32. The first applicant complained that as the aforementioned treatment took place on private property in the presence of her eight year-old daughter, it had also given rise to a breach of her right to respect for her private and family life under Article 8 (art. 8).

This claim was contested by the Government. The Commission did not consider it necessary to examine this complaint in view of its conclusion that there had been a violation of Article 3 (art. 3).

33. The first applicant's complaint under Article 8 (art. 8) is essentially based on the same disputed facts which have already been considered in connection with Article 3 (art. 3) and found not to have been established (see paragraphs 29-31 above). This being so, the said complaint does not call for separate examination.

II. THE SECOND APPLICANT

34. The second applicant alleged that, having regard to the police officers' excessive use of force against her mother in her presence, she suffered inhuman and degrading treatment contrary to Article 3 (art. 3) as well as a violation of her right to respect for her private and family life under Article 8 (art. 8).

35. Both the Government and the Commission contested the former claim. The Commission accepted the latter allegation as it took the view that Monika Klaas, a minor, had suffered considerable damage to her physical and moral integrity as a result of watching her mother's forcible arrest. This was denied by the Government.

36. It follows from paragraph 31 that the facts on which the second applicant relies are not established. Accordingly the Court considers that her complaints are likewise unfounded.

FOR THESE REASONS, THE COURT

1. Holds by six votes to three that there has been no violation of Article 3 (art. 3) in respect of the first applicant;

2. Holds by six votes to three that the first applicant's complaint under Article 8 (art. 8) does not call for separate examination;

3. Holds unanimously that there has been no violation of Article 3 (art. 3) in respect of the second applicant;

4. Holds by six votes to three that there has been no violation of Article 8 (art. 8) in respect of the second applicant.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 September 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinions of Mr Pettiti, Mr Walsh and Mr Spielmann are annexed to this judgment.

R. R.
M.-A. E

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted with the minority of the Chamber in support of the view that there had been a breach of Articles 3 and 8 (art. 3, art. 8) of the European Convention on Human Rights.

The reasoning adopted by the majority of the Chamber, on both Article 3 and Article 8 (art. 3, art. 8), seems to me to be based on an inaccurate interpretation of the issues raised and an erroneous application of the Convention.

As regards police violence, which is a serious problem throughout Europe, the key issue raised by the Klaas case was that of the burden of proof. The majority did not recognise this.

In my view, which I think is supported by several European codes of criminal procedure, the major acknowledged principle is that the role of the police is to ensure the safety and protection of the public.

While the police must intervene to provide the necessary protection and law enforcement, they have to respect fundamental rights when doing so. The basic rule is that the police must protect the individual from any violence and ensure people's physical safety. When called upon to act in regard to serious criminal offences, they are not entitled to use violence other than in circumstances of self-defence (légitime défense) or forceful resistance, and then the response must be proportionate to the danger.

In such a case, the burden of proving the need for self- defence or the fact of forceful resistance must be on the police, since otherwise police officers could commit violence and then maintain that there had been forceful resistance, thus throwing on the victims the onus of proof, which would be almost impossible to discharge in the face of statements made by sworn officials.

The issue before the Court was a particularly serious one and wholly analogous to the one dealt with in the Tomasi v. France* judgment, contrary to the majority's opinion. It was an established fact that violence had occurred during the period of arrest, when police violence is prohibited as it is during police custody. The violence could clearly be imputed to police officers as in the Tomasi case, in which the European Court seems to have indicated that Article 3 (art. 3) applied notwithstanding the physical level of severity of the violence.

The reasoning used by the Court in order to reject the Commission's opinion that there had been a breach does not seem to me to be adequate. The majority appear to take the view that the contrary decision is justified by the Court's assessing the facts differently from the Commission.

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* Judgment of 27 August 1992, Series A no. 241-A.

But the Commission, like the Court, based its opinion on the facts as set out at the time the application was lodged and there was no new evidence produced before the Commission and the Court.

