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

COURT (PLENARY)

CASE OF GUZZARDI v. ITALY

(Application no. 7367/76)

JUDGMENT

STRASBOURG

6 November 1980

In the Guzzardi case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. WIARDA, President,
Mr. G. BALLADORE PALLIERI,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. R. RYSSDAL,
Mr. W. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. P.-H. TEITGEN,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCIA DE ENTERRIA,
Mr. B. WALSH,

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

Having deliberated in private on 28 and 29 April and on 1 and 2 October 1980,

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

PROCEDURE

1. The Guzzardi case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application against the Italian Republic lodged with the Commission on 17 November 1975 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of that State, Mr. Michele Guzzardi, by means of a letter from his lawyer, Mr. Michele Catalano, to the Secretary-General of the Council of Europe.

2. The Commission’s request, to which was attached the report provided for under Article 31 (art. 31) of the Convention, was lodged with the

registry on 8 March 1979, 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 Italian Republic 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 5 par. 1 (art. 5-1) of the Convention and, to a lesser extent, under Articles 3, 6, 8 and 9 (art. 3, art. 6, art. 8, art. 9).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. G. Balladore Pallieri, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the Vice-President of the Court (Rule 21 par. 3 (b) of the Rules of Court). On 30 March 1979, the Vice-President drew by lot, at the request of the President and in the presence of the Registrar, the names of the five other members, namely Sir Gerald Fitzmaurice, Mrs. D. Bindschedler-Robert, Mr. P.-H. Teitgen, Mr. G. Lagergren and Mr. E. García de EnterrÍa (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43).

4. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 par. 5). At a meeting held on 18 May 1979, he ascertained the views of the Agent of the Italian Government ("the Government") and the Delegates of the Commission regarding the procedure to be followed. Immediately thereafter, he decided that the Government should have until 7 November to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar. On 7 November, the President extended the first of these time-limits until 13 December, following requests sent by the Government to the Registrar on 23 October and then, in different terms, on 5 November; he reduced the second time-limit to five weeks.

The Government's memorial was received at the registry on 13 December 1979. On 17 December, the Secretary to the Commission advised the Registrar that the Delegates would present their observations at the hearings.

5. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed on 18 December that the oral hearings should open on 29 January 1980.

On 11 January, the President instructed the Registrar to obtain from the Commission a certain number of documents. They were produced on 15 and 23 January.

6. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 29 January. Immediately before their opening, the Chamber had held a short preparatory meeting; it had authorised the representative of the Government to use the Italian language (Rule 27 par. 2).

There appeared before the Court:
- for the Government:
Mr. G. AZZARITI, State Counsel (avvocato dello Stato),
Agent's Delegate;
- for the Commission:
Mr. J. FAWCETT, *Principal Delegate*,
Mr. J. FROWEIN, *Delegate*.

The Court heard addresses by those appearing and their replies to questions put by it and by two of its members. It requested them to produce several documents; the majority of these, and some other documents, were supplied by the Commission and the Government on 29 and 30 January and on 11 April and 26 June.

7. At the close of deliberations held on 30 and 31 January, the Chamber, considering that the case raised serious questions affecting the interpretation of the Convention, decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

Having obtained, through the Registrar, the agreement of the Agent of the Government and the concurring opinion of the Delegates of the Commission, the Court decided on 29 April that the proceedings would continue without further oral hearings (Rule 26).

8. Two documents which the President, Mr. Wiarda, had requested from the Commission on 31 January were supplied by its secretariat to the registry on 4 February. On 11 April and 21 May, respectively, the registry received the original Italian text and the French version - the official version for the Court (Rule 27 par. 1) - of a memorial filed by the Government to support certain of the documents which they had supplied (see paragraph 6 in fine above). On 12 May, the Secretary to the Commission transmitted to the Registrar two notes by the applicant's lawyer, dated 11 January and 29 April; the second note contained comments on the aforesaid memorial and also referred back to the first note.

AS TO THE FACTS

I. PARTICULAR FACTS OF THE CASE

A. The criminal proceedings taken against Mr. Guzzardi

9. Mr. Guzzardi, an Italian citizen born in 1942, had left Palermo (Sicily) in 1966 to take up residence in Vigevano (in the province of Pavia). He was arrested on 8 February 1973, placed in detention on remand in Milan and

then charged with conspiracy and being an accomplice to the abduction on 18 December 1972 of a businessman; the latter had been freed by his kidnappers on 7 February 1973 after payment of a substantial ransom.

The applicant was acquitted on 13 November 1976 by the Milan Regional Court (Tribunale di Milano) for lack of sufficient evidence, but convicted on 19 December 1979 by the Milan Court of Appeal which sentenced him to eighteen years' imprisonment and a fine.

The criminal proceedings in question are not in issue, at least not in direct issue, in the present case.

10. Under Article 272 (first paragraph, item 2) of the Italian Code of Criminal Procedure, the applicant's detention on remand – during which he married his fiancée by whom he shortly afterwards had a son - could not continue for more than two years; it thus had to terminate on 8 February 1975 at the latest.

11. On that date, Mr. Guzzardi was removed from Milan gaol and taken under police escort to the island of Asinara, which lies off Sardinia.

B. The measure of "special supervision" applied to the applicant

12. On 23 December 1974, the Milan Chief of Police (questore) had in fact sent to the Milan State prosecutor (procuratore della Repubblica) a report recommending that Mr. Guzzardi be subjected to the measure of "special supervision" provided for in section 3 of Act no. 1423 of 27 December 1956 ("the 1956 Act" - see paragraphs 45-51 below) and section 2 of Act no. 575 of 31 May 1965 ("the 1965 Act" - see paragraph 52 below). The report referred to indications that although the applicant claimed to be working in the building trade, he was actually engaged in illegal activities and belonged to a band (cosca) of mafiosi; it listed four convictions pronounced against him in 1965, 1967, 1969 and 1972 and described him as "one of the most dangerous" of individuals.

