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

COURT (CHAMBER)

CASE OF DEWEER v. BELGIUM

(Application no. 6903/75)

JUDGMENT

STRASBOURG

27 February 1980

In the Deweer case,

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. H. MOSLER, *President*,
Mr. M. ZEKIA,
Mr. R. RYSSDAL,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. P.-H. TEITGEN,
Mr. F. GÖLCÜKLÜ,
Mr. J. PINHEIRO FARINHA,

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

Having deliberated in private on 28 and 29 September 1979 and on 4 and 5 February 1980,

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

PROCEDURE

1. The Deweer case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application against the Kingdom of Belgium lodged with the Commission on 6 February 1975 under Article 25 (art. 25) of the Convention by a Belgian national, Mr. Julius Deweer.

2. The Commission's request, to which was attached the report provided for under Article 31 (art. 31) of the Convention, was filed with the registry of the Court on 14 December 1978, within the period of three months laid down by Articles 32 par. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the Kingdom of Belgium recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 6 (art. 6) of the Convention and Article 1 of Protocol No. 1 (P1-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Pallieri, the President of the Court (Rule 21 par. 3 (b) of the Rules of Court). On 26 January 1979, in the presence of the Registrar, the President of the

Court drew by lot the names of the five other members, namely Mr. R. Ryssdal, Mrs. D. Bindschedler-Robert, Mr. P.-H. Teitgen, Mr. F. Gölcüklü and Mr. J. Pinheiro Farinha (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43). Subsequently, Mrs. Bindschedler-Robert was exempted from sitting (17 May 1979) and Mr. Balladore Pallieri was prevented from taking part in the consideration of the case (25 September 1979); they were replaced by the first two substitute judges, Mr. Mosler and Mr. Zekia (Rules 22 par. 1 and 24 par. 1 and 4).

Mr. Balladore Pallieri and then, as from 25 September 1979, Mr. Mosler assumed the office of President of the Chamber (Rule 21 par. 5).

4. Acting through the Registrar, the President of the Chamber ascertained the views of the Agent of the Belgian Government ("the Government") and the Delegates of the Commission regarding the procedure to be followed. On 6 June 1979, having particular regard to their concurring statements, the President decided that it was not necessary for memorials to be filed; in addition, he directed that the oral hearings should open on 27 September 1979. On 13 September, the President instructed the Registrar to request the Commission to produce certain documents to the Court; these documents were filed by the Commission on 19 September.

5. The hearings took place in public at the Human Rights Building, Strasbourg, on 27 September. Immediately prior to their opening, the Chamber had held a short preparatory meeting.

There appeared before the Court:

- for the Government:

Mr. J. NISET, Legal Adviser
at the Ministry of Justice, *Agent*,
Mr. J. DE MEYER, Professor
at the University of Louvain, *Counsel*,
Mr. R. GEURTS, Inspector
at the Ministry of Economic Affairs, *Adviser*;

- for the Commission:

Mr. Gaukur JÖRUNDSSON, *Principal Delegate*,
Mr. S. TRECHSEL, *Delegate*,
Mr. J.-M. VAN HILLE, the applicant's counsel
before the Commission, assisting the Delegates (Rule 29 par. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mr. De Meyer for the Government and by Mr. Gaukur Jörundsson, Mr. Trechsel and Mr. van Hille for the Commission, as well as their replies to questions put by the Court.

6. On 1 October 1979, acting on the instructions of the Chamber and the President, the Registrar made a written request to the Commission for an item of information and two documents. The following day, the matters requested were supplied to the Registrar by the Secretary to the Commission.

AS TO THE FACTS

A. The particular circumstances of the case

7. The applicant, a Belgian national, had been a retail butcher in Louvain since 1935. He died on 14 January 1978, but one month later his widow and three daughters advised the Commission that they considered themselves to have a material and moral interest in seeing completed the proceedings he had instituted.

8. On 18 September 1974, his shop, where he employed several persons, was the subject of a visit by Mr. Vanderleyden, an official in the Economic Inspectorate General. This official found an infringement of the Ministerial Decree of 9 August 1974 "fixing the selling price to the consumer of beef and pig meat" ("the Decree of 9 August 1974"), in that Mr. Deweer had not reduced his prices of pork by 6.5 per cent as required by Article 2 par. 4 and his "retail margin" for that meat was 5.95 BF in excess of the maximum - 22 BF per kilogram - permitted under Article 3 par. 1 (see paragraph 18 below).

When questioned in this connection, the applicant made the following statement, according to the report drawn up the same day by the inspector (translation from the Dutch original):

> "...
>
> As is shown by the price-markings recorded by you, for beef I have applied the reduction provided for in the Ministerial Decree of 9 August 1974 and my margin is less than 22 F.
>
> As concerns pig meat, I have not applied the reduction and my margin is in excess of 22 F.
>
> This is because my calculations were for category 2 pig meat instead of category 1 pig meat. This was a mistake on my part. I acted in good faith and, in your presence, I immediately reduced the prices in order not to exceed the margin of 22 F."

He added the following note, signed, like the report, by Mr. Vanderleyden and himself:

> "... I buy my meat on the hoof and ... the costs listed below were not included by you in your calculations:
>
> (1) 1.50 F commission per live kg;
>
> (2) transport costs of 100 F per animal, that is 1 F per kg;
>
> (3) slaughter costs: 100 F per animal;
>
> (4) slaughter tax: 105.20 per animal;

(5) transport costs for each carcase: 100 F per animal."

The inspector did not supply a copy of the report to Mr. Deweer. He set out the foregoing facts in a formal statement, known as a "pro-justitia", dated 18 September 1974; the Economic Inspectorate General transmitted this formal statement on 26 September to the procureur du Roi attached to the Louvain Court of First Instance.

9. On 30 September, the Louvain procureur du Roi ordered the provisional closure of the applicant's shop within forty-eight hours from notification of the decision. The decision cited the gravity of the facts, whilst noting that there was no need to request a sentence of imprisonment; it referred to the interview report of 18 September and to sections 1 par. 1, 2, 5 to 7, 9 and 11 of the Economic Regulation and Prices Act of 22 January 1945 (see paragraphs 12 to 16 below). The closure was to come to an end either on the day after the payment of a sum of 10,000 BF by way of friendly settlement (minnelijke schikking) or, at the latest, on the date on which judgment was passed on the offence; Mr. Deweer had eight days in which to indicate whether he accepted the offer of settlement.

The same day the procureur du Roi wrote Mr. Deweer the following letter (translation from the Dutch original):

"...

You are hereby informed of the decision provisionally closing your business in pursuance of section 11 par. 2 of the Act of 22 January 1945. Your attention is particularly drawn to the heavy penalties imposed by the Act for failure to comply with this decision.

The amount of the friendly settlement proposed is fixed at 10,000 F.

I should be obliged if, within eight days, you would transfer this sum to Post Office Account no. ... and advise me whether you accept the offer of settlement.

The closure of your business will be terminated the day after you make the required payment.

..."

10. On 1 October, a deputy superintendent of police delivered this letter to the applicant together with a copy of the decision to which it referred. Mr. Deweer replied on 3 October by registered letter in the following terms (translation from the Dutch original):

"Dear Sir,

...

Kindly note that I am today paying the sum proposed in your letter of 30 September 1974 by way of friendly settlement; consequently, the criminal proceedings become

barred once and for all (section 11 par. 1 of the Act of 22 January 1945) and the closure of my establishment will no longer be put into effect.

Kindly note, however, that I reserve all my rights to take action against the Belgian State before the civil courts, in particular for the restitution of this sum plus damages.

In point of fact:

- I have not as yet received any copy of the report which is the basis of the penalties imposed in my respect;

- as far as I can recollect, the findings of those drawing up the report did not take account of the factors which are essential for calculating the prices;

- an application for a declaration of annulment of the Decree of 9 August 1974 will be lodged before the Conseil d'État which has already annulled four similar Decrees (see the judgment of 5 July 1973);

- a closure can only come into effect forty-eight hours after notification of the conviction (section 11 par. 2 of the Act refers to section 9 par. 5 which speaks exclusively of convictions).