In not substantively answering the main question and not, in my view, providing sufficient reasoning for its decision, in that the decision went contrary to the Commission's opinion founded on the burden of proof, the majority left unanswered the vital questions that have arisen in Europe in the sphere of police violence. At a time when police authorities are making a considerable effort to improve the teaching of professional ethics in police colleges, the Klaas case provided the opportunity to set out within the context of Article 3 (art. 3) of the Convention the issue of the burden of proof and the ingredients of forceful resistance and self-defence.

The majority's decision seems to me to be out of step with the findings of the European Committee for the Prevention of Torture which has noted the seriousness of police violence in the countries it has visited. In particular, the report on Germany mentioned the Committee's concerns in this connection (see pages 18-19, 63 and 86 of doc. CPT/Inf (93) 13).

The decision also seems to be contrary to the teaching in European police colleges and to police forces' codes of professional ethics in Europe. There can be no doubt that senior police officers in Europe wish to be able to prevent any "blunders" being committed by junior police officers, sometimes owing to insufficient training and education in this sphere.

The majority did not, in my view, take sufficient account of a number of data that are, however, of great assistance when assessing the facts:

1. German legislative provisions;
2. German police regulations; and
3. the reports of the European Committee for the Prevention of Torture.

*
* *

In traditional national criminal law and according to the general principles of criminal law in Europe, police violence cannot be dealt with in the same way as other violence between individuals. The prohibition on such violence is a requirement of the role of the police, which is primarily to protect people.

Justifying circumstances and the defence of provocation in respect of ordinary assaults by private individuals and by police officers are not analysed in the same way in criminal law.

Policemen are never authorised to assault people, other than in cases of forceful resistance to them in the execution of their duties or in self-defence, and then it is for the police to prove such forceful resistance or that an act was in self-defence.

Even in these cases, the police must prove that their reaction was proportionate. In the instant case, however, certain assaults have been

established and are not disputed. The police did not prove forceful resistance and their reaction was certainly disproportionate.

The circumstances of the case in comparison with the Tomasi case (murder suspect) are proportionately more to be regretted although the violence was nearly of the same intensity in both cases. At all events, the criterion of the degree of seriousness was not dealt with in the Tomasi case.

The reports of the European Committee for the Prevention of Torture, which are fairly damning of several police forces, are all pleas for help to lawyers in the context of the European Convention on Human Rights and the Council of Europe's Parliamentary Assembly Resolution 690 (1979) on the Declaration on the Police.

In the instant case, even if the policeman's responsibility for the shoulder injury is ruled out, the existence of the marks of other blows are not in dispute. They cannot be attributed to forceful resistance by the person arrested and were certainly due to police violence. This is all the more regrettable as the conduct of the police officers from the moment that they decided to take the applicant to the police station cannot be separated from what gave rise to the incident. The offence complained of was moreover a minor one, a regulatory offence.

In its judgment the Detmold Regional Court said:

> "The Chamber is admittedly convinced that the plaintiff incurred the injuries complained of when she was arrested by the two police officers. In any event the plaintiff ended up with a graze on her temple, contusion of the left shoulder and probably also concussion, as was also confirmed in part by witnesses Bolte and Wildschut and moreover does not seem to be seriously contested by the defendant Land. These injuries were probably sustained by the plaintiff in the context of her arrest. ... It is not clear to the Chamber which of the statements corresponds to what really happened. Definite findings of fact can therefore not be made in this respect."

The police cannot deal with peaceful law-abiding citizens and dangerous criminals in the same way - that would be a negation of the role of the police. The public have a claim on the police for protection, and the police have a corresponding duty to provide it.

Similarly, in the case of a citizen's arrest of an offender caught red-handed (which is authorised, inter alia, in Great Britain), the issue of liability is looked at differently from police intervention in similar circumstances.

A dispute between private persons that leads to violence cannot be compared to police intervention. The bases of consideration in criminal law are different. The concepts of self-defence, justification and provocation are governed by different legal rules in the case of assaults by the police.

These distinctions are observed in most national codes of ethics for the police. The major consideration is that a police officer is, above all, there to guarantee the protection of the citizen's physical inviolability.