Following an application made in accordance with this recommendation by the State prosecutor on 14 January 1975, the Milan Regional Court (2nd Criminal Chamber) directed on 30 January that Mr. Guzzardi be placed under special supervision for three years, the measure to be combined with the obligation to reside "in the district (comune) of the island of Asinara", a locality that had been designated by the Ministry of the Interior. In its decision the Court further directed that the applicant should:

- start looking for work within a month, establish his residence in the prescribed locality, inform the supervisory authorities immediately of his address and not leave the place fixed without first notifying them;
- report to the supervisory authorities twice a day and whenever called upon to do so;
- lead an honest and law-abiding life and not give cause for suspicion;

- not associate with persons convicted of criminal offences and subjected to preventive or security measures;

- not return to his residence later than 10 p.m. and not go out before 7 a.m., except in case of necessity and after having given notice in due time to supervisory authorities;

- not keep or carry any arms;

- not frequent bars or night-clubs and not take part in public meetings;

- inform the supervisory authorities in advance of the telephone number and name of the person telephoned or telephoning each time he wished to make or receive a long-distance call.

13. Mr. Guzzardi appealed to the Milan Court of Appeal; his appeal had no suspensive effect (section 4, sixth paragraph, of the 1956 Act) and so did not prevent the contested decision from being put into effect.

In a memorial of 10 February 1975, his lawyer, Mr. Catalano, challenged the decision on a number of grounds, alleging that it was invalid and unjustified. He submitted, in particular, that on Asinara his client could neither find employment nor live together with his wife and child; there was thus an inconsistency between the reasoning and the operative provisions of the decision of 30 January. In addition, the decision referred to a non-existent district since in point of fact the island was no more than a sub-division of the district of Porto Torres (Sardinia). Mr. Catalano requested the Court of Appeal, in the first place, to quash the decision in its entirety; in the alternative, to limit it to special supervision without an order for compulsory residence; in the further alternative, to designate a district in Northern Italy where the applicant might find work, live with his family, meet with his lawyer in order to prepare his defence in the criminal proceedings and attend, as and when necessary, an urological clinic to receive the treatment required by his state of health.

14. On 12 February, the Court of Appeal (1st Criminal Chamber), by way of a preliminary ruling on submissions to the same effect by the public prosecutor, ordered that Mr. Guzzardi be transferred to the urological clinic of Sassari hospital (Sardinia); it also instructed its registry to seek information from the carabinieri in Sassari on the possibility of finding accommodation for three people and work on the island of Asinara.

However, on 14 February the prosecuting authorities requested the Court of Appeal to revoke or suspend the aforesaid order. They pointed out that during his detention on remand Mr. Guzzardi had refused to submit to analyses in the University of Milan urological clinic; that experts considered that he was probably not suffering from any serious illness; that his covert intention was to use hospitalisation as a means of escape; that section 3 of the 1956 Act did not prohibit an order for compulsory residence in a given locality within a district; that the Court of Cassation had so held in two judgments, one of which concerned precisely the island of Asinara, which was, besides, "potentially" one of the best places in Italy for tourism.

The Court of Appeal consequently suspended its order on the same day and directed that further hearings on the matter be held on 12 March 1975.

15. The officer commanding the criminal investigation department of the Milan carabinieri wrote, also on 14 February 1975, to the Court of appeal with the following information which had been supplied by the Sassari carabinieri:

- for those subjected to compulsory residence on Asinara, there were only two flats suitable for accommodating a family; they were occupied by the families in turn for periods of between thirty and sixty days;
- the island offered no possibility of permanent employment; there was just one firm which employed two residents in turn for short spaces of time;
- the police stationed on Asinara were in a position to effect the requisite supervision.

16. On 17 and 21 February 1975, Mr. Catalano filed memorials with the Court of Appeal challenging the "fanciful" statements of the prosecuting authorities and requesting that further enquiries be undertaken in the shape of an investigation on the spot (sopral-luogo). In his view, his client was physically and mentally a prisoner (carcerato) on Asinara; he was vegetating there in conditions worse than those of his detention on remand. The applicant himself, in a letter of 20 February, described the island as a "veritable concentration camp".

17. On 12 March 1975, the Milan Court of Appeal (1st Chamber) dismissed the appeal and confirmed the decision of 30 January. As regards Mr. Guzzardi’s health and the absence of violation of section 3 of the 1956 Act, the Court of Appeal relied in substance on the arguments that had already been invoked by the prosecuting authorities on 14 February (see paragraph 14 above, second sub-paragraph). It found no good reason for regarding Asinara as an unsuitable locality for compulsory residence. It emphasised that the contested measure was designed to separate the individual from his milieu and render his contacts with it more difficult. This requirement took precedence over other problems, such as the absence of regular employment and of adequate accommodation for a family; moreover, at the time of his marriage the applicant could not have hoped to live with his wife and son since he was then in detention on remand and under a serious charge. His criminal record, the most disquieting criminal activities in which he engaged under the cloak of honesty, his violent character and his exceptional cunning showed that he presented a marked danger to society (spiccata pericolosità sociale). Supervision of such an individual was sufficiently important to justify the curtailment of other individual legal interests taken into account by the law (l’affievolimento di alter situazioni giuridiche soggettive che la legge prende in considerazione).