I have therefore paid the amount of the friendly settlement for the sole purpose of limiting the damage suffered by me; for the prejudice resulting from the closure of my establishment as from today until the eventual hearing of the case before the criminal court might be far in excess of 10,000 F and the civil court might then draw certain conclusions from the fact I had not mitigated my loss.

..."

11. Following this payment, which had in fact already been made on 2 October, the applicant did not have his shop closed. He did not bring any action before the civil courts for restitution of money paid over without cause and for damages; nor did he apply to the Conseil d'État for a declaration of annulment of the Decree of 9 August 1974.

B. The legislation in issue

12. At the relevant time, State intervention in the sphere of prices was governed in Belgium by the Economic Regulation and Prices Act ("the 1945/1971 Act"). This Act derived from the Legislative Decree of 22 January 1945 "on repression of offences against rules relating to the country's supplies", as several times amended, in the last instance by an Act of 30 July 1971 which had modified the original title.

Section 2 par. 1, 2 and 4, read in conjunction with section 1 par. 1, empowered the Minister responsible for economic affairs to fix by Decree, for the whole or part of the territory of the Kingdom, price-ceilings to be respected in transactions of sale, offer for sale or purchase of products,

materials, foodstuffs, goods or animals, as well as the maximum profit to be made by any vendor or intermediary.

The investigation and the finding of offences against the 1945/1971 Act were normally the responsibility of officials from the Economic Inspectorate General, acting on behalf of the Minister, and formed the subject of reports which were transmitted to the procureur du Roi; these reports were deemed to be conclusive until production of proof to the contrary (section 6).

13. In addition to imprisonment of one month to five years and a fine of 3,000 to 30,000,000 BF (section 9 par. 1), offenders were liable to various criminal and administrative sanctions (sections 2 par. 5, 3, 7, 9 par. 2 to 6, 10, 11 and 11 bis). One of the most serious of these sanctions was closure of the offender's business, which took four forms:

(a) Under section 2 par. 5, the Minister could direct closure on a provisional basis, for five days at the most, in the event of refusal to comply with the instructions given by officials empowered by him; an appeal having suspensive effect was available to the person concerned before the judge in chambers at the Court of First Instance with jurisdiction in criminal matters.

(b) Section 3, second paragraph, allowed the Minister, even in the absence of any offence, also to close establishments whose activity he considered useless or harmful.

(c) Section 9 par. 5 enabled the courts to order closure for a period not exceeding five years, without prejudice to any penalty of imprisonment, fine or forfeiture (section 9 par. 1 to 4).

(d) In the instant case, the closure decision was taken by the procureur du Roi. It was based on section 11 par. 2 according to which:

> "The procureur du Roi or, where preliminary investigations have been instituted, the investigating judge may order the provisional closure of the offender's establishment. The closure may not continue beyond the date on which judgment is passed on the offence.
>
> ..."

The 1945/1971 Act did not provide for any appeal against such a decision to which, according to section 11 par. 2 in fine, section 9 par. 5 (b) applied. This latter section read as follows:

> "The closure ... shall come into effect forty-eight hours after notification of the conviction. If the decision of closure is contravened, the procureur du Roi shall take all appropriate action in order to secure compliance therewith, in particular by affixing seals ..., and the offender shall be liable to imprisonment of six months to two years and to a fine"

which, in September 1974, was fixed at the amount of 3,000 to 3,000,000 BF.

14. Whereas the first three forms of closure had apparently not been used for fifteen years or so, the same was not true of the fourth form. Provisional closure of that type was ordered in the context of judicial proceedings already instituted or imminent and could thus precede a sentence of closure imposed by a court of law in pursuance of section 9 par. 5. However, according to decided case-law, provisional closure constituted an administrative measure differing in character from and incapable of being offset against any such sentence; it was not entered on the judicial records (casier judiciaire) or on the information extracts (bulletins de renseignements) and lists of convictions issued by the municipal authorities.

15. When he did not consider it necessary to seek a sentence of imprisonment and if proceedings for the offence had not yet been instituted before the trial court, the procureur du Roi could, under section 11 par. 1, inform the offender by registered letter that it was open to him to avoid prosecution by effecting one or more payments or services ("prestations"). The 1945/1971 Act listed five such payments or services from which the procureur du Roi made his choice. The first consisted of paying over a certain sum of money which might, if appropriate, be greater than the maximum fine fixed by the Act. The procureur du Roi called on the person concerned to advise him within a given period whether he accepted the settlement proposed; full and punctual performance of the settlement barred criminal proceedings.

Although often referred to as a fine by way of settlement, the payment thus made was not regarded in Belgian law as a penalty. Consequently, the payment could not be taken into consideration when dealing with further offences and was not entered on the judicial records. It was nevertheless notified to the municipal authorities of the person’s place of residence; until a period of five years had expired, mention of it was included in the information extracts the municipalities supplied to the judicial authorities but not in the lists of convictions intended for other authorities. In that respect, settlements negotiated in accordance with section 11 par. 1 of the 1945/1971 Act resembled those provided for under, inter alia, Articles 166 to 169 and 180 to 180 ter of the Code of Criminal Procedure.

With the possible exception of one or a few instances dating back to 1946, the closure orders issued by a procureur du Roi in pursuance of paragraph 2 of section 11 of the 1945/1971 Act were always accompanied by an offer of settlement made in accordance with paragraph 1. Such was the case in seven decisions - including the one affecting the applicant - taken in 1974 with regard to butchers in the district of Louvain. On the other hand, the converse situation - an offer of settlement without there being any closure order - was a frequent occurrence.

16. Again, under the terms of section 11 bis, a provision not applied in Mr. Deweer’s case, the officials specially empowered for these purposes by the Minister could, on finding an offence, fix a sum whose voluntary

payment by the offender likewise barred criminal proceedings. In such cases, the settlement was not even entered on the information extracts issued by the municipal authorities.

17. Since the period under consideration, section 4 par. 4 of the 1945/1971 Act has been amended in one respect by section 24 of the Business Accounting and Annual Accounts Act of 17 July 1975, but each of the clauses quoted or summarised above, including in particular section 11, was left unchanged.

18. The offence established in the instant case by the Economic Inspectorate General related to the Ministerial Decree of 9 August 1974 "fixing the selling price to the consumer of beef and pig meat" (see paragraph 8 above). This Decree, which was passed pursuant to the 1945/1971 Act, came into force on 14 August 1974; it was intended, like numerous other Decrees preceding it, to restrain rises in the cost of products constituting a major item in the consumer's budget and in the computation of the official price-index.

Article 2 dealt with pig meat. Paragraph 1 of Article 2 required retailers in business before 1 November 1972 - such as the applicant - not to charge in excess of the prices prevailing during the first three weeks of October 1972 as increased by 10 per cent. Paragraph 4 specified that until 31 October 1974 the selling prices to the consumer, inclusive of value-added tax, charged in accordance with paragraph 1, had to be marked down by 15 per cent. The combined effect of these two paragraphs was to produce a price reduction of 6.5 per cent as compared with the levels current in October 1972.

Article 3, however, contained a proviso. Under paragraph 1 of Article 3, retailers able to show that they were not obtaining a retail margin of 22 BF per kilogram were, subject to not exceeding that margin, allowed to charge prices other than those following from Article 2. Paragraph 2 indicated what was to be understood by "retail margin", namely the difference between "the weighted average selling price not inclusive of value-added tax" and "the weighted average purchase price", these two prices being in their turn defined in paragraphs 3 and 4. Paragraph 2 did not include any provisions regarding those butchers - a minority of the order of 2 per cent - who, like Mr. Deweer, purchased their meat on the hoof.

Under Article 7, offences against the Decree of 9 August 1974 were to be investigated, established, prosecuted and punished in accordance with the provisions of Parts II and III of the 1945/1971 Act. Section II, which was applied in Mr. Deweer's case, appeared in Part III of the latter Act.

