

# EUROPEAN COURT OF HUMAN RIGHTS

## Golder Case

21 February 1975

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22. The following final submissions were made to the Court at the oral hearing on 12 October 1974 in the afternoon.

- for the Government:

"The United Kingdom Government respectfully submit to the Court that Article 6 para. 1 (art. 6-1) of the Convention does not confer on the applicant a right of access to the courts, but confers only a right in any proceedings he may institute to a hearing that is fair and in accordance with the other requirements of the paragraph. The Government submit that in consequence the refusal of the United Kingdom Government to allow the applicant in this case to consult a lawyer was not a violation of Article 6 (art. 6). In the alternative, if the Court finds that the rights conferred by Article 6 (art. 6) include in general a right of access to courts, then the United Kingdom Government submit that the right of access to the courts is not unlimited in the case of persons under detention, and that accordingly the imposing of a reasonable restraint on recourse to the courts by the applicant was permissible in the interest of prison order and discipline, and that the refusal of the United Kingdom Government to allow the applicant to consult a lawyer was within the degree of restraint permitted, and therefore did not constitute a violation of Article 6 (art. 6) of the Convention.

The United Kingdom Government further submit that control over the applicant's correspondence while he was in prison was a necessary consequence of the deprivation of his liberty, and that the action of the United Kingdom Government was therefore not a violation of Article 8 para. 1 (art. 8-1), and that the action of the United Kingdom Government in any event fell within the exceptions provided by Article 8 para. 2 (art. 8-2), since the restriction imposed was in accordance with law, and it was within the power of appreciation of the Government to judge that the restriction was necessary in a democratic society for the prevention of disorder or crime.

In the light of these submissions, Mr. President, I respectfully ask this honourable Court, on behalf of the United Kingdom Government, to hold that the United Kingdom Government have not in this case committed a breach of Article 6 (art. 6) or Article 8 (art. 8) of the European Convention on Human Rights and Fundamental Freedoms."

- for the Commission:

"The questions to which the Court is requested to reply are the following:

(1) Does Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights secure to persons desiring to institute civil proceedings a right of access to the courts?

(2) If Article 6 para. 1 (art. 6-1) secures such a right of access,

are there inherent limitations relating to this right, or its exercise, which apply to the facts of the present case?

(3) Can a convicted prisoner who wishes to write to his lawyer in order to institute civil proceedings rely on the protection given in Article 8 (art. 8) of the Convention to respect for correspondence?

(4) According to the answers given to the foregoing questions, do the facts of the present case disclose the existence of a violation of Article 6 and of Article 8 (art. 6, art. 8) of the European Convention on Human Rights?"

AS TO THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

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29. The submissions made to the Court were in the first place directed to the manner in which the Convention, and particularly Article 6 para. 1 (art. 6-1), should be interpreted. The Court is prepared to consider, as do the Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the

organization" - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention).

30. In the way in which it is presented in the "general rule" in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.

31. The terms of Article 6 para. 1 (art. 6-1) of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth.

32. The clearest indications are to be found in the French text, first sentence. In the field of "contestations civiles" (civil claims) everyone has a right to proceedings instituted by or against him being conducted in a certain way - "équitablement" (fairly), "publiquement" (publicly), "dans un délai raisonnable" (within a reasonable time), etc. - but also and primarily "à ce que sa cause soit entendue" (that his case be heard) not by any authority whatever but "par un tribunal" (by a court or tribunal) within the meaning of Article 6 para. 1 (art. 6-1) (Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 95). The Government have emphasised rightly that in French "cause" may mean "procès qui se plaide" (Littré, Dictionnaire de la langue française, tome I, p. 509, 5°). This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension "l'ensemble des intérêts à soutenir, à faire prévaloir" (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, tome I, p. 666, II-2°). Similarly,

the "contestation" (claim) generally exists prior to the legal proceedings and is a concept independent of them. As regards the phrase "tribunal indépendant et impartial établi par la loi" (independent and impartial tribunal established by law), it conjures up the idea of organisation rather than that of functioning, of institutions rather than of procedure.

The English text, for its part, speaks of an "independent and impartial tribunal established by law". Moreover, the phrase "in the determination of his civil rights and obligations", on which the Government have relied in support of their contention, does not necessarily refer only to judicial proceedings already pending; as the Commission have observed, it may be taken as synonymous with "wherever his civil rights and obligations are being determined" (paragraph 52 of the report). It too would then imply the right to have the determination of disputes relating to civil rights and obligations made by a court or "tribunal".