18. Mr. Guzzardi appealed to the Court of Cassation. In a supplementary memorial of 3 April 1975, his lawyer put forward three grounds of appeal

pursuant to Articles 475 par. 3 and 524 par. 1 and 3 of the Code of Criminal Procedure:

(i) It was not permissible under section 3 of the 1956 Act to make an order for a person's compulsory residence - which amounted to subjecting him to a "judicial sanction" limiting his private and family liberty (libertà privata e famigliare) - on any scrap of land (qualunque pezzo di terra), such as Asinara, regardless of its area (quali che siano i metri quadrati entro cui si deve osservare il soggiorno), rather than on the whole of the territory of a district. The contrary interpretation adopted by the Court of Appeal was "restrictive and aberrant" and disregarded a man's right to private and family life (alla vita privata e famigliare) which was guaranteed by the European Convention and the Italian Constitution. If the Court of Cassation were nevertheless inclined to follow that interpretation, it should refer the matter to the Constitutional Court.

(ii) The Court of Appeal's statement that Mr. Guzzardi did not need any particular medical treatment was a misrepresentation of the facts (travisamento dei fatti).

The law did not permit any curtailment of legal interests which it protected, conferred and made mandatory (non consent[iva] veruno affievolimento di situazioni giuridiche tutelate, volute e pretese proprio dalla legge). It followed that the Court of Appeal had applied the law incorrectly (errata applicazione della legge) when it held that the necessity for special supervision justified such curtailment.

(iii) Finally, the reasoning was contradictory (contraddittorietà) in various respects. Thus, the Court of Appeal had - without an investigation on the spot - deemed Asinara to be suitable for the execution of the measure complained of although the applicant would not there be able to comply with the directives contained in the Milan Regional Court's decision.

Mr. Catalano therefore requested the Court of Cassation to quash the judgment of 12 March 1975 after transmitting the file to the Constitutional Court for the purpose of obtaining a ruling that section 3 of the 1956 Act, as interpreted by the Court of Appeal, was incompatible with Article 13, fourth paragraph, and Article 27, second and third paragraphs, of the Constitution.

Article 13 concerns "personal liberty": the fourth paragraph provides that "the infliction of any physical or mental violence on persons subjected to any form of restriction on their liberty shall be a punishable offence". The second paragraph of Article 27 enshrines the presumption of innocence; the third paragraph stipulates that "punishment may not take the form of treatment repugnant to feelings of humanity and must be aimed at re-education of the convicted person".

19. The Court of Cassation gave judgment on 6 October 1975. It accepted the submissions of the public prosecutor attached to the Court of Cassation and dismissed the appeal as being devoid of foundation.

As regards the first ground of appeal, the Court of Cassation pointed out that its settled case-law established that under certain conditions, which were satisfied in the present case, an order for compulsory residence could refer to a given locality within a district. Likewise, the "curtailment" of, and the "undoubted limitations" on, "various rights of the individual concerned" stemmed directly from the application of measures which had on numerous occasions been recognised to be in conformity with the Constitution, for example in a judgment delivered by the Constitutional Court on 15 June 1972.

As regards the second ground, the Court of Cassation held that in the particular circumstances the Court of Appeal had been right in turning down the argument concerning Mr. Guzzardi's state of health.

As regards the third ground, the Court of Cassation perceived no contradiction since the intended object was to remove the applicant from Milan and to separate him from the members of the mafia who carried on their activities there without hindrance.

The Court also declared the question of constitutionality raised by the applicant to be manifestly ill-founded. There again, the public prosecutor had cited the above-mentioned judgment of 15 June 1972; he had in addition referred to the administrative nature of the decision designating the locality (natura amministrativa della determinazione del luogo).

20. On 14 November 1975, Mr. Catalano made two applications to the Milan Regional Court.

The first application was addressed to the President of the 2nd Criminal Chamber in his capacity of judge supervising the execution of sentences (giudice di sorveglianza). It requested him to cancel (abolire) the compulsory residence order, maintaining that if the President, or someone designated by him for the purpose, were to visit Asinara, he would be left in no doubt that the obligation to live there was contrary to the law, the legislation, justice and individual human rights.

The second application invited the 2nd Chamber to substitute for Asinara a district where Mr. Guzzardi could work, not come into contact with suspects (indiziati) and live with his wife and son who had been obliged to leave the island since their permit to reside there had expired.

The lawyer referred to an Order of 27 October 1975 concerning an appeal by one Ignazio Pullarà; the Milan Court of Appeal had stated therein that it was for the judge supervising the execution of sentence to make an appraisal of living conditions on Asinara.

The 2nd Criminal Chamber gave its decision on 20 January 1976. First of all, it affirmed that the implementation of preventive measures was a matter within the competence of the police authorities (pubblica sicurezza) and not of the judge supervising the execution of sentences. It added that exigencies of the protection of society justified the special form of isolation undergone by those sent to Asinara, namely individuals who were extremely

dangerous. However, those exigencies necessitated neither separating those concerned from their families nor depriving them of regular employment. Accordingly, the Regional Court, whilst rejecting both applications, directed that the text of its decision be communicated to the Minister of the Interior and to the Sassari questore.

21. On 21 July 1976, the Milan questore requested the Milan Regional Court to order Mr. Guzzardi's transfer to the district of Force, in the province of Ascoli Piceno, on the Italian mainland. The reason advanced was that the simultaneous presence on Asinara of the applicant and of his co-accused (coimputato), Ignazio Pullarà, who was also in the process of "serving" (scontare) a compulsory residence measure, might have unfortunate repercussions on the ensuing stages of the criminal proceedings and, above all, on security on the island.