19. The criminal prosecutions launched for failure to comply with the Decree of 9 August 1974 resulted, in numerous cases, in acquittals. For the most part, the relevant courts gave as the ground for their verdict the illegality of the Decree; in so doing they were acting in pursuance of Article 107 of the Constitution which states: "The courts and tribunals shall not

apply any general, provincial or local decrees and regulations save insofar as they are in accordance with the law." In the early stages, the prosecuting authorities entered appeals which, however, failed; eventually they abandoned any attempt at appeal.

Certain courts adopted another solution: faced with the accused pleading the incompatibility of the Decree with Community law, they requested the Court of Justice of the European Communities to give a preliminary ruling pursuant to Article 177 of the Treaty establishing the European Economic Community; for reasons that were the subject of dispute before the Commission, the Court of Justice did not have the occasion to deliver any ruling.

20. In a case brought before it on 14 October 1974 by a retail butcher and pork-butcher, the Conseil d'État declared the Decree of 9 August 1974 to be contrary to the principle of the equality of all Belgians before the law (Article 6 of the Constitution): the appreciable distinction drawn between retain according to the period of their establishment in business did not appear to the Conseil d'État to be justified either by any technical necessity or by imperative considerations of general economic interest. It accordingly annulled the Decree on 31 May 1978 (Ghekiere v. the State of Belgium).

Four earlier Decrees of a similar kind, dating back to 1970 and 1971, had suffered the same fate on 5 July 1973 (National Federation of Retail Butchers and Pork-Butchers of Belgium v. the State of Belgium).

21. After being amended on 7 October 1974, 29 October 1974, 13 November 1974 and 12 February 1975, the Decree of 9 August 1974 was repealed on 27 March 1975. The Decree which replaced it on the latter date, and which came into force on 11 April 1975, contained - as did the Decrees of 7 October and 13 November 1974 – specific clauses relating to retailers who purchased their meat on the hoof (Article 3 par. 4, last sub-paragraph). The Decree of March 1975 was the subject of a request for a preliminary ruling submitted by the Neufchâteau Court of First Instance; the Court of Justice of the European Communities gave its decision on the request on 29 June 1978 (Procureur du Roi v. P. Dechmann, case 154/77, European Court Reports 1978, pp. 1573-1595).

PROCEEDINGS BEFORE THE COMMISSION

22. In his application of 6 February 1975 to the Commission, Mr. Deweer objected to section 11 of the 1945/1971 Act and to the manner in which the Louvain procureur du Roi had applied that section in his case. He invoked each of the three paragraphs in Article 6 (art. 6) of the Convention, complaining in substance of the imposition of a fine by way of settlement under constraint of provisional closure of his establishment.

When giving the notice provided for in Rule 42 par. 2 (b) of its Rules of procedure (18 May 1976), the Commission of its own motion requested the Government also to take account of Article 1 of Protocol No. 1 (P1-1) in their written observations on admissibility; subsequently, Mr. Deweer placed additional reliance on this Article (P1-1) in order to supplement his submissions.

23. The Commission accepted the application on 10 March 1977. In its report of 5 October 1978, it expressed the unanimous opinion that:

- "the combined use ... of the procedures for settlement and for provisional closure of the business" violated the right, "guaranteed to the applicant under Article 6 par. 1 (art. 6-1) of the Convention, to a fair hearing in criminal proceedings";

- "taken in isolation, the decision of provisional closure" had neither "offended against the principle of the presumption of innocence", embodied in Article 6 par. 2 (art. 6-2), nor contravened Article 1 of Protocol No. 1 (P1-1);

- there was no call "to pursue the examination of the case under Article 6 par. 3 (art. 6-3)".

The report contains one separate opinion.

Mr. Deweer, on the basis of Article 50 (art. 50) of the Convention, submitted a request before the Commission for compensation of 100,000 BF.

FINAL SUBMISSIONS MADE TO THE COURT

24. At the hearings on 27 September 1979 the Government made the following final submissions:

> "...May it please the Court to hold:
>
> principally,
>
> that the application was brought before the Commission without domestic remedies having been exhausted and is accordingly not admissible;
>
> in the alternative,
>
> that the annulment by the Conseil d'État of Belgium of the Decree creating the offence prompting the decisions to which the application relates has rendered the application devoid of object, that accordingly there is no longer any need for a ruling and that the case should therefore be struck off the list;
>
> in the further alternative,
>
> that the decisions to which the application relates are not at variance with Belgium's obligations under the European Convention on Human Rights, in particular under

Article 6 (art. 6) of the Convention and under Article 1 of the First Protocol (P1-1), and that the application is accordingly ill-founded;

in the final alternative,

that the annulment of the Decree creating the offence and the resultant reimbursement of the fine of 10,000 francs paid by way of settlement by the applicant on 2 October 1974 will have made complete reparation, within the meaning of Article 50 (art. 50) of the Convention, for the consequences of the decisions to which the application refers."

For his part Mr. van Hille, speaking on behalf of the applicant's heirs, limited the initial request for just satisfaction (see paragraph 23 in fine above)

- "in the material sphere", to "reimbursement of the amount of the fine of 10,000 Belgian francs paid without cause" and of 800 French francs for travel and accommodation costs incurred on the occasion of the hearings held before the Commission on 9 December 1977;

- "as regards non-pecuniary damage", to the "finding by the Court of a violation of Mr. Deweer's rights".

AS TO THE LAW

I. AS CONCERNS THE GOVERNMENT'S PRELIMINARY PLEAS

A. The plea of non-exhaustion of domestic remedies

1. The jurisdiction of the Court and estoppel

25. In the Government's submission, the application was inadmissible on the ground of non-exhaustion of domestic remedies. The Court has jurisdiction to take cognisance of such preliminary pleas insofar as the respondent State may have first raised them before the Commission "to the extent that their character and the circumstances permit[ted]" (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 29-31, par. 47-55).

26. The Government relied on the fact that Mr. Deweer did not

- apply to the Conseil d'État for a declaration of annulment of the Decree of 9 August 1974;

- bring a civil action for restitution of the sums paid over and for damages;

- apply for a retrial of the criminal case (révision en matière pénale);

- have recourse to other remedies.

In their written observations on admissibility filed in 1976, the Government had already pleaded before the Commission failure to exercise the first two remedies. The Court must therefore take them into consideration (see the last-mentioned judgment, loc. cit.).

As to the third remedy, the Government had stated, in their pleadings of 9 December 1977 on the merits, that it would be open to the applicant should the Conseil d'État annul the Decree of 9 August 1974 (see page 24 of the verbatim record). It is true that the Government had not pleaded non-exhaustion on this point but it would have been difficult for them to do so in the circumstances; annulment was hypothetical at the time and did not occur until 31 May 1978, by which date the case had already been at the stage of deliberations for more than six months and reopening the hearings could scarcely have been envisaged (see paragraph 20 above and Appendix I to the Commission's report). There is accordingly no estoppel.

On the other hand, the Government never specified the nature of the "other remedies" to which they adverted at the hearings of 27 September 1979. Admittedly, the Government have alleged before the Court, as they did before the Commission (see page 21 of their memorial of September 1977), that even without waiting for the launching of any criminal prosecution Mr. Deweer could have "brought an action ... to recover damages for the loss he suffered as a result of the provisional closure of his establishment or the excessive length of such closure" and could have endeavoured "to have the closure suspended through an application for interim measures". However, the Government were and are here proceeding from a supposition that does not correspond to the particular facts, namely that the closure had actually taken place because - which was not the case - the applicant had not paid the fine proposed by way of settlement; above all, the Government's point went and goes to the merits and not to Article 26 (art. 26) (see paragraph 52 below). Where a Contracting State prays in aid the obligation to exhaust remedies, a rule essentially intended to "protect its national legal order", it is for the State to prove that there exist available remedies which have not been utilised by those concerned (see the above-mentioned De Wilde, Ooms and Versyp judgment, pp. 31 and 33, par. 55 and 60). The Court would be straying outside its given role were it to set about identifying the "other remedies" the Government had in mind.