The Government have submitted that the expressions "fair and public hearing" and "within a reasonable time", the second sentence in paragraph 1 ("judgment", "trial"), and paragraph 3 of Article 6 (art. 6-1, art. 6-3) clearly presuppose proceedings pending before a court.

While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded; the Delegates of the Commission rightly underlined this at paragraph 21 of their memorial. Besides,

in criminal matters, the "reasonable time" may 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" (Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19; Neumeister judgment of 27 June 1968, Series A no. 8, p. 41, para. 18; Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110). It is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute.

33. The Government have furthermore argued the necessity of relating Article 6 para. 1 (art. 6-1) to Articles 5 para. 4 and 13 (art. 5-4, art. 13). They have observed that the latter provide expressly or a right of access to the courts; the omission of any corresponding clause in Article 6 para. 1 (art. 6-1) seems to them to be only the more striking. The Government have also submitted that if Article 6 para. 1 (art. 6-1) were interpreted as providing such a right of access, Articles 5 para. 4 and 13 (art. 5-4, art. 13) would become superfluous.

The Commission's Delegates replied in substance that Articles 5 para. 4 and 13 (art. 5-4, art. 13), as opposed to Article 6 para. 1 (art. 6-1), are "accessory" to other provisions. Those Articles, they say, do not state a specific right but are designed to afford procedural guarantees, "based on recourse", the former for the "right to liberty", as stated in Article 5 para. 1 (art. 5-1), the second for the whole of the "rights and freedoms as set forth in this Convention".

Article 6 para. 1 (art. 6-1), they continue, is intended to protect

"in itself" the "right to a good administration of justice", of which "the right that justice should be administered" constitutes "an essential and inherent element". This would serve to explain the contrast between the wording of Article 6 para. 1 (art. 6-1) and that of Articles 5 para. 4 and 13 (art. 5-4, art. 13).

This reasoning is not without force even though the expression "right to a fair (or good) administration of justice", which sometimes is used on account of its conciseness and convenience (for example, in the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 25), does not appear in the text of Article 6 para. 1 (art. 6-1), and can also be understood as referring only to the working and not to the organisation of justice.

The Court finds in particular that the interpretation which the Government have contested does not lead to confounding Article 6 para. 1 (art. 6-1) with Articles 5 para. 4 and 13 (art. 5-4, art. 13), nor making these latter provisions superfluous. Article 13 (art. 13) speaks of an effective remedy before a "national authority" ("instance nationale") which may not be a "tribunal" or "court" within the meaning of Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4). Furthermore, the effective remedy deals with the violation of a right guaranteed by the Convention, while Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4) cover claims relating in the first case to the existence or scope of civil rights and in the second to the lawfulness of arrest or detention. What is more, the three provisions do not operate in the same field. The concept of "civil rights and obligations" (Article 6 para. 1) (art. 6-1) is not co-extensive with that of "rights and freedoms as set forth in this Convention" (Article 13) (art. 13),

even if there may be some overlapping. As to the "right to liberty" (Article 5) (art. 5), its "civil" character is at any rate open to argument (Neumeister judgment of 27 June 1968, Series A no. 8, p. 43, para. 23; Matznetter judgment of 10 November 1969, Series A no. 10, p. 35, para. 13; De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 44, para. 86). Besides, the requirements of Article 5 para. 4 (art. 5-4) in certain respects appear stricter than those of Article 6 para. 1 (art. 6-1), particularly as regards the element of "time".

34. As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed.

In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are "resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" of 10 December 1948.

In the Government's view, that recital illustrates the "selective process" adopted by the draftsmen: that the Convention does not seek to protect Human Rights in general but merely "certain of the Rights stated in the Universal Declaration". Articles 1 and 19 (art. 1, art. 19)

are, in their submission, directed to the same end.

The Commission, for their part, attach great importance to the expression "rule of law" which, in their view, elucidates Article 6 para. 1 (art. 6-1).

The "selective" nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention.

This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), refers in two places to the rule of law: first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 (art. 3) which provides that "every Member of the Council of

Europe must accept the principle of the rule of law ..."

And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.

35. Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of

that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15).

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to

everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English "determination", French "décidera").

...

40. In this connection, the Court confines itself to noting what follows.

In petitioning the Home Secretary for leave to consult a solicitor with a view to suing Laird for libel, **Golder** was seeking to exculpate himself of the charge made against him by that prison officer on 25 October 1969 and which had entailed for him unpleasant consequences, some of which still subsisted by 20 March 1970 (paragraphs 12, 15 and 16 above). Furthermore, the contemplated legal proceedings would have concerned an incident which was connected with prison life and had occurred while the applicant was imprisoned. Finally, those proceedings would have been directed against a member of the prison staff who had made the charge in the course of his duties and who was subject to the Home Secretary's authority.