The Regional Court (vacation Chamber) gave a decision to that effect, and for the same reasons, on the following day; it specified that the remainder of its decision of 30 January 1975 (see paragraph 12 above) was to continue in force.

22. Mr. Guzzardi had to remain at Force until 8 February 1978, on which date the three-year period fixed by the last-mentioned decision expired.

C. The applicant's stay on the island of Asinara

1. Description of the locality

23. Asinara lies off the north-west tip of Sardinia. The island, which is long and narrow with a rugged terrain, measures about 20 km. at its greatest length. Whilst the island as a whole covers 50 sq. km., the area reserved for persons in compulsory residence represented a fraction of not more than 2.5 sq. km. This area was bordered by the sea, roads and a cemetery; there was no fence to mark out the perimeter. About nine-tenths of the island was occupied by a prison.

24. Administratively, the island forms an integral part of the district of Porto Torres, a small Sardinian coastal town one hour away by boat. The southernmost point of the island can also be reached in fifteen minutes if one embarks at Stintino, to the north of Porto Torres. Sea communications are interrupted during very bad weather.

25. The principal settlement on the island, Cala d'Oliva, houses nearly all of the island's permanent population - approximately two hundred people; this population comprises the prison staff and their families, schoolteachers, a priest, the post office employees and a few tradesmen.

The persons in compulsory residence were lodged in the hamlet of Cala Reale which consists mainly of a former medical establishment and certain other buildings including a school, a chapel and a carabinieri station where the applicant had to report twice a day (see paragraph 12 above).

2. Possibilities of movement

26. The Government maintained before the Commission that one could circulate at will within Cala Reale. According to Mr. Guzzardi on the other hand, an instruction issued by the officer in charge of the carabinieri restricted movement for persons in compulsory residence to a radius of about 800 metres.

27. Persons in compulsory residence had no access to the prison zone or to Cala d'Oliva. The inhabitants of the latter village could, in contrast, visit Cala Reale whenever they pleased, whereas outsiders - such as tourists - were in principle not allowed to go there.

28. Persons in compulsory residence could apply for authorisation to visit Sardinia or the Italian mainland if they had good reasons, such as medical treatment, family grounds or compliance with an order of the judicial authorities.

The Government stated that authorisation was "normally" given on production of the appropriate documents of following a brief police enquiry, but according to the applicant it was very difficult to obtain. Even in the case of urgent medical treatment, so he contended, there was a long delay, sometimes as much as a whole month. In any event, such trips were made under the strict supervision of the carabinieri.

29. There existed the additional possibility of going in turn to Porto Torres to buy provisions, likewise after authorisation and under supervision. The frequency of the crossings as well as the number of participants were the subject of dispute. The Government spoke of four persons per week, whereas for Mr. Guzzardi it was just one; he claimed that he had had to wait six months before receiving the necessary permission.

3. Accommodation

30. Most of the persons in compulsory residence were housed in two buildings belonging to the former medical establishment; these buildings were fairly large and consisted principally, so it seems, of bedrooms with one or two beds.

A third building, a small construction known as the "Pagodina", was allocated to "residents" (soggiornanti) who were accompanied by their families. The "Pagodina" contained two flats each comprising a bedroom and a kitchen.

The applicant lived in one of the main buildings or in the "Pagodina", depending upon whether he was alone or with his family. He could not go out between 10 p.m. and 7 a.m., except in case of necessity and after having notified the authorities in due time (see paragraph 12 above).

31. These various buildings were somewhat dilapidated. According to Mr. Guzzardi, their state of disrepair was such as to render them almost uninhabitable. For the Government, on the contrary, the condition of the

buildings was "acceptable" up to the time when some of their occupants committed acts of vandalism, an occurrence not denied by the applicant.

4. Medical assistance, health and sanitary conditions

32. The medical service at Cala Reale was provided by the prison doctor. He lived at Cala d'Oliva but could be reached by telephone and be on hand within the space of about thirty minutes.

Before the Commission, the Government submitted that there was a dispensary at Cala Reale, with a male nurse in attendance; the applicant disputed the presence of any nurse.

When persons in compulsory residence needed to be hospitalised or to consult a specialist, they were sent to the State hospital and university clinics in Sassari. Such journeys required authorisation from the competent court - the Milan Regional Court in the applicant's case (see also paragraph 28 above).

33. The Government medical officer for Sassari province was responsible for supervising health and sanitary conditions at Cala Reale. While the Government considered the level of the conditions to be good, in Mr. Guzzardi's view they left much to be desired. In particular, he complained of the lack of any arrangements for removing rubbish (see also paragraph 42 below).

5. Presence of the family

34. Persons in compulsory residence could apply to the administrative authority for permission to have their nearest relations join them on the island and stay with them either in the "Pagodina" (see paragraph 30 above) or, failing that, in the rather confined bedroom - 4 metres by 4 metres - allocated to each of them.

The Government stressed before the Commission that the shortage of water on Asinara, which had neither a spring nor an aqueduct and was supplied periodically by navy tankers, made is necessary to limit the number of persons authorised to stay there.

35. Initially, the applicant's wife and son and also, from time to time, his parents-in-law and nephew lived together with him.

On 9 October 1975, the members of his family were ordered to leave the island; their residence permits had expired on 28 August and he had not applied for their renewal. They were, however, able to return at the beginning of December and stayed with him until his departure for Force (see paragraph 21 above).

6. Possibilities of attending worship

36. There is a chapel at Cala Real. According to Mr. Guzzardi, it remained closed except for religious services at Christmas and Easter. The Government submitted in reply that the religious authorities - there was a priest living at Cala d'Oliva – would willingly have opened the chapel for services at any time had they been asked to do so, but that no one had ever made such a request.