27. What has to be examined in deciding whether the plea is well-founded is thus limited to the failure to

- apply for a declaration of annulment of the Decree of 9 August 1974;
- bring a civil action for restitution of the sums paid over and for damages;
- apply for a retrial of the criminal case.

2. Whether the plea is well-founded

(a) Application for a declaration of annulment of the Decree of 9 August 1974

28. In its decision of 10 March 1977 on the admissibility of the application, the Commission judged an application to the Conseil d'État for a declaration of annulment of the Decree of 9 August 1974 to be inadequate. In the Commission's view, it would not have provided "redress for the applicant's complaints" which were directed not against "the basic principle" of the Ministerial Decree of 9 August 1974, "the legislation creating the offence" found by the inspector, Mr. Vanderleyden, but solely against "the procedure for dealing with" that offence (see page 34 of the report). The Commission expressed substantially the same opinion before the Court.

The Government replied that in his letter of 3 October 1974 to the Louvain procureur du Roi, Mr. Deweer indeed appeared to be objecting to the very principle of the Decree of 9 August 1974 since he gave notice of the lodging of an application to have the Decree declared null (see paragraph 10 above). This remedy, added the Government, "was the most radical because it allowed" the applicant to claim the retroactive invalidation of "the legislation creating the offence"; the judgments delivered by the Conseil d'État on 5 July 1973 and 31 May 1978 were said to have demonstrated the remedy's effectiveness (see paragraph 20 above). In the Government's submission, the fact that Mr. Deweer chose to limit his complaint before the Commission to the "procedure for dealing with the offence" did not absolve him from previously seeking in Belgium to have the Decree set aside.

29. As the Court has recently emphasised, the only remedies which Article 26 (art. 26) of the Convention requires to be exercised are those that are both available and sufficient in respect of the violation alleged (see the Airey judgment of 9 October 1979, Series A no. 32, p. 11, par. 19). The breaches complained of by the applicant before the Commission, and now complained of by his heirs, consist in infringements of the right to a fair trial (Article 6) (art. 6) and of the right of property (Article 1 of Protocol No. 1) (P1-1); these infringements were allegedly occasioned by the decision taken on 30 September 1974, namely the provisional closure of the shop failing payment of a "fine" by way of friendly settlement.

Although the powers of the Louvain procureur du Roi were exercised in the particular circumstances in order to deal with an offence against Articles 2 par. 4 and 3 par. 1 of the Decree of 9 August 1974, they were not conferred by this Decree, an instrument of subordinate legislation against which an application for a declaration of annulment could be brought in accordance with the terms of section 14 of the Consolidated Conseil d'État Acts, but rather by a statutory text not liable to challenge in this way, that is to say section 11, par. 1 and 2, of the 1945/1971 Act (see paragraphs 8, 9, 13 and 15 above).

In point of fact, Mr. Deweer was not mistaken in his objective: his claim before the Commission was directed against section 11, in particular paragraph 2 of the section, and not against the Ministerial Decree (see, especially, pages 2 and 17 of his memorial of July 1977 on the merits). Admittedly, doubts concerning the legality of the Decree had previously been expressed in his letter of 3 October 1974 to the procureur du Roi (see paragraph 10 above), but he did not revive the issue in his application to the Commission.

This choice is binding on the Court. In availing himself of Article 25 (art. 25), the applicant was free to decide upon the measures of which he would claim to be the victim. What Article 26 (art. 26) in principle prevents is coming directly before the Commission with a complaint which has not first been litigated within the national legal order; on the other hand, the person concerned is not obliged by Article 26 (art. 26) to repeat in his petition to the Commission the full case he argued before the relevant national authorities.

An application for a declaration of annulment would, it is true, probably have led - after a fairly lengthy interval (see paragraph 20 above) and by a side-wind as it were - to a finding that, having regard to Article 6 of the Belgian Constitution, Mr. Deweer had not committed any punishable offence and, in consequence, to reimbursement of the 10000 BF paid over by him. Nevertheless, the direct and speedy protection of the rights guaranteed by Article 6 (art. 6) of the Convention and Article 1 of Protocol no. 1 (P1-1) would not have been thereby secured. In short, such an action would have remedied certain of the consequences of the contested decision but not its cause, that is the concurrent application of paragraphs 1 and 2 of section 11 of the 1945/1971 Act. Article 26 (art. 26) of the Convention does not go so far as to require the use of such an indirect means of redress; it does not have the inflexible character which the Government seem to attribute to it (see, mutatis mutandis, the Stögmuller judgment of 10 November 1969, Series A no. 9, p. 42 par. 11).

(b) Action for restitution of money paid over without cause and for damages

30. According to the Commission, an action for restitution of money paid over without cause and for damages (Articles 1235 and 1382 of the Civil Code) was of "uncertain" value "as Belgian law would not appear to have been broken in the circumstances"; in any event, the action would have left intact, in the shape of an entry in the information extracts attached to criminal files, a record of the impugned settlement of the criminal proceedings (see paragraph 15 above); the result, the Commission stated, is that this action also would not have constituted an effective and sufficient remedy (see page 34 of the report).

The Government’s rejoinder was that Mr. Deweer did not appear to regard the action as of uncertain value, since in his letter of 3 October 1974

to the procureur du Roi he reserved his right to bring such proceedings (see paragraph 10 above). In their submission, judging by the attitude of the Conseil d'État and several criminal courts as to the legality of the Decree of 9 August 1974, the action would have had good chances of success; they maintained that it would have allowed not only "the legislation creating the offence" but also "the procedure for dealing with the offence" to be challenged, for example on grounds of non-compliance with the Convention.

31. The action in question prompts on the part of the Court the same comments, mutatis mutandis, as those already set out above in the first and last sub-paragraphs of paragraph 29. In particular, it would not have offered the applicant a genuine opportunity to argue his case before a court invested with jurisdiction to "determine" a "criminal charge". As was pointed out by the Delegates, payment of the fine by way of composition had barred any criminal proceedings (see paragraph 15 above). Only indirectly could the civil court have taken cognisance of the criminal side of the matter; the Government admitted this in a reply to a question put by the Court.

(c) Application for a retrial of the criminal case

32. The question should be put, as it was by the Delegates, whether an application for a retrial of the criminal case is relevant for the purposes of Article 26 (art. 26). In any event, at least on a literal reading Articles 443 and following of the Code of Criminal Procedure, which govern the matter, are concerned solely with convictions that have become final. The Government themselves pointed this out, but it seemed possible to them to rely on these provisions "by analogy" in the case of a fine paid by way of settlement; however, they added that to their knowledge no one had as yet ever tried to do so. The Court does not have to rule on the correctness of a submission which at first view is debatable for the reason that the remedy in question is regarded under Belgian law as being extraordinary; the Court confines itself to finding that the Government have not produced the proof they were obliged to adduce (see paragraph 26 above).

33. To sum up, the plea of non-exhaustion has not been substantiated on any of the three counts.

B. The request to strike the case off the list

34. Citing the De Becker judgment of 27 March 1962 (Series A no. 4, p. 26, par. 14), the Government contended that the application had become devoid of object as a result of the annulment by the Decree of 9 August 1974. The Government accordingly invited the Court to strike the case out of its list.

35. The issue must be examined by the Court on the basis of Rule 47 of the Rules of Court, the present wording of which dates from 27 August 1974.

36. Paragraph 1 of the Rule does not apply in the circumstances since it covers solely discontinuance by an applicant Party, that is to say a State which has brought a case before the Court (see the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 21, par. 47).

37. Paragraph 2 admittedly provides that when "informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter" the Court may, subject to paragraph 3, strike out of the list "a case brought before [it] by the Commission". However, there being no agreement - whether formal or otherwise - between the Government and the applicant or his heirs, it is not possible in the circumstances to talk of either a "friendly settlement" or an "arrangement" (see the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, p. 15, par. 36). What remains to be determined is whether there exists any "other fact of a kind to provide a solution of the matter".