The behaviour of the two policemen was contrary to their own police code of ethics as recognised in German police colleges. Yet there were not even any administrative or disciplinary penalties - another point in common with the Tomasi case. Out of deference to their police forces, State authorities show little zeal in proceedings relating to police blunders. The European Committee for the Prevention of Torture deplores this attitude, which runs contrary to Article 3 (art. 3) of the Convention.

On the other hand, at a time when the number of attacks on the police by subversive elements is increasing and the police after find themselves actually or potentially outnumbered, the State and the courts must support the police, who are essential for the maintenance of public order and the upholding of democracy.

The question that arises on a charge of forceful resistance is whether it is for the prosecution or the defence (at the trial or pre-trial stage) to show, firstly, that the assault actually took place and was unjustified and, secondly, that the response was necessary and measured. Logically, on account both of the presumption of innocence and of the general principles concerning the onus of proof it is for the prosecution to prove that the legal requirement of forceful resistance was satisfied and that the violence was justified.

Nor must it be forgotten that police officers and public servants who, without any legitimate cause, commit violence on people are punishable under the criminal law. This is so that officials or officers cannot, if they commit physical violence, always plead that their assault was justified.

Did not Hegel write: "An attack is a negation of the law; defence is a negation of that negation and is therefore the application of the law"? It is no doubt for this reason that a right of self-defence (légitime défense) occasionally arises, as the code itself specifies, in defence of others as well as of oneself*, and also that self-defence can only be pleaded if the attack was unjustified, in other words if it breached the peace, and if the defensive police response was a measured one and restored the peace without otherwise disturbing it.

If a policeman relies on self-defence against the person arrested or on forceful resistance by that person, the resistance of the person arrested must have been impossible to overcome.

German legislation is in line with this. The following are quoted by the European Committee for the Prevention of Torture:

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* See, for example, as regards French Criminal Law: Lyons tribunal de grande instance, 16 October 1973, Juris-Classeur périodique (JCP), 1974, II, 17812, note by Bouzat, comment by Larguier, Revue de science criminelle et de droit comparé sc. crim., 1975, p. 406. See also, on the protection of the property of others, Blois Criminal Court, 11 January 1978, and Orléans Court of Appeal, 17 September 1979, cited by A. Romerio, "La violence légitime", J.C.P., 1980, I, 2974.

1. Under the terms of Article 1, paragraph 1, of the Basic Law: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority". Article 2, paragraph 2, states: "Everyone shall have the right to life and to inviolability of his person ...". The Federal Constitutional Court has ruled that the latter provision also applies to any harm caused by psychological or mental torture and by equivalent methods of questioning.

In addition, Article 104, paragraph 1, of the Basic Law states: " ... Detained persons may not be subjected to mental nor to physical ill-treatment."

2. Many of the Penal Code's provisions make acts of torture and other forms of ill-treatment an offence. Among the most important are sections 340 and 343.

Section 340 states:

> "(1) A public official who commits, or permits to be committed, bodily harm during the exercise of his duties or in connection therewith, shall be punished by imprisonment from three months to five years. In less serious cases imprisonment of up to three years or a fine shall be imposed.
>
> (2) If serious bodily harm (section 224) is committed, not less than two years' imprisonment shall be imposed and, in less serious cases, imprisonment from three months to five years."

Section 343 provides that:

> "(1) Whoever, in his capacity as public official, whose duties involve acting in:
>
> 1. a criminal proceeding, or a proceeding to order authorised custody;
>
> 2. an administrative fine proceeding; or
>
> 3. a disciplinary proceeding or an honour court or professional court proceeding;
>
> physically abuses another, or makes use of violence against him, or threatens him with violence, or mentally torments him, in order to coerce him to give testimony, or not to do so, in the proceeding, shall be punished by imprisonment from one to ten years."

By way of comparison, as regards police-custody measures applicable to anybody and the behaviour required of police officers, the new Article 10 of the French Code of Criminal Procedure provides:

> "The police shall be responsible for any person arrested; such a person must not be subjected to any violence or any inhuman or degrading treatment by police officers or others."