37. The applicant also claimed that a mass was celebrated every Sunday by the prison chaplain, but on premises situated outside the area in which persons in compulsory residence could move freely (see paragraph 26 above).

7. Possibilities of obtaining work

38. For persons in compulsory residence, the prospects of employment were limited to the openings offered by a firm at Cala Reale, Massidda-Costruzioni edili, which were somewhat modest – four persons in 1975 and eleven in 1976. The Government submitted that Mr. Guzzardi had shown no interest at all in this possible source of work. Mr Guzzardi did, however, produce a certificate from Massidda showing that he had worked for the company from October 1975 to May 1976 and had subsequently made repeated and pressing requests for employment, but without success.

8. Possibilities for cultural and recreational activities

39. Persons in compulsory residence could obtain books and newspapers at Porto Torres, either themselves or through other people who went there. They had the use of one television set according to the applicant, several sets according to the Government. The existence of communal canteen and recreation facilities was also the subject of dispute before the Commission.

9. Communications with the outside

40. Mr. Guzzardi had to give to the authorities prior notice of the name and number of the person telephoned or telephoning whenever he wished to make or receive a call (see paragraph 12 above). On the other hand, his correspondence in the form of letters and telegrams was not monitored.

10. Representations made by the applicant with regard to living conditions on the island

41. On 11 August 1975, the applicant sent a letter to the Porto Torres pretore in which he confessed that he had not discharged certain of the obligations imposed on him by the Milan Regional Court on 30 January (see paragraph 12 above), namely seeking employment, looking for a fixed residence and not associating with other "residents" and criminal elements. He stated that he had tried in vain to comply with these directives and that the officer in charge of the carabinieri on Asinara had never raised any

objection despite section 12 of Act no. 1423 of 27 December 1956 (see paragraph 51 below). No action was taken on his letter.

42. In addition, on 9 January 1976 all the persons in compulsory residence addressed a collective protest to the Sassari questore. They claimed (a) the allocation of a suitable house to each of them; (b) permanent access to Cala Reale by members of their families; (c) work opportunities capable of providing maintenance for them and their families, the subsidy of 45,000 or 46,500 Lire paid by the Ministry not being sufficient for the purpose; (d) the mooring at Cala Reale, instead of Porto Torres, of the boat used for transporting them; (e) the right to go individually and at least once a week to Porto Torres to purchase food supplies; (f) the reopening of the post office at Cala Reale; (g) the improvement of the health and sanitary conditions in the inhabited zones and adjoining areas; (h) on-the-spot medical assistance and the possibility of consulting specialists without delay; (i) more humane treatment from the bodies coming under the authority of the police headquarters; (j) proper upkeep of the premises; (k) installation of a second telephone.

The Government asserted that they thereupon took certain steps to satisfy some of these requests, in particular as regards items (a), (b), (d) and (f).

D. Discontinuance of the use of Asinara as a place of compulsory residence

43. The situation of the "residents" at Cala Reale was also criticised in the press. The administrative authorities investigated possible remedial measures but, in the face of the expense involved and time needed, did not pursue the matter. In consequence, the Ministry of the Interior decided in August 1977 to strike (depennare) the island out of the list of places for compulsory residence. By that date Mr. Guzzardi had been living at Force for more than a year (see paragraph 21 above); however, two of the documents filed show that his application to the Commission was not unconnected with the Ministry’s decision. The last individuals in compulsory residence left Asinara on 17 November 1977.

II. THE LEGISLATION APPLIED IN THE APPLICANTS CASE

44. The treatment complained of by the applicant was based on Act no. 1423 of 27 December 1956 and Act no. 575 of 31 May 1965.

A. The 1956 Act

45. This Act makes provision for a variety of preventive measures which can be taken against "persons presenting a danger for security and public morality" (misure di prevenzione nei confronti delle persone pericolose per la sicurezza e per la pubblica moralità).

46. Under section 1, the Act applies to, amongst others, "idlers" and "habitual vagrants who are fit for work" (gli oziosi e i vagabondi abituali, validi al lavoro), "anyone who is regularly and notoriously involved in illicit dealings" (che sono abitualmente e notoriamente dediti a traffici illeciti) and individuals who, by reason of their behaviour and style of life (tenore di vita), must be considered as habitually living, even in part, on the proceeds of crime or on the rewards of complicity therein (con il favoreggiamento), or whose outward conduct gives good reason to believe that they have criminal tendencies (che, per le manifestazioni cui abbiano dato luogo, diano fondato motivo di ritenere che siano proclivi a delinquere).

The Chief of Police may send to such persons a warning (diffida) in which he will call on them to mend their ways and notify them that, if not, the measures mentioned in the subsequent sections will be put into effect.

A report by the Milan Chief of Police (see paragraph 12 above) indicates that Mr. Guzzardi received such a diffida in Palermo on 26 September 1967 that is well before the events prompting his application to the Commission.

47. In the case of individuals who present a danger for public security or morality and are found elsewhere than at their place of residence, the Chief of Police may also send them back to that place and forbid them to return without prior authorisation or until after the expiry of a period not exceeding three years to the district from which they are being excluded; non-compliance with such an order will render them liable to a penalty of "arrest" (arresto) of between one and six months (section 2).

48. If an individual presenting a danger to public security or morality has not mended his ways despite the warning, he may, under section 3, be placed under special police supervision (sorveglianza speciale della pubblica sicurezza); if need be, this may be combined either with a prohibition on residence in one or more given districts or provinces or, in the case of a particularly dangerous person (particolare pericolosità), with an order for compulsory residence in a specified district (obbligo del soggiorno in un determinato comune).