Mr. Deweer’s death certainly does not constitute such a fact. On 14 February 1978, Mrs. Deweer and her three daughters advised the Commission "of their material and moral interest in seeing completed the proceedings instituted by their husband and father" (see paragraph 6 of the Commission’s report). The Government did not challenge this interest. The Court, for its part, wishes to mark its full approval of the practice which the Commission has been following in cases of this nature and which it has implicitly confirmed in the present instance: when an applicant dies during the course of proceedings, his heirs may in principle claim in their turn to be "victims" (Article 25 par. 1 of the Convention) (art. 25-1) of the alleged violation, as rightful successors and, in certain circumstances, on their own behalf (see application no. 4427/70, 24. 5. 1971, X v. Federal Republic of Germany, Collection of Decisions, vol. 38, p. 39; application no. 6166/73; 30. 5. 1975, Baader, Meins, Meinhof and Grundmann v. Federal Republic of Germany, Decisions and Reports, vol. 2, p. 66; applications nos. 7572/76, 7586/76 and 7587/76, 8. 7. 1978, Ensslin, Baader and Raspe, ibid., vol. 14, pp. 67 and 83). In the present case, Mr. Deweer’s widow and children today have the status of applicants.

The "fact" relied on by the Government is the judgment of 31 May 1978 whereby the Conseil d’État annulled the Decree of 9 August 1974. Like Mr. Deweer’s death (14 January 1978), it predated the adoption of the Commission’s report (5 October 1978) and is mentioned therein at paragraph 20 in fine. The Court has therefore had cognisance of the "fact" as from the moment when the case was referred to it (14 December 1978). However, Rule 47 par. 2, as is made clear by its text, is concerned with the Court being "informed" of something having a bearing on a case already

pending before it. Furthermore and above all, the judgment by the Conseil d'État could at the very best have led to restitution of the 10,000 BF paid over by Mr. Deweer; it did not restore the right being claimed by him in the circumstances, namely the right to defend himself in criminal proceedings in accordance with the requirements of Article 6 (art. 6) of the Convention. Up to the present time, the "matter" has thus received no "solution".

38. Furthermore, paragraphs 1 and 2 of section 11 of the 1945/19971 Act are still in force (see paragraph 17 above), with the result that they can at any moment be applied in combination as occurred in relation to Mr. Deweer. The leading issue raised by the case therefore remains unresolved; this issue transcends the person and the interests of the applicant and his heirs. This being so, the Court must, having regard to paragraph 3 of Rule 47 of the Rules of Court, proceed with the consideration of the issue (see, mutatis mutandis, the above-mentioned Luedicke, Belkacem and Koç judgment, p. 15, par. 36, last sub-paragraph, and the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 62, par. 154).

II. AS CONCERNS THE MERITS

A. The alleged violation of Article 6 par. 1 (art. 6-1) of the Convention

39. Mr. Deweer's claim to be the victim of "the imposition of a fine paid by way of settlement under constraint of provisional closure of his establishment" was based in the first place on Article 6 par. 1 (art. 6-1) of the Convention, the first sentence of which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

According to the Commission, "taken separately, neither the offer of settlement nor the closure decision" would offend against the above-quoted provision, but the "combined use" of the two procedures did violate the right it guarantees (see paragraphs 49 and 59 of the report).

The Government, for their part, submitted that

> "the act whereby ... the payment of a fine by way of settlement was proposed to the applicant ... did not constitute a 'determination' either of 'his civil rights and obligations' or of 'any criminal charge against him' but was simply a proposal for a friendly settlement" that did not prejudice his "right 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'";

- "the act whereby ... the Louvain procureur du Roi ordered the provisional closure of the applicant's establishment constituted no more

than a control and safety measure, was not in the nature of a penalty, was not intended to be a ‘determination’ either of a ‘criminal charge’ or of ‘civil rights and obligations’, did not prejudge whatever the courts might have decided in this respect and consequently could not prejudice Mr. Deweer’s right ‘to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’";

- "there is nothing in the ... Convention ... to prohibit the combined application of the friendly settlement and provisional closure procedures".

40. The Court will confine its attention to the last-mentioned point. In proceedings originating in an individual application, the Court should as far as possible limit its examination to the issues raised by the concrete case before it. Consequently, the Court’s task is to rule not whether paragraphs 1 and 2 of section 11 of the 1945/1971 Act are in themselves compatible with the Convention, but whether the manner in which they were applied in the specific circumstances, that is their "combined use", was so compatible.

1. The applicability of Article 6 par. 1 (art. 6-1) in the present case

41. The question whether Article 6 par. 1 (art. 6-1) is relevant does not appear to have been the subject of discussion. Before the Commission, no one denied that "criminal proceedings had been instituted against the applicant"; the applicability of Article 6 par. 1 (art. 6-1) of the Convention was said to follow from sections 5, 9 and 11 of the 1945/1971 Act (see paragraphs 52 and 53 of the report). At the hearings, the Delegates found it "quite obvious" that Mr. Deweer was faced with a "criminal charge" (in the French text: "accusation en matière pénale"); the Government did not dissent.

42. As far as the French text is concerned, the applicant did not have - in the terminology of Belgian domestic law - the status of accusé when the Louvain procureur du Roi wrote to him on 30 September 1974; furthermore, as is stated at the end of section 11 par. 1 of the 1945/1971 Act, no proposal for settlement may be made once proceedings for the offence have been instituted before the trial court (see paragraphs 9 and 15 above).

The concept embodied in the French expression "accusation en matière pénale" is, however, "autonomous"; it has to be understood "within the meaning of the Convention" (see notably the König judgment of 28 June 1978, Series A no. 27, p. 29, par. 88), more especially since the English text of Article 6 par. 1 (art. 6-1) - like that of Article 5 par. 2 (art. 5-2) - employs the term "charge" which is very wide in scope.

In "criminal" matters, the "reasonable time" stipulated by Article 6 par. 1 (art. 6-1) "necessarily begins with the day on which a person is charged" (see the Neumeister judgment of 27 June 1968, Series A no. 8, p. 41, par. 18). And the "reasonable time" may on occasion "start to run from a date prior to the seisin of the trial court, of the ‘tribunal’ competent for the ‘determination ... of [the] criminal charge’" (see the Golder judgment of 21

February 1975, Series A no. 18, p. 15, par. 32). The Wemhoff and Neumeister judgments of 27 June 1968 and then the Ringeisen judgment of 16 July 1971 took as the starting-point the moment of arrest, the moment when the person was officially notified that he would be prosecuted and the moment when preliminary investigations were opened, respectively (Series A no. 7, pp. 26-27, par. 19; Series A no. 8, p. 41, par. 18; and Series A no. 13, p. 45, par. 110).

43. In the present case there was no arrest and no official notification of impending prosecution. Again, the inspection carried out by Mr. Vanderleyden in Mr. Deweer's shop formed part of the continuing process of controlling observance of the statutes and regulations on the country's economic life (see the "pro-justitia" of 18 September 1974: "toezicht op de wets - en reglementsbeschikkingen betreffende's Lands economisch leven"); the inspection was not performed within the context of the repression of crime. The "pro-justitia" of 18 September 1974 was forwarded to the procureur du Roi "for information and decision", "voor kennisgeving en beschikking" (see paragraphs 8 and 12 above) so that it was for him to decide upon the appropriate action. In his letter of 30 September 1974, the procureur du Roi - while advising the applicant of the closure of his establishment - offered him a means of "avoiding prosecution", namely payment of the sum of 10,000 BF. Criminal proceedings had not as yet been instituted when they were barred by the payment made on 2 October (section 11 par. 1 of the 1945/1971 Act, paragraphs 9-11 and 15 above).

44. However, the prominent place held in a democratic society by the right to a fair trial (see especially the above-mentioned Airey judgment, pp. 12-13, par. 24) prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6 par. 1 (art. 6-1). The Court is compelled to look behind the appearances and investigate the realities of the procedure in question.