Similarly, Article 9 of the Code of Criminal Procedure provides:

> "Where a police officer is empowered by law to use force ..., he shall only use such force as is strictly necessary and proportionate to the purpose to be achieved."

On a point which the Court did not have to deal with directly but which throws extra light on the impugned police behaviour, namely the arrangements for testing blood alcohol level, some principles of general police regulations on the subject should be remembered.

Taking to the police station for a blood alcohol level test

The fact of a person's being unable or unwilling to be breathalysed means that his blood alcohol level must be tested but does not in itself entail any sanction.

In the instant case the applicant was merely unable to be breathalysed; furthermore, this fact was established in the applicant's private back-yard and not in connection with any judicially authorised house search.

As regards handcuffs, police codes of ethics generally provide as follows:

Use of handcuffs

As an example, Article 803 of the French Code of Criminal Procedure, as amended by the Act of 4 January 1993, provides that a person shall not be handcuffed unless he can be regarded as a danger to others or to himself or as being likely to try to abscond. The German rule is similar. Other than in one of these situations, the use of handcuffs is therefore prohibited. Where it is allowed, it is for the officers whose duty it is to accompany the person concerned to assess the best way of putting on the handcuffs, having regard to the danger to others or to the person himself or to the risk that the person concerned may escape. Coercion by handcuffing is justified only in such cases.

Forceful resistance to police action

There is forceful resistance when a person resists the action of a police officer by a violent act (and not merely passively).

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* *

In their reasoning in paragraph 30 of the judgment the majority seem to want to invalidate the Commission's opinion on the basis of a different assessment of the facts and in the absence of any fresh evidence relating to that assessment subsequent to the Commission's opinion.

But the discrepancy really concerns the primordial issue of the burden of proof, which the Commission took as its basis.

I accordingly consider that, as the evidence stood, the Commission's observations remained apposite, in particular the following paragraphs of its report.

> "82. The Commission recalls that ill-treatment must attain a certain level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc. (Eur. Court H. R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 65-67, paras. 162-167; Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, pp. 14-15,

paras. 29-30; Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 39, para. 100).

83. Such treatment causing, if not actual bodily injury, at least intense physical and mental suffering falls into the category of inhuman treatment within the meaning of Article 3 (art. 3). It is degrading if it arouses in the person subjected thereto feelings of fear, anguish and inferiority capable of humiliating and debasing this person and possibly breaking his or her physical or moral resistance (Eur. Court H. R., Ireland v. the United Kingdom judgment, loc. cit., p. 68, para. 174; Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, p. 40, para. 107; Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 42, paras. 90-91; Soering judgment, loc. cit.).

...

98. As regards the question whether the force used by Police Constables Bolte and Wildschut against the first applicant for the purpose of her arrest was strictly proportionate, the Commission attaches particular weight to the injuries suffered by the first applicant in the course of her arrest (Eur. Court H. R., Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, opinion of the Commission, pp. 51-52, paras. 92-100, 105).

...

100. The respondent Government have not explained that the first applicant's injuries resulted from a use of force proportionate in the circumstances of her arrest. They regarded these injuries as accidental and regrettable consequences of an arrest which had as such been lawful. Their submissions in this respect were based upon the findings of the Detmold Regional Court in its judgment of 30 October 1987 and upon the statements of Police Constables Bolte and Wildschut, heard as witnesses in these proceedings.

...

102. The Commission, in examining whether there has been a violation of Article 3 (art. 3), cannot share the approach to the question of proof and assessment of evidence, as expressed by the respondent Government on the basis of the Regional Court's judgment.

103. The Commission recalls that in cases where injuries occurred in the course of police custody, it is not sufficient for the Government to point at other possible causes of injuries, but it is incumbent on the Government to produce evidence showing facts which cast doubt on the account given by the victim and supported by medical evidence (see Eur. Court H. R., Ireland v. the United Kingdom, Series B no. 23-I, p. 413; see also, mutatis mutandis, Tomasi judgment, loc. cit., opinion of the Commission, p. 52, para. 99; Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 26, para. 59).