In these circumstances, **Golder** could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of **Golder**, the right to go before a court as guaranteed by Article 6 para. 1 (art. 6-1).

## II. ON THE ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

41. In the opinion of the majority of the Commission (paragraph 123 of the report) "the same facts which constitute a violation of Article 6 para. 1 (art. 6-1) constitute also a violation of Article 8 (art. 8)". The Government disagree with this opinion.

...

In order to show why the interference complained of by **Golder** was "necessary", the Government advanced the prevention of disorder or crime and, up to a certain point, the interests of public safety and the protection of the rights and freedoms of others. Even having regard to the power of appreciation left to the Contracting States, the Court cannot discern how these considerations, as they are understood "in a democratic society", could oblige the Home Secretary to prevent **Golder** from corresponding with a solicitor with a view to suing Laird for libel. The Court again lays stress on the fact that **Golder** was seeking to exculpate himself of a charge made against him by that prison officer acting in the course of his duties and relating to an incident in prison. In these circumstances, **Golder**

could justifiably wish to write to a solicitor. It was not for the Home Secretary himself to appraise - no more than it is for the Court today - the prospects of the action contemplated; it was for a solicitor to advise the applicant on his rights and then for a court to rule on any action that might be brought.

The Home Secretary's decision proves to be all the less "necessary in a democratic society" in that the applicant's correspondence with a solicitor would have been a preparatory step to the institution of civil legal proceedings and, therefore, to the exercise of a right embodied in another Article of the Convention, that is, Article 6 (art. 6).

The Court thus reaches the conclusion that there has been a violation of Article 8 (art. 8).

...

FOR THESE REASONS, THE COURT,

1. Holds by nine votes to three that there has been a breach of Article 6 para. 1 (art. 6-1);
2. Holds unanimously that there has been a breach of Article 8 (art. 8);
3. Holds unanimously that the preceding findings amount in themselves to adequate just satisfaction under Article 50 (art. 50).

...

Introduction

1. For the reasons given in Part I of this Opinion, I have - though with some misgivings - participated in the unanimous affirmative vote of the Court on the question of Article 8 (art. 8) of the European Convention on Human Rights. To that extent therefore, I must hold the United Kingdom to have been in breach of the Convention in the present case.

2. On the other hand I am quite unable to agree with the Court on what has been the principle issue of law in these proceedings, - namely that of the applicability, and interpretation, of Article 6, paragraph 1 (art. 6-1), of the Convention - the question of the alleged right of access to the courts - the point here being, not whether the Convention ought to provide for such a right, but whether it actually does. This is something that affects the whole question of what is legitimate by way of the interpretation of an international treaty while keeping within the confines of a genuinely interpretative process, and not trespassing on the area of what may border on judicial legislation. I deal with it in Part II below.

...

A. The applicability aspect

18. In the present case the chief issue that has arisen and been the subject of argument, is whether the Convention provides in favour of private persons and entities a right of access to the courts of law in the various countries parties to it. It is agreed - and admitted in

the Court's Judgment (paragraph 28) - that the only provision that could have any relevance for this purpose - Article 6, paragraph 1 (art. 6-1) - does not directly or in terms give expression to such a right. Nevertheless this right is read into the Convention on the basis partly of general considerations external to Article 6.1 (art. 6-1) as such, partly of inferences said to be required by its provisions themselves.

...

1. The question of approach

25. The significance of the question of approach or attitude in the present case lies in the fact that, as already mentioned, and as was generally admitted, neither in the Convention as a whole nor in Article 6.1 (art. 6-1) in particular, is any provision expressly made for a specific general substantive right (14) of access to the courts. It is in fact common ground that if the principle of such a right is provided for, or even recognized at all by any Article of the Convention, this can only result from an inference drawn from the first sentence of Article 6.1 (art. 6-1) - 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."