45. When seen in this light, the relevant provisions of the Belgian legislation (see paragraphs 12-15 above) prove to be enlightening. The source of the 1945/1971 Act is a Legislative Decree published during the Second World War, in the middle of a time of shortages, rationing and the "black market". Through a series of drastic measures, this Legislative Decree set on foot "the repression of offences against rules relating to the country's supplies". The return to conditions of plenty has enabled its severity to be relaxed and its title to be changed, but even the existing text still carries the imprint of its origin. The wording employed bears witness to this. Thus, paragraphs 1 and 2 of section 11, the basis of the contested decisions by the Louvain procureur du Roi, utilise terms such as "offender" and "offence". In addition, anyone who contravenes a Decree passed in pursuance of Part I of the Act, as for instance the Decree of 9 August 1974, is liable to the penalties listed in section 9, that is to say imprisonment, fine, forfeitures, court ordered closure of premises and publicising of the

judgment. The offer of settlement made on 30 September 1974 was in effect a substitute for at least certain of those penalties. Had the applicant rejected the offer, the accompanying decision of provisional closure would have come into operation, if need be until "the date on which judgment [was] passed on the offence" (section 11 par. 2); he would have risked imprisonment and a fine if he had disregarded the closure decision (sections 9 par. 5 (b) and 11 par. 2 read in conjunction).

Similarly, the "pro-justitia" of 18 September 1974 described Mr. Deweer as being "in breach" ("in overtreding") of Articles 2 par. 4 and 3 par. 1 of the Decree of 9 August 1974 (see paragraph 8 above). In his decision of 30 September, the Louvain procureur du Roi also mentioned an "offence" ("een inbreuk"); although he judged it unnecessary to request imprisonment as punishment for the offence ("dat geen hoofdgevangenisstraf dient gevorderd te worden ter beteugeling van gezegd misdrijf"), the procureur du Roi stressed its "gravity" ("de ernst"). By letter of the same date, he drew the applicant's especial attention to the "heavy penalties" ("strenge straffen") under the Act for failure to comply with the closure order (see paragraph 9 above).

The closure order, as the Government have well shown, was made "in the normal course of the criminal proceedings that had to be taken following the offence reported against Mr. Deweer". The order was a prelude to "criminal proceedings" which the procureur du Roi contemplated instituting if the "offender" were to refuse a friendly settlement.

In addition, the Government stressed the applicant's alleged "confession" to the inspector, Mr. Vanderleyden, and the "flagrant offence" whose commission they claimed Mr. Deweer "acknowledged on the spot". In their view, in agreeing to "pay the fine by way of settlement" - "a kind of compensation to the community for his reprehensible conduct" - the applicant had admitted his "guilt", "perhaps not explicitly but in substance" (see page 34 of the verbatim record of the hearings of 9 December 1977 before the Commission).

Although such a fine is not assimilated to a penalty, its payment had, in any event, to be mentioned in the information extracts supplied by municipalities for inclusion in criminal files (see paragraph 15 above).

46. There accordingly exists a combination of concordant factors conclusively demonstrating that the case has a criminal character under the Convention. The "charge" could, for the purposes of Article 6 par. 1 (art. 6-1), be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence. In several decisions and opinions the Commission has adopted a test that appears to be fairly closely related, namely whether "the situation of the [suspect] has been substantially affected" (Neumeister case, Series B no. 6, p. 81; case of Huber v. Austria, Yearbook of the Convention, vol. 18, p. 356, 67; case of Hätti v. Federal Republic of Germany, ibid., vol. 19, p.

1064, 50, etc.). Under these circumstances, the Court considers that as from 30 September 1974 the applicant was under a "criminal charge".

47. Article 6 (art. 6) was therefore fully applicable by virtue of the last-mentioned phrase. The Court is not compelled to ascertain whether paragraph 1 of Article 6 (art. 6-1) was also material on account of the existence of a dispute over "civil rights and obligations": this question is devoid of interest for the decision in the particular case (see, mutatis mutandis, the Engel and others judgment of 8 June 1976, Series A no. 22, pp. 36-37, par. 87).

2. The application of Article 6 par. 1 (art. 6-1) in the present case

48. Under Article 6 par. 1 (art. 6-1), Mr. Deweer had the right to a fair trial (see the above-mentioned Golder judgment, p. 18, par. 36) before "an independent and impartial tribunal established by law", incorporating a "hearing" followed by "determination of [the] criminal charge against him". The French text of Article 6 par. 1 (art. 6-1) contains the term "bien-fondé" which, the Court recalls, refers to the charge being well-founded in law as well as in fact (see the above-mentioned Delcourt judgment, p. 14). Before the trial court, the applicant would therefore have been entitled not only to rely, as he did before Mr. Vanderleyden, on his good faith or the additional costs incurred by a butcher buying on the hoof (see paragraph 8 above) but also to plead that the Decree of 9 August 1974 was contrary to the Constitution or incompatible with Community law (see paragraphs 19-20 above). Mr. Deweer would in addition have enjoyed the benefit of the guarantees in paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3).

49. The "right to a court", which is a constituent element of the right to a fair trial, is no more absolute in criminal than in civil matters. It is subject to implied limitations, two examples of which are given at paragraph 58 of the Commission's report (decision not to prosecute and order for discontinuance of the proceedings); it is not the Court's function, though, to elaborate a general theory of such limitations (see, mutatis mutandis, the above-mentioned Golder judgment, pp. 18-19, par. 36 and 38-39).

The current proceedings do not, however, concern a limitation of that nature. By paying the 10,000 BF which the Louvain procureur du Roi "required" by way of settlement (see paragraph 9 above), Mr. Deweer waived his right to have his case dealt with by a tribunal.

In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, inter alia, of fines paid by way of composition. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention; on this point the Court shares the view of the Commission (see paragraphs 55-56 of the

report; decision of 5. 3. 1962, application no. 1197/61, X v. Republic of Germany, Yearbook of the Convention, vol. 5, pp. 94-96).

Nevertheless, in a democratic society too great an importance attaches to the "right to a court" (see paragraph 44 above) for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (ordre public) of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 (art. 6) calls for particularly careful review (see, for Article 5 (art. 5), the above-mentioned De Wilde, Ooms and Versyp judgment, p. 36, par. 65). The Court is not unaware of the firmness with which the Belgian courts have condemned, on the basis of Article 8 of the Constitution and Article 6 (art. 6) of the Convention, failure to respect the "right to a court" in private legal relationships (see, for example, the Brussels Civil Court, 23. 11. 1967, Journal des Tribunaux 1967, p. 741; compare the Court of Cassation, 1. 6. 1966, with the final submissions of Advocate General Mahaux, Pasicrisie 1966, pp. 1249-1250 and 1251-1252). At least the same degree of vigilance would appear indispensable when someone formerly "charged with a criminal offence" challenges a settlement that has barred criminal proceedings. Absence of constraint is at all events one of the conditions to be satisfied; this much is dictated by an international instrument founded on freedom and the rule of law (see the above-mentioned Golder judgment, pp. 16-17, par. 34). Here again, the Court concurs with the Commission.

50. In paragraph 57 of its report, the Commission expressed the opinion that there was constraint in the present case : it considered that the applicant waived the guarantees of Article 6 par. 1 (art. 6-1) only "under the threat of [the] serious prejudice" that the closure of his shop would have caused him.

51. (a) The Government’s first submission was as follows: the offer of settlement made to Mr. Deweer on 30 September 1974 amounted in law to no more than a "proposal for a friendly settlement" which he could quite well have rejected; "in accepting the offer and acting upon it on 2 October", the applicant, "by paying a relatively modest sum, succeeded in avoiding the risk of receiving a sentence which might have been more severe than this fine paid by way of settlement" and "which might, if appropriate, have been accompanied by a court order for the closure of the establishment" (section 9 par. 5 of the 1945/1971 Act; see paragraph 13 above).