Only the Regional Court of the chief town of the province has power to order these measures; it will do so on the basis of a reasoned application by the Chief of Police to its President (section 4, first paragraph). The Regional Court must give a reasoned decision (provvedimento) in chambers within thirty days. It will first hear the public prosecutor’s department and the person concerned, the latter being entitled to submit written pleadings and to be assisted by a lawyer (section 4, second paragraph).

The prosecuting authorities and the person concerned may, within ten days, lodge an appeal which does not have suspensive effect; the Court of

Appeal has to give a reasoned decision (decreto) in chambers within thirty days (section 4, fifth en sixth paragraphs). That decision may in turn and on the same conditions be the subject of a further appeal to the Court of Cassation which must give its ruling in chambers within thirty days (section 4, seventh paragraph).

49. When adopting one of the measures listed in section 3, the Regional Court will specify for how long it is to remain in force - not less than one and not more than five years (section 4, fourth paragraph) - and will give directives with which the person in question must comply (section 5, first paragraph).

In the case, as here, of an individual who has been placed under special supervision because he is suspected of living on the proceeds of crime, the Regional Court will direct him to look for work within an appropriate time, to establish his residence and advise the police authorities (autorità di pubblica sicurezza) thereof and not to leave it (allontanarsi) without first informing them (section 5, second paragraph; see paragraph 12 above).

In all cases, The Regional Court will order the individual to lead an honest and law-abiding life; not to give cause for suspicion; not to associate with persons convicted of criminal offences and subjected to preventive or security measures; not to return to his residence at night after, and not to go out in the morning before, a specified time, except in case of necessity and after having given notice in due time to the authorities; not to keep or carry any arms; not to frequent bars or night-clubs; not to take part in public meetings, etc. (section 5, third paragraph; see also the fourth paragraph of that section and paragraph 12 above).

Anyone who, like Mr. Guzzardi is subject to a compulsory residence order may also be directed not to leave (andare lontano) his house without notifying the supervisory authorities (autorità preposta alla sorveglianza) and to report to them on stated days and whenever called upon to do so (section 5, fifth paragraph; see paragraph 12 above). The person concerned will be issued with a card which he must carry with him and show to the police whenever so requested (section 5, sixth paragraph).

50. The Chief of Police is responsible for the implementation of these various measures (section 7, first paragraph). On application by the person concerned and after the police have been heard, the decision ordering the measures may be revoked or varied by the authority (dall'organo) which issued it, insofar as the grounds therefore no longer exist (section 7, second paragraph).

51. Any person who fails to abide by the obligations attaching to special supervision or by those specified in a compulsory residence order is liable to a penalty of "arrest" of three months to one year or six months to two years, respectively (section 9, first and second paragraphs, and section 12, first paragraph).

B. The 1965 Act

52. The 1965 Act completes this panoply of legal texts with provisions directed against the mafia (disposizioni contro la mafia). According to section 1, the Act is applicable to persons - such as Mr. Guzzardi - whom there are strong reasons to suspect of belonging to mafia-type associations (indiziati di appartenere ad associazioni mafiose). State prosecutors may propose that the preventive measures described above be taken against such persons, even if no prior warning has been given; the decision rests with the courts (section 2). Under section 5, wrongfully leaving the district of compulsory residence is punishable by "arrest" of six months to two years.

PROCEEDINGS BEFORE THE COMMISSION

53. In his application of 17 November 1975 and 30 January 1976 to the Commission (no. 7367/76), Mr. Guzzardi complained of "the arbitrary action of the Italian authorities" who were compelling him to reside not within a district but rather on a "scrap of land" (pezzo di terra) where he was unable to work, keep his family permanently with him, practise the Catholic religion or ensure his son’s education; he described his situation at Cala Reale as "the most barbarous imprisonment, the most degrading and pernicious incarceration". He referred to Articles 3, 8 and 9 (art. 3, art. 8, art. 9) of the Convention and to Article 2 of Protocol No. 1 (P1-2) and alleged breach of "the personal and family right" (del diritto individuale e familiare), "the right to religion" and "the right to a proper administration of justice".

54. In may 1976, when giving the notice provided for in Rule 42 par. 2 (b) of its Rules of Procedure, the Commission invited the Government to present, amongst other matters, observations on the applicability of Articles 5 and 6 (art. 5, art. 6) of the Convention. Subsequently, Mr. Guzzardi also placed express reliance on these two Articles (art. 5, art. 6).

55. On 1 March 1977, the Commission declared the complaint under Article 2 of Protocol No. 1 (P1-2) inadmissible as being manifestly ill-founded. It accepted the remainder of the application after dismissing pleas of non-exhaustion of domestic remedies raised by the Government.

In its report of 7 December 1978, the Commission expressed the opinion that there had occurred a failure to observe the requirements of Article 5 par. 1 (art. 5-1) of the Convention (unanimous) but not of Articles 3 (art. 3) (unanimous), 8 (art. 8) (eleven votes to none, with one abstention) and 9 (art. 9) (unanimous), and that the impugned proceedings fell outside the ambit of Article 6 (art. 6) (unanimous).

56. On 4 April 1977, Mr. Guzzardi lodged a second application (no. 7960/77) concerning, this time, his living conditions at Force (see

paragraphs 21 and 22 above). The Commission did not join it to the first application (Rule 29 of the Rules of Procedure) but declared it inadmissible on 5 October 1977. The Commission found, inter alia, that there had not been deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention but solely restrictions on liberty of movement and freedom to choose one's residence, these being rights guaranteed by Article 2 of Protocol No. 4 (P4-2) which Italy had not ratified.