104. Such considerations likewise apply in cases where a person is arrested by police authorities and thereby subjected to their power. In the present case, having regard to the injuries suffered by the first applicant in the course of her arrest, her allegations of a disproportionate use of force seem plausible in the absence of any evidence or convincing other explanation."

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* *

In its decision the German civil court, which did not consider the matter from the point of view of the European Convention, gave no relevant ground, in my view, for concluding that there has been no breach. That court was dealing with a different legal issue (an action for damages). The European Court was not bound by its decision.

Furthermore, that court did not choose between the two versions of the facts and did not rule out violence. The police version therefore cannot be accepted as the only accurate, established one. Police violence must be punished, because the police play a major role in safeguarding public order and democracy. The police are all the more effective and respected when the public know that if there are "blunders", there will be administrative or judicial sanctions.

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* *

As to Article 8 (art. 8), the majority have not, in my view, provided valid reasons for their decision or dealt with the problem that arose. This was the following.

In the circumstances of the case, even on the assumption that there had been no breach of Article 3 (art. 3), had there been a breach of Article 8 (art. 8) in respect of the first applicant (the mother)?. The circumstances of the case - possible venial traffic offence, no refusal by the applicant to be breathalysed, police intervention within the inner courtyard, private residence, disproportion between the strength of the two young policemen and that of the victim, humiliation of the latter - were sufficient to warrant finding a breach of Article 8 (art. 8).

As regards the second applicant, even on the assumption that the police violence would have been justified in another similar case in respect of the mother, the assessment of proportionality had to be different in the case of a mother arrested on the pretext of an offence - and a trifling one at that - in the presence of one or more of her children. The policemen were under a duty to weigh up the impact on the child and the resulting humiliation both for the mother and for the child, in particular on account of the use of handcuffs. The majority did not really take these two aspects into account.

Conclusion

The scope of the judgment is open to question, since the issue of the burden of proof has not been expressly decided.

On the whole, the Court’s finding that there has been no breach seems to me an inadequate response to the problem raised.

For all the foregoing reasons, I therefore voted for finding that there had been a breach of both Article 3 and Article 8 (art. 3, art. 8) of the European Convention.

DISSENTING OPINION OF JUDGE WALSH

1. This case has arisen from an encounter between the first applicant Hildegard Klaas, then accompanied by her eight year-old daughter Monika, on 28 January 1986, with two male police officers. At the time of the encounter the applicant Hildegard Klaas was 48 years old and the police officers were respectively 26 years old and 33 years old. On that date the applicant had apparently driven her motor car, in which her daughter was a passenger, through a red traffic light. That incident did not result in any damage to person or property, but had apparently been observed by the two police officers who followed her to the back entrance to the block of flats where she lived to which she had driven her motor car. Because the police detected a smell of alcohol on her breath she was requested to take a breathalyser test. The applicant apparently failed to do this satisfactorily in the sense that there appeared to be some breathing difficulty on her part and when requested she agreed to undergo a blood test. As that test would involve her going to the police station she was formally arrested by one of the police officers who physically restrained her. There is no doubt that, as from that moment, she was in the custody of the police. All the subsequent injuries sustained by the applicant accordingly took place during that period of custody. I cannot therefore accept as a valid distinction the fact that in the case of Tomasi v. France (see the judgment of 27 August 1992, Series A no. 241-A), the applicant had been in custody for many hours. Whether one is in the custody of the police for but a few minutes or for a few days makes no difference to the principle involved. When the police take a person into custody they have automatically assumed the duty and obligation to save such person from harm whether from members of the police or from any other party. Once a person's liberty has been restrained by the police, she or he is in police custody, whether or not formal words of arrest have been pronounced. Once it has been established that physical injury has been sustained by such person while in police custody, the burden falls upon the police or their State to show that such injuries were not caused or brought about by the actions of the police or their want of care.