Furthermore, the Government maintained, the Commission’s reasoning is inconsistent. Whereas the procedure followed in the circumstances is stated at paragraph 57 of the report to be in breach of the Convention for the reason that it was tainted with constraint, paragraphs 55 and 59 contain the recognition that settlement of criminal cases is legitimate. In a sense, so the argument continued, that kind of settlement "always takes place under some form of ‘constraint’ and under the ‘threat’ of more or less ‘serious’ prejudice"; thus, criminal proceedings represent, "for the majority of those"

against whom they are taken "or likely to be taken, something to be feared" and, in very many instances, "a sufficiently serious ‘threat’ to encourage [them] ... to forgo" the trial of their case by a court of law.

(b) The Court points out that while the prospect of having to appear in court is certainly liable to prompt a willingness to compromise on the part of many persons "charged with a criminal offence", the pressure thereby brought to bear is in no way incompatible with the Convention: provided that the requirements of Articles 6 and 7 (art. 6, art. 7) are observed, the Convention in principle leaves the Contracting States free to designate and prosecute as a criminal offence conduct not constituting the normal exercise of one of the rights it protects (see the above-mentioned Engel and others judgment, p. 34, par. 81).

Moreover, the applicant was probably scarcely apprehensive about criminal prosecution since it was not unlikely that prosecution would result in an acquittal, perhaps proceeded by a request to the Court of Justice of the European Communities for a preliminary ruling (see paragraphs 19-20 above). The "constraint" complained of by the applicant was to be found in another quarter, namely in the closure order of 30 September 1974.

This order was due to come into effect forty-eight hours after notification of the decision of the procureur du Roi and it could have remained in force until the date on which the competent court passed judgment on the offence (sections II par. 2 and 9 par. 5 (b) of the 1945/1971 Act; see paragraph 13 above). In the meantime, that is possibly during a period of months, the applicant would have been deprived of the income accruing from his trade; he would nonetheless have incurred the risk of having to continue to pay his staff and of not being able to resume business with all his former customers once his shop reopened (see pages 2, 7, 46, 47 and 49 of the verbatim record of the hearings of 9 December 1977 before the Commission; and the note of the hearings of 27 September 1979 - the reply given by the applicants’ counsel to the Court’s third question). Mr. Deweer would have suffered considerable loss as a consequence.

The Louvain procureur du Roi did admittedly offer Mr. Deweer a means of avoiding the danger, namely by paying 10,000 BF in "friendly settlement" (see paragraph 9 above). This solution certainly represented by far a lesser evil. As the Government rightly pointed out, the sum in question was only slightly above the minimum amount - 3,000 BF - of "the fine laid down by law", whereas under section 11 par. 1 of the 1945/1971 Act it could have been more than the maximum, namely 30,000,000 BF (see paragraphs 13 and 15 above). Accordingly, as the Delegates observed, there was a "flagrant disproportion" between the two alternatives facing the applicant. The "relative moderation" of the sum demanded in fact tells against the Government’s argument since it added to the pressure brought to bear by the closure order. The moderation rendered the pressure so compelling that it is not surprising that Mr. Deweer yielded.

52. Pleading as to the merits and not as to admissibility (see paragraph 26 above), the Government put forward a second objection. They maintained that nothing prevented Mr. Deweer from refusing a "friendly settlement" and challenging the decision of the procureur du Roi by bringing "an action tot recover damages for the loss suffered as a result of the closure of his establishment", or "the excessive length of such closure", and by making an "application for interim measures" "to have the closure suspended" (see paragraph 44 of the Commission's report).

(a) On the latter point, the Government invoked Article 584 of the Belgian Judicial Code, a provision that could be applied in "a wide variety of circumstances" although up till now, they said, it would not appear to have been relied on in any comparable case : "The President of the Court of First Instance shall, in respect of all matters except those which the law excludes from the jurisdiction of the courts of justice, give a provisional ruling in cases which he recognises as being urgent."

The Delegates, for their part, did not believe that a "provisional measure ordered by the prosecuting authorities" could, in its turn, be the subject of another "provisional measure" decreed by a civil court with the object of countermanding the former measure, especially since in Belgium civil proceedings must await the outcome of criminal proceedings ("le pénal tient le civil en état").

The Court shares the Delegates' scepticism and would add the following considerations to those which they advanced. As the Government themselves pointed out, "an application for interim measures is normally accessory to a principal claim" and, as is laid down by Article 1039 of the Judicial Code, "orders for interim measures are made without prejudice to the merits". However, the Court does not perceive which court having to deal with the "merits" of the case could have ordered discontinuance of the impugned closure by relying, for example, on the Constitution or the Convention. Whilst section 2 par. 5 of the 1945/1971 Act allows an appeal, having suspensive effect, against closure decisions issued by the Minister of Economic Affairs to be made to the judge in chambers at the Court of First Instance with jurisdiction in criminal matters, no right of appeal against closure decisions emanating from the procureur du Roi is granted by the Act (see paragraph 13 above).

(b) As for suing for damages in respect of the loss caused by the closure, the Government did not specify in what form they conceived such an action. In Belgium, there are strict rules on the personal liability of officers serving in the public prosecutor's department (parquet). Thus, they "can be called to account" ("la prise à partie") only "if they have been guilty of deceit or fraud", "if the law declares them to be liable in damages" or if the law "expressly" stipulates that they are to be called to account (Articles 1140 and 1141 of the Judicial Code, taken together). The Government did not allege that any of these conditions was satisfied in the present case. Neither

did they indicate in what way the decision of the Louvain procureur du Roi could entail liability on the part of the authorities.

It is not for the Court to deal with issues of Belgian domestic law which are apparently unsettled and on which the Government have not supplied sufficient information. The Court confines itself to noting that the applicant, who was faced with a serious and immediate peril, quite naturally attended to the most pressing matter first without embarking on hazardous legal speculations; the Court cannot reproach him for doing so.

53. The Government finally stressed that "the Commission admitted" that "the outright closure" of the shop would have been reconcilable with the Convention, even though "so radical a solution would certainly have cost the applicant more than 10,000 [Belgian] francs". From this premise, they described the logic of the reasoning followed in the report as "curious", submitting that, "still according to the Commission", the breach of Article 6 (art. 6) stemmed in substance from a "favour" granted to Mr. Deweer, namely the offer of a settlement whereby the procureur du Roi was to adopt a solution milder, more flexible and less burdensome than closure. In this way, claimed the Government, an "absurd conclusion" was reached.

The Court recalls that it is limiting its examination to the combined use of the two procedures (see paragraph 40 above); it has no intention of ruling whether a closure order unaccompanied by any offer of settlement would have been compatible with the Convention.

The Court further notes, as did the Delegates, that the situation suggested by the Government has never occurred in practice, except in the immediate post-war period when shortages were prevalent and the economy was under great strain. Since 1946, procureurs du Roi have utilised paragraph 2 of section 11 of the 1945/1971 Act solely in conjunction with paragraph 1; on the other hand, they have frequently applied paragraph 1 without paragraph 2 (see paragraph 15 above, last sub-paragraph).

Besides, in the area of human rights he who can do more cannot necessarily do less. The Convention permits under certain conditions some very serious forms of treatment, such as the death penalty (Article 2 par. 1, second sentence) (art. 2-1), whilst at the same time prohibiting others which by comparison can be regarded as rather mild, for example "unlawful" detention for a brief period (Article 5 par. 1) (art. 5-1) or the expulsion of a national (Article 3 par. 1 of Protocol No. 4) (P4-3-1). The fact that it is possible to inflict on a person one of the first-mentioned forms of treatment cannot authorise his being subjected to one of the second-mentioned, even if he agrees or acquiesces (see, mutatis mutandis, the Commission's report in the De Becker case, Series B no. 2, pp. 90-91, 101-102 and 124-125).

54. To sum up, Mr. Deweer's waiver of a fair trial attended by all the guarantees which are required in the matter by the Convention was tainted by constraint. There has accordingly been breach of Article 6 par. 1 (art. 6-1).