FINAL SUBMISSIONS MADE TO THE COURT

57. In their second memorial (see paragraph 8 above), the Government maintained the submissions set out in their first memorial (see paragraph 4 above), whereby they had requested the Court

> "- to declare inadmissible the issue raised by the Commission (namely whether the applicant, Mr. Guzzardi, was deprived of his liberty by being ordered to reside compulsorily on the island of Asinara), on the ground that the person concerned failed to raise that issue on his own initiative, as is required by Article 25 (art. 25) of the Convention,
>
> and on the further ground that domestic remedies have not been previously exhausted, as is required by Article 26 (art. 26) of the Convention;
>
> - to declare that the object of the proceedings has disappeared, with the result that it will serve no purpose to rule on the Commission's request;
>
> - to declare that the placing of Mr. Guzzardi in compulsory residence constituted neither arrest or detention nor, in any event, deprivation of liberty but a restriction on freedom of movement, lying outside the scope of Article 5 (art. 5) of the Convention;
>
> - to declare that in any event the preventive measure applied to Mr. Guzzardi is justified by sub-paragraph (e) of Article 5 par. 1 (art. 5-1-e) of the Convention."

AS TO THE LAW

I. THE GOVERNMENTS PRELIMINARY PLEAS

A. The plea concerning the ex officio examination of the case under Article 5 (art. 5) (and Article 6) (art. 6)

58. The Government objected to the Commission having on its own initiative taken into consideration Article 5 (art. 5) – and Article 6 (art. 6) - as from May 1976 (see paragraph 54 above). Their argument ran as follows. In order to bring a case before the Commission, a "person, non-governmental organisation or group of individuals" must claim to be the victim "of a violation ... of the rights set forth in [the] Convention". By these words, Article 25 (art. 25) identified both the persons empowered to lodge an application and the object of the proceedings instituted before the Commission and then, if appropriate, before the Court, namely a finding that the breach alleged by the applicant did occur. However, Mr. Guzzardi initially invoked only Articles 3, 8 and 9 (art. 3, art. 8, art. 9) of the Convention and Article 2 of Protocol No. 1 (P1-2) (see paragraph 53 above). Whilst the characterisation in law to be given to a contested measure was a matter for the trial judge, the Commission had overlooked another general principle, that is to say the obligation to limit the decision to facts adduced by the litigant. In order to find a violation of Article 5 (art. 5), the Commission had relied on circumstances which Mr. Catalano had mentioned neither in his first letter, dated 17 November 1975, nor in the application form and explanatory memorandum of 30 January 1976, those circumstances being the restriction to 2.5 sq. km. of the area reserved for persons in compulsory residence, the almost permanent supervision, the impossibility of making social contacts and the length of the compulsory residence. In the Government’s submission, the Commission had thereby erred outside its jurisdiction.

59. The Government had already formulated a similar argument before the Commission. Their observations of 3 September 1976 (at pages 12, 13 and 18), filed subsequent to the official notification of the application (see paragraph 54 above), set it out in embryo. It is no cause for surprise that the Government did not develop the point until after the admissibility decision of 1 March 1977 (see the memorial of 8 February 1978, the oral pleadings made the following day and the memorial of 15 March 1978); for until then it did not emerge very clearly that the Commission was going to review under Article 5 (art. 5) - and Article 6 (art. 6) - not the compulsory residence order in itself, as the Government seemed to believe, but the manner in which the order was implemented at Cala Reale. Accordingly, no issue of estoppel arises (see, mutatis mutandis, the Artico judgment of 13 May 1980, Series A no. 37, pp. 13-14, 27).

60. Whilst the Commission’s report went no further than summarising the Government’s argument (see paragraph 67, last sub-paragraph), the Delegates did reply thereto in detail at the hearings held on 29 January 1980. The Court agrees for the main part with the Delegates’ opinion, for the following reasons.

61. Article 25 (art. 25) requires that individual applicants should claim to be the victim "of a violation of the rights set forth in the Convention"; it

does not oblige them to specify which Article, paragraph or sub-paragraph or even which right they are praying in aid.

The Commission has given the above-cited phrase an interpretation which corresponds to the purpose and object of the Convention: from the outset it inserted in its Rules of Procedure a clause to the effect that the application should set out "as far as possible" - this being very flexible wording - "the provision of the Convention alleged to have been violated" (Rule 41 par. 1 from 1955 to 1974, subsequently Rule 38 par. 1).

Any greater strictness would lead to unjust consequences; for the vast majority of "individual" petitions are received from laymen applying to the Commission without the assistance of a lawyer (see the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 38, par. 92).

62. The Government did not, moreover, dispute the Commission's and the Court's power, inherent in the nature of their functions, to decide upon the characterisation in law to be given to a matter (see the König judgment of 28 June 1978, Series A no. 27, p. 32, par. 96); however, in the Government's submission the applicant had not even raised in substance the issue of an infringement of his physical liberty.

In support of this contention, they referred principally to Mr. Catalano's first letter, dated 17 November 1975, and to the application form and explanatory memorandum of 30 January 1976 (see paragraph 53 above). It should not be forgotten, however, that the original application sent to the Commission is often followed by additional documents intended to complete it by eliminating initial omissions or obscurities (see the above-mentioned Ringeisen judgment, pp. 37-38, par. 90). The Court would also point out that from the start Mr. Catalano described Cala Reale as an "extremely small area", "guarded by the police" who used to "forbid access to anybody and everybody", a scrap of land (pezzo or pezzetto di terra) "inhabited only by habitual criminals and police officers"; his client, he added, was being subjected there to "the most barbarous imprisonment, the most degrading and pernicious incarceration" (and a violation of the right to a proper administration of justice). For the Government, these expressions were merely "hyperboles and metaphors" employed in a context alien to Article 5 (art. 5) (see page 18 of the memorial of 8 February 1978), but the Court considers, as did the Commission, that they amounted to a complaint of a failure to observe the right guaranteed by Article 5 (art. 5).