2. The evidence clearly established that the injuries sustained by the applicant were serious injuries and amount to infringements of her bodily integrity. Mrs Klaas's injuries were examined by a doctor on the day following the incident and she was ill from 28 January to 8 February. The findings of the first doctor were subsequently confirmed by other doctors and photographs were taken on 29 January which showed what her then condition was. The distinguished Delegate of the Commission, Professor Frowein, was justified in urging upon the Court that the present case was of considerable importance for laying down the standard to be applied under Article 3 (art. 3) of the Convention by police officers when dealing with a normal, non-dangerous citizen in the performance of their duties. He

submitted that the use of force by police officers resulting in important injuries must be seen as inhuman and degrading treatment in violation of Article 3 (art. 3) of the Convention if it cannot be shown that the force used was necessary to accomplish the lawful duties of the police officers. I think he was correct in this submission. It is already well established in the jurisprudence of both the Commission and the Court that people who are clearly injured while in police custody must be presumed to have been treated in violation of Article 3 (art. 3) when no explanation to the contrary is given by the State which, as Professor Frowein submitted, is the only institution which can submit a proof to the contrary.

3. The incident in question occurred at a point 60 to 100 metres from where she had been arrested. The parties had gone to that point so that the applicant could hand the care of her eight year-old daughter over to a neighbour. The police appeared to form the opinion then that she intended to seek refuge in the neighbour's house and thereupon proceeded to handcuff her and the injuries were incurred during that episode. In subsequent investigation and court hearings the police could offer no greater explanation than that the applicant had caused the injuries herself and that they, the police, did not do anything which could have caused them. The German Regional Court which dealt with the civil proceedings felt that it could not rely upon the direct evidence of either the applicant or her daughter or of the two policemen on the grounds that each had an interest in telling a particular story. In effect the court then appears to have speculated on how the matter had arisen and ultimately it came to the conclusion that the applicant, on whom was the burden of proof in those proceedings, had not established her case.

4. While the Court will always pay respectful attention to the findings of a national court, it is of course in no way bound by the findings of fact in national courts when an alleged breach of the Convention is being investigated by the Court. When a case comes before this Court it has already been through the Commission and the establishment and verification of the facts is primarily a matter for the Commission. While the Court would not lightly discard the Commission's findings of primary facts it is free to draw its own inferences from the facts and is ultimately free to make its own appreciation of the whole case in the light of the materials before it. In the present case the Commission unanimously held that the police, and therefore the State, was answerable for the injuries suffered by the applicant. A minority of the Commission found that they were not sufficiently substantial to amount to a breach of Article 3 (art. 3) but the majority of the Commission held that there had been a breach of Article 3 (art. 3). All the Commission were unanimous on the point that there had been a breach of Article 8 (art. 8) so far as the first applicant was concerned. Unlike the German courts in the civil proceedings, the Commission took the view that the burden of proof fell upon the police and upon the State. This

clearly had not been discharged. The German Regional Court appears to have in effect made no finding whatsoever of primary facts save that the injuries had been sustained by the applicant.

5. In view of the unanimous findings on the fact by the Commission and the absence of a positive finding by the German court on the primary facts, there does not appear to me to be any reasonable justification for taking a completely opposing view of the facts. It is not in dispute that a considerable amount of violence had occurred, which included twisting the applicant's arm behind her back and handcuffing both her arms behind her back and physically pulling her along with them. This had been sought to be justified by the police on the grounds that she was resisting arrest, but she had already been arrested after having failed the breathalyser test (see paragraph 1 above). The police could not, however, offer any explanation as to how the injuries which were evidenced by the photographs came about, nor as to whether she was caused pain by jerking upon her handcuffed arms. It was admitted by the police that she did not have the head injury when they first met her. The explanation was that "she might have got this injury" during the altercation which was alleged to have ensued when she was placed in handcuffs. In view of the fact that this lady had no police record of any description and no reputation of violence or association with any persons who might be thought to indulge in violent activities, the police approach to her was one which could be fairly described as being heavy-handed. There was no question of her being drunk though the police approach to her on this subject is revealing. The analysis of her blood shows that her blood alcohol exceeded 0.8 per ml by 0.02 per ml, notwithstanding which the police charged her with the criminal offence of driving while under the influence of alcohol (drunken driving), a charge which was subsequently dropped by the public prosecutor's office on the ground that there was no evidence upon which such an opinion could reasonably be formed. In fact, the applicant was never brought before any criminal court.