It is evident on the face of it that the direct (and the only direct right) right conveyed by this provision is a right to (i) "a fair

and public hearing", (ii) "within a reasonable time", and (iii) by a tribunal which is "independent", "impartial", and "established by law". Naturally the question of these several matters, viz. of a not unduly delayed fair and public hearing before an impartial tribunal, etc., can only arise if some proceedings, civil or criminal, have actually been commenced and are currently going through their normal course of development. But that is not the point. The point is that this says nothing whatever in terms as to whether there shall be any proceedings. The Article (art. 6-1) assumes the factual existence of proceedings, in the sense (but no further) that, if there were none, questions of fair trial, etc. would have no relevance because they could not arise. The Article (art. 6-1) can therefore only come into play if there are proceedings. It is framed on the basis that there is a litigation which, as my colleague Judge Zekia puts it, is sub judice. But that is as far as its actual language goes. It does not say that there must be proceedings whenever anyone wants to bring them. To put the matter in another way, the Article simply assumes the existence of a fact, viz. that there are proceedings, and then, on the basis of that fact, conveys a right which is to operate in the postulated event (of proceedings), - namely a right to a fair trial, etc. But it makes no direct provision for the happening of the event itself - that is to say for any right to bring the event about. In short, so far as its actual terms go, it conveys no substantive right of access independently of and additional to the procedural guarantees for a fair trial, etc., which are clearly its primary object. The question is therefore, must it be regarded as doing so by a process of implication?

Digression: Article 1 (art. 1) of the Convention

26. However, before going on to consider the question of implication as it arises in connection with Article 6.1 (art. 6-1), a parenthesis of some importance must be opened, concerning another factor that calls for a short-circuiting of the whole issue of Article 6.1 (art. 6-1). This concerns the effect to be given to Article 1 (art. 1) of the Convention which runs as follows:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention."

The operative word here, in the present context, is "defined"; and in consequence, the effect of this provision - (since it is rights and freedoms "defined" in the Convention that the States parties to it are to secure to everyone within their jurisdiction) - is to exclude from that obligation anything not so defined. Therefore, even if, in order to avoid relying on what might be regarded as a technicality, one refrains from attempting a "definition of defining", as compared with, say, mentioning, indicating, or specifying (15), the question necessarily arises whether a right or freedom that is not even mentioned, indicated or specified, but merely - at the most - implied, can be said to be one that is "defined" in the Convention in any sense that can reasonably be attributed to the term "defined"? In my opinion, not; and on this question I am in entire agreement with the views expressed by my colleague Judge von Verdross.

27. This conclusion does not turn on a mere technicality. In the

first place, even if one accepts the view that, as has been said (16), "the word 'defined' in this provision is not very apt" and that in the Convention "none of the rights or freedoms are defined in the strict sense", they are at least mentioned, indicated or specified - in short named. This is not so with the right of access which, as such, finds no mention in the Convention. Secondly, a large part of the proceedings in the case, and of the arguments of the participants - those relating to inherent or other limitations on the right of access, if considered to be implied by Article 6.1 (art. 6-1) - was taken up, precisely, with the question of how that right was to be understood, what it amounted to, - in short how it was to be defined, - conclusively establishing the need for a definition, even if only by limitation or circumscription; - and definitions must be expressed - they cannot rest on implication.

28. The necessary conclusion therefore seems to be that it is impossible - or would be inadmissible - to regard as falling under the obligation imposed by Article 1 (art. 1) of the Convention - an obligation that governs its whole application - a right or freedom which the Convention does not trouble to name, but at the most implies, and which cannot even usefully be implied without at the same time proceeding to a rather careful definition of it, or of the conditions subject to which it operates, and which, by circumscribing it, define it (17).

...

Resumption on the question of approach

i. The Court's approach

32. It is an understandable, reasonable and legitimate point of view that access to the courts of law is, or should be, regarded as an important human right. Yet it is an equally justifiable view to say that the very importance of the right requires (more especially in a convention based on inter-State agreement, not sovereign legislative power) that it should be given explicit expression, not left to be deduced as a matter of inference. This leads up to an essential point. There is a considerable difference between the case of "law-giver's law" edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is necessarily to be inferred from what it contains. The whole balance tilts from (in the case of law-giver's law) the negatively orientated principle of an interpretation that seems reasonable and does not run counter to any definite contra-indication, and an interpretation that needs to have a positive foundation in the convention that alone represents what the parties have agreed to, - a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from these; - and the word "necessarily" is the decisive one.

33. That word is significant because the attitude of the Commission to this case and, though more guardedly, that of the Court, seems to

me to have amounted to this, - that it is inconceivable, or at least inadmissible, that a convention on human rights should fail in some form or other to provide for a right of access to the courts: therefore it must be presumed to do so if such an inference is at all possible from any of its terms. This attitude clearly underlies what is said in the last section of paragraph 35 of the Court's Judgment, that it would, in the opinion of the Court "be inconceivable ... that Article 6.1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it possible to benefit from such guarantees, that is, access to a court". As a matter of logical reasoning however, this is a complete non-sequitur. It might perhaps seem natural that procedural guarantees of this kind should "first" be preceded by a protection of the right of access: the fact remains that, in terms, they are not, and that the inference that they must be deemed so to be is at best a possible and in no way a necessary one; - for it is a perfectly conceivable situation that a right of access to the courts should not necessarily always be afforded, or should be limited to certain cases, or excluded in certain cases, but that where it is afforded there should be safeguards as to the character of the ensuing proceedings.