B. The alleged violation of Article 6 par. 2 and 3 (art. 6-2, art. 6-3) of the Convention

55. The applicant also invoked paragraph 2 and the first four sub-paragraphs of paragraph 3 of Article 6 (art. 6-2, art. 6-3):

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

The Government put forward no separate arguments in this connection. The Commission, for its part, expressed the opinion that "taken in isolation, the decision of ... closure cannot have offended against the principle of the presumption of innocence". In view of its conclusion regarding paragraph 1 (art. 6-1), the Commission saw no purpose in considering under paragraph 2 (art. 6-2) the remainder of the applicant's complaints and judged that there was no call to pursue an examination under paragraph 3 (art. 6-3).

56. Since only the combined use of the two procedures is relevant (see paragraph 40 above), the Court does not have to determine whether the closure decision or the offer of settlement, taken individually, offended against paragraph 2 (art. 6-2) or paragraph 3 of Article 6 (art. 6-3).

The Court further points out that these two paragraphs (art. 6-2, art. 6-3) represent specific applications of the general principle stated in paragraph 1 of the Article (art. 6-1). The presumption of innocence embodied in paragraph 2 (art. 6-2) and the various rights of which a non-exhaustive list appears in paragraph 3 (art. 6-3) ("minimum rights", "notamment") are constituent elements, amongst others, of the notion of a fair trial in criminal proceedings (see, for example, the Commission's report in the case of Nielsen v. Denmark, 15 March 1961, Yearbook of the Convention, vol. 4, pp. 548-550).

Yet Mr. Deweer was totally deprived of such a trial since, under constraint, he agreed to its waiver (see paragraph 54 above). Accordingly,

the question whether paragraphs 2 and 3 were observed (art. 6-2, art. 6-3) has no real significance in his regard; it is entirely absorbed by the question whether paragraph 1 (art. 6-1) was complied with. The finding of a breach of the requirements of paragraph 1 dispenses the Court from also examining the case in the light of paragraphs 2 and 3, a course which might have been incumbent on it in different circumstances (see the above-mentioned Engel and others judgment, pp. 37-39, par. 89-91).

C. The alleged violation of Article 1 of Protocol No. 1 (P1-1)

57. The Commission of its own motion had taken into consideration Article 1 of Protocol No. 1 (P1-1), which in substance guarantees every natural or legal person's right of property (see paragraph 22 above). However, when ruling on the admissibility of the application, the Commission indicated that this was a subsidiary issue. In its report of 5 October 1978, the Commission expressed the opinion - contrary to the argument which Mr. Deweer advanced "to supplement his submissions" and which was contested by the respondent State - that there had been no violation of this Article (P1-1) since "the closure order was not enforced".

58. The Court recalls that the combined use of the two procedures, the sole object of its review (see paragraph 40 above), led Mr. Deweer to pay a fine by way of settlement of 10,000 BF and, hence, to suffer a certain reduction of his assets. However, the collection of this sum, having been effected in conditions incompatible with Article 6 par. 1 (art. 6-1) of the Convention, was unlawful (see paragraph 54 above). Accordingly, it proves superfluous to determine whether the collection offended against Article 1 of Protocol No. 1 (P1-1) as well; resolving this issue is devoid of interest for the decision in the particular case.

D. The application of Article 50 (art. 50) of the Convention

59. Mr. van Hille requested, on behalf of the applicant's heirs, just satisfaction consisting

- "in the material sphere", of "reimbursement of the amount of the fine" and 800 French francs for travel and accommodation costs incurred on the occasion of the hearings held before the Commission on 9 December 1977;
- "as regards non-pecuniary damage", of the "finding by the Court of a violation of Mr. Deweer's rights" (see paragraph 24 above).

According to the Government, the annulment of the Decree of 9 August 1974 by the Conseil d'État and the "resultant reimbursement of the fine ... paid by way of settlement ... will have made complete reparation, within the meaning of Article 50 (art. 50) of the Convention, for the consequences of the decisions to which the application refers" (ibid.).

On 1 October 1979, the Registrar, acting on the Court's instructions, asked the Commission to specify "whether under Rule 4 par. 2 of the Addendum to its Rules of Procedure it had granted to the applicant free legal aid covering the expenses" mentioned by Mr. van Hille. The Secretary to the Commission replied in the negative on the following day.

60. The Court considers that the question is accordingly ready for decision (Rule 50 par. 3, first sentence, of the Rules of Court).

As far as the Court is aware, the Belgian authorities have not as yet reimbursed Mr. Deweer's heirs the 10,000 Belgian francs which he paid without cause. Furthermore, it is not disputed that the expenses referable to his appearance before the Commission in December 1977 were actually incurred and their assessment at 800 French francs appears most reasonable. Finally, the applicant and his family undoubtedly suffered non-pecuniary damage warranting at least moral satisfaction.

The Court therefore allows the request.

FOR THESE REASONS, THE COURT

1. Rejects unanimously the Government's plea that domestic remedies have not been exhausted;

2. Decides unanimously not to strike the case out of its list;

3. Holds unanimously that there has been breach of paragraph 1 of Article 6 (art. 6-1) of the Convention;

4. Holds unanimously that it is not necessary also to examine the case under paragraphs 2 and 3 of the said Article (art. 6-2, art. 6-3);

5. Holds by six votes to one that it is also not necessary to examine the case under Article 1 of Protocol No. 1 (P1-1);

6. Affords unanimously to the applicants just satisfaction consisting
   - in the material sphere, of reimbursement by the respondent State of the ten thousand Belgian francs (10,000 BF) paid by their husband and father on 2 October 1974 and of eight hundred French francs (800 FF) for travel and accommodation costs incurred on the occasion of the hearings held before the Commission on 9 December 1977;
   - as regards non-pecuniary damage, of the finding of a violation of Mr. Deweer's rights.

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

Hermann MOSLER
President

Marc-André EISSEN
Registrar

The separate opinion of Mr. Pinheiro Farinha is annexed to the present judgment in accordance with article 51 par. 2 (art. 51-2) of the Convention and Rule 50 par. 2 of the Rules of Court.

H. M.
M.-A. E.

PARTLY DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

I very much regret that I am unable to share the opinion of the majority of my colleagues as regards paragraph 58 and point 5 of the operative provisions of the judgment.

I well understand and approve paragraphs 55 and 56 because in the present case it can be said that paragraph 1 of Article 6 (art. 6-1) of the Convention absorbs that Article's paragraphs 2 and 3 (art. 6-2, art. 6-3). We are, in fact, faced with what is known as "apparent concurrence" (Scheinkonkurrenz or Gesetzeskonkurrenz); the finding of a breach of the requirements of paragraph 1 (art. 6-1) therefore dispenses the Court from also examining the present case in the light of paragraphs 2 and 3 (art. 6-2, art. 6-3).

The same does not apply to Article 1 of Protocol No. 1 (P1-1): Article 6 (art. 6) of the Convention calls for a fair trial, attended by all the guarantees which are required in the matter by the Convention, whereas Article 1 of Protocol No. 1 (P1-1) concerns protection of the right of property.

The same fact or situation may give rise to violation of both interests without the one absorbing the other. Here we are faced with a "notional concurrence" (Idealkonkurrenz or Tateinheit). In my opinion, the Court should accordingly also examine and deliberate on the case with reference to Article 1 of Protocol No. 1 (P1-1). It would thus conclude either that there has been breach of Article 6 § 1 (art. 6-1) of the Convention and of

Article 1 of the Protocol (P1-1) (the Court has already held that facts may constitute a violation of several Articles of the Convention, for example in the Golder case); or that there has been no breach of Article 1 (P1-1), a result which would correspond to my own opinion (the Court has already found violation of one Article and no violation of another, for example, in the Ringeisen case); or even that Article 1 (P1-1) is not applicable to Mr. Deweer's complaints (the Court adopted this solution for Article 8 of the Convention and Article 1 of the Protocol in the Marckx case) (art. 8, P1-1).