6. In my view a breach of Article 3 (art. 3) has occurred in that she was subjected to inhuman and degrading treatment which has not been justified. I regard inhuman treatment as being distinct from degrading treatment but I am satisfied that they are both established in the present case. I am also of the opinion that there was a breach of Article 8 (art. 8) in her case and a breach of Article 8 (art. 8) in the case of her daughter Monika who had been wrongly and unwillingly exposed to the incident which brought about the injuries to her mother. In Monika's case I am not satisfied that there was any breach of Article 3 (art. 3).

DISSENTING OPINION OF JUDGE SPIELMANN

(Translation)

I am unable to agree with the decision of the majority of the Chamber of the Court for the reasons set out below, which I have divided into two parts, namely:

I. The specific case, II. The principle.

I. The specific case

A. The reasoning of the judgment

In the specific case I can accept neither the reasoning of the judgment, nor, accordingly, its conclusions, except as regards the finding of no violation of Article 3 (art. 3) in respect of the second applicant.

(a) The first applicant

1. Alleged violation of Article 3 (art. 3)

I wish to dissociate myself from what is said in the second sub-paragraph of paragraph 29 and the second and third sub-paragraphs of paragraph 30 of the judgment.

- second sub-paragraph of paragraph 29

According to the second sub-paragraph of paragraph 29 of the decision of the majority of the Chamber:

> "... it is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them (see, inter alia, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, p. 12, para. 34, and the Vidal v. B778elgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, paras. 33-34)."

If that is the case in principle for the application of Article 6 (art. 6) of the Convention, the same is not true, in my view, when the Court has to apply Article 3 (art. 3) (see under II).

- second sub-paragraph of paragraph 30

According to the second sub-paragraph of paragraph 30 of the decision of the majority of the Chamber:

> "The Court would distinguish the present case from that of Tomasi v. France ... where certain inferences could be made from the fact that Mr Tomasi had sustained unexplained injuries during forty-eight hours spent in police custody."

Observations

1. I can see no difference from the point of view of Article 3 (art. 3) of the Convention according to whether the ill-treatment was meted out during police custody or in the course of an arrest (see paragraph 103 of the Commission's report). In both cases the person concerned is in the hands of the police.

2. On the other hand, I can see a major difference between the two cases (but not that identified by the majority of the Chamber):

The Tomasi case was set against a background of quasi-terrorism. The applicant had been suspected of having participated in an attack carried out at Sorbo-Occagnano (Upper Corsica) in the evening of 11 February 1982 against the Foreign Legion rest centre, which was unoccupied at that time of the year. Senior Corporal Rossi and Private Steinte, who, unarmed, were responsible for maintaining and guarding the centre, had been shot and wounded, the former fatally and the latter very severely.

The climate was such that, for the territory concerned, France could have made the declaration provided for in Article 15 (art. 15) of the Convention.

In the Klaas case the first applicant was suspected of having failed to stop at a red light and driving while under the influence of drink. The blood test showed her to have an alcohol level of 0.82 milligrams per millilitre.

Therein lies the real difference between the two cases.

- third sub-paragraph of paragraph 30

According to the third sub-paragraph of paragraph 30:

> "No cogent elements have been provided which could lead the Court to depart from the findings of fact of the national courts."

This is an erroneous line of reasoning.

It is not incumbent on the applicant to provide convincing evidence, it falls to the Government, where injuries are evidenced by medical certificates, to prove that the police intervention was not disproportionate in relation to the "offences" committed. The Government did not do this; indeed they could not have done so.

2. Alleged violation of Article 8 (art. 8)

According to paragraph 33 of the judgment:

> "The first applicant's complaint under Article 8 (art. 8) is essentially based on the same disputed facts which have already been considered in connection with Article 3 (art. 3) and found not to have been established ... . This being so, the said complaint does not call for separate examination."