34. Generally speaking, at least in this type of provision, an inference or implication can only be regarded as a "necessary" one if the provision cannot operate, or will not function, without it. As has already been indicated (*supra*, paragraph 25), in Article 6.1 (art. 6-1) the necessary, and the only necessary inferential element lies in the assumption (without which the provision makes no sense but more than which it does not require in order to make sense) that

legal proceedings of some kind have been started and are in progress. It is in no way necessary, either to the operation of this text, or to give it significant meaning and scope, that the further and quite gratuitous assumption should be made that the text implies not only the existence of proceedings but an a priori right to bring them, - which is to enter upon a distinct order or category of concept, for doing which there is no warrant, since the Article (art. 6-1) has ample scope without that. To quote my colleague Judge Zekia, it "has ... its raison d'être ... without grafting the right of access onto it".

...

ii. A different approach

38. In my view, the correct approach to the interpretation of Article 6.1 (art. 6-1) is to bear in mind not only that it is a provision embodied in an instrument depending for its force upon the agreement - and indeed the continuing support - of governments, but also that it is an instrument of a very special kind (23), emulated in the field of human rights only by the Inter-American Convention on Human Rights signed at San José nearly twenty years later. This was in considerable measure founded on the European one, particularly as regards its "enforcement" machinery. But it has not been brought into force. Such machinery is not to be found in the United Nations Covenants on Human rights, which in any case also do not seem to be in force. Speaking generally, the various conventions and covenants on human rights, but more particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of

governments in the sphere of their domestic jurisdiction or domaine réservé. Most especially, and most strikingly, is this the case as regards what is often known as the "right of individual petition", whereby private persons or entities are enabled to (in effect) sue their own governments before an international commission or tribunal, - something that, even as recently as thirty years ago, would have been regarded as internationally inconceivable. For these reasons governments have been hesitant to become parties to instruments most of which, apart from the European Convention, have apparently not so far attracted a sufficient number of ratifications to bring them into force. Other governments, that have ratified the European Convention, have hesitated long before accepting the compulsory jurisdiction of the Court of Human Rights set up under it. Similar delays have occurred in subscribing to the right of individual petition which, like the jurisdiction of the Court, has to be separately accepted. This right moreover, may require not only an initial, but a continuing acceptance, since it may be, and in several instances has been given only for a fixed, though renewable, period. It is indeed solely by reason of an acceptance of this kind that it has been possible for the present (**Golder**) case to be brought before the European Commission and Court of Human Rights at all.

39. These various factors could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon

the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming. (In this connexion the passage quoted in the footnote below (24) from the oral argument of Counsel for the United Kingdom before the Commission should be carefully noted.) Any serious doubt must therefore be resolved in favour of, rather than against, the government concerned, - and if it were true, as the Judgment of the Court seeks to suggest, that there is no serious doubt in the present case, then one must wonder what it is the participants have been arguing about over approximately the last five years!

### iii. Intentions and drafting method

40. It is hardly possible to establish what really were the intentions of the contracting States under this head; but that of course is all the more reason for not subjecting them to obligations which do not result clearly from the Convention, or at least in a manner free from reasonable doubt. The obligation now under discussion does not have that character. Moreover, speaking from a very long former experience as a practitioner in the field of treaty drafting, it is to me quite inconceivable that governments intending to assume an international (25) obligation to afford access to their courts, should have set about doing so in this roundabout way, - that is to say should, without stating the right explicitly, have left it to be deduced by a side-wind from a provision (Article 6.1) (art. 6-1) the immediate and primary purpose of which (whatever its other possible implications might be) - no one who gives an objective reading can doubt - was

something basically distinct as a matter of category, namely to secure that legal proceedings were fairly and expeditiously conducted. No competent draftsman would ever have handled such a matter in this way.

...

48. Conclusion on the question of right of access - I omit other points in order not further to overload this Opinion. But I have to conclude that - like it or not, so to speak - a right of access is not to be implied as being comprehended by Article 6.1 (art. 6-1) of the Convention, except by a process of interpretation that I do not regard as sound or as being in the best interests of international treaty law. If the right does not find a place in Article 6.1 (art. 6-1), it clearly does not find a place anywhere in the Convention. This is no doubt a serious deficiency that ought to be put right. But it is a task for the contracting States to accomplish, and for the Court to refer to them, not seek to carry out itself.