The majority of the Commission, having found a violation of Article 3 (art. 3), decided in accordance with its case-law "that no separate issue [arose] under Article 8 (art. 8) of the Convention in respect of the first applicant".

The minority of the Commission was clearly in a different position as it had not found a violation of Article 3 (art. 3), taking the view that the

treatment inflicted on the first applicant, although serious, had not attained the level of severity necessary to bring it within the ambit of Article 3 (art. 3) of the Convention.

On the other hand the minority, in contrast to the majority of the Court, considered that there had been a violation of Article 8 (art. 8), on the following grounds:

> "... the treatment was in our view an interference with the first applicant's right to respect for her private life for which there was no justification under Article 8 para. 2 (art. 8-2) of the Convention." (see the dissenting opinion of Mr Nørgaard, Mr Trechsel, Mr Danelius and Mr Marxer)

If I, like the minority of the Commission, had reached the conclusion that there had been no violation of Article 3 (art. 3) - which I did not -, I would have had no hesitation whatsoever in finding a violation of Article 8 (art. 8).

It is in any case interesting to note that all the members of the Commission found at least one violation of the Convention as regards the first applicant and they did so because, instead of basing their decision on the assessment of evidence effected by the Detmold Regional Court, they made their own assessment of the evidence.

(b) The second applicant

1. Alleged violation of Article 3 (art. 3)

I agree with the almost unanimous opinion of the Commission that the negative effects of the events on the second applicant were not such as to constitute inhuman and degrading treatment within the meaning of Article 3 (art. 3) of the Convention (see, however, the dissenting opinion of Mr Loucaides).

2. Alleged violation of Article 8 (art. 8)

Having found that there had been a violation of Article 8 (art. 8) in respect of the first applicant, logically I had to consider that there had also been one in respect of the second applicant. I would have done so even if I had not found a violation of Article 3 (art. 3) in respect of the first applicant. For both applicants the interference was in no way justified (Article 8 para. 2) (art. 8-2).

B. Conclusions

1. I conclude that there was a violation of Article 3 (art. 3) of the Convention in relation to the first applicant.
2. I conclude that there was also a violation of Article 8 (art. 8) in respect of the first applicant.

3. I conclude that there was no violation of Article 3 (art. 3) as regards the second applicant.

4. I conclude that there was a violation of Article 8 (art. 8) in respect of the second applicant.

II. The principle

The questions of principle raised by the Klass case go far beyond its specific facts. Police brutality is not a solely German phenomenon; it is a European problem.

If anyone is in any doubt about this, he should read the reports of the European Committee for the Prevention of Torture.

What is the explanation?

In my opinion there are at least three, namely:

1. Because police ill-treatment most frequently occurs without witnesses, except the victim, the facts are systematically contested.

2. Injuries formally evidenced by medical certificates are either self-inflicted, accidental or quite simply inexplicable (suddenly for an incomprehensible reason the person concerned fell knocking his head against a cupboard). The same sort of situation arose in the Tomasi v. France case.

3. All too often this ill-treatment (usually referred to in French as "bavures" or blunders) is tolerated by the national courts.

In these circumstances, I take the view that it is for the European Court to assess the evidence and not for instance the Detmold Regional Court or a court of appeal.

Following the annulment of eight Articles of the Immigration Law by the French Conseil constitutionnel, Mrs Béatrice Patrie, President of the Syndicat de la magistrature has recently written in particular as follows:

> "We can therefore only welcome the fact that the French Conseil constitutionnel, following the example of its European counterparts, is devoting itself to its task as the guardian of freedoms, because if it did not, human rights would become, just like the 'fundamental principles recognised by the laws of the Republic' as being 'particularly necessary to our time', mere appendages serving only to embellish the civic education lessons close to the heart of ..." (Le Monde, 19.8.1993, translated from the French)

What is true for constitutional courts must a fortiori apply to the European Court of Human Rights.