63. Furthermore, it is not decisive whether Mr. Guzzardi was complaining of his living conditions on Asinara rather than of a deprivation of liberty. It is somewhat unreal to draw such distinction in the present case. The Commission and the Court have to examine in the light of the Convention as a whole the situation impugned by an applicant. In the performance of this task, they are, notably, free to give to the facts of the case, as found to be established by the material before them (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64,

par. 160), a characterisation in law different from that given to them by the applicant.

Seen in an overall context, the material submitted to the Commission and the Court clearly shows that the present case raises an issue under Article 5 (art. 5).

B. The objection of non-exhaustion of domestic remedies

64. The Government further pleaded that the applicant did not exhaust his domestic remedies. Their preliminary objection was based on Article 26 (art. 26) of the Convention and was divided into two branches.

65. The first branch, which related to the 1975 proceedings that terminated in the Court of Cassation (see paragraphs 12 to 19 above), may be summarised as follows. Never at any relevant moment had Mr. Guzzardi invoked, even in substance, the right embodied in Article 5 (art. 5) of the Convention. He had in no way claimed to be deprived, in practice, of his liberty at Cala Reale; the Commission had erred in affirming the contrary when it ruled on the admissibility of his complaints. Furthermore, the procedure laid down by section 4 of the 1956 Act was concerned solely with the lawfulness of the compulsory residence order, whereas the settling of the arrangements for implementing the order was a matter for discretionary administrative decisions and hence fell outside the jurisdiction of the courts. This was so, for example, as regards the designation of the district where the person was to reside: the court merely "took formal notice" of the place "specified" by the administrative authority and, subject where necessary to a review of lawfulness, "recorded" the latter’s choice. This, so the Government maintained, was precisely what occurred in the present case.

66. The second branch of the objection concerned the transfer request made on 14 November 1975 (see paragraph 20 above) and was formulated in the following way. Although admittedly directed towards eliminating the violation complained of, the transfer request was still pending when, barely three days after making it, Mr. Guzzardi applied to the Commission. In addition, the request was addressed to another authority lacking jurisdiction, namely the Milan Regional Court: in fact it declared itself to be without jurisdiction on 20 January 1976 whilst at the same time directing that the text of its decision be communicated to the Minister of the Interior and the Sassari Chief of Police. With regard to his living conditions on the island, in particular the limited space available, Mr. Guzzardi had not exercised any remedy either before the competent administrative authorities or, in the event of his representations being rejected, before a court - whether ordinary or administrative - in pursuance of Article 113 of the Constitution.

67. The Court will take cognisance of preliminary pleas of this kind insofar as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of

admissibility, to the extent that their character and the circumstances permitted (see the above-mentioned Artico judgment, pp. 12-14, par. 24 and 27). In respect of each branch of the objection, the Court must first of all satisfy itself that this condition has been fulfilled in the present case and that the Government are therefore not estopped.

1. The first branch of the objection (the procedure ordering compulsory residence)

(a) Estoppel

68. Prior to the admissibility decision of 1 March 1977, the Government's line of argument was not exactly the same as that adopted subsequently. They criticised the applicant for not having challenged before the courts the compatibility of the 1956 and 1965 Acts with the first two paragraphs of Article 13 of the Italian Constitution, these being paragraphs which were said to correspond to Article 5 (art. 5) of the Convention (see the written observations of 3 September 1976, 21 January 1977 and 21 February 1977). They repeated this objection on later occasions, and finally in their memorial of 15 March 1978 to the Commission (at pages 17 to 19), which was appended to their memorial of December 1979 to the Court.

69. The submission summarised at paragraph 65 above were not put to the Commission by the Government until the memorials and oral pleadings of 8 February, 9 February and 15 March 1978. Nevertheless, certain passages in the application form of 30 January 1976 and on other written statements by Mr. Catalano might have led the Government to believe that the application was challenging the compulsory residence order as such and, indirectly, the 1956 and 1965 Acts (see the Government's observations of 3 September 1976, at pp. 9 and 14; of 21 January 1977, at pp. 2 and 4; of 21 February 1977, at p. 1). The admissibility decision (see paragraph 5 of the section entitled "The law" and item 2 of the operative provisions) and subsequently a letter dated 14 March 1977 to the parties (see paragraph 5 of the report) showed that the Commission "was [primarily] interested in the living conditions" at Cala Reale, "the situation complained of" by Mr. Guzzardi. The decision and the letter would appear to have prompted the Government to supplement their initial argument in order to adapt it to the Commission's approach (see, mutatis mutandis, paragraph 59 above). Developing a case in this way is not, in the circumstances, incompatible with the requirements of a proper administration of justice (see the above-mentioned Artico judgment, pp. 13-14, par. 27); there is accordingly no estoppel.

(b) Whether the objection is substantiated

70. In their memorial of 8 February 1978 to the Commission (at pp. 19, 20, 21 and 24), the Government acknowledged that, in regard to the manner of implementation of the contested measure, the applicant had in substance claimed before the courts of his own country the rights guaranteed by Articles 3, 6, 8 and 9 (art. 3, art. 6, art. 8, art. 9) of the Convention. Consequently, the question whether the first branch of the preliminary objection is substantiated concerns solely the alleged breach of Article 5 (art. 5) (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 31, par. 55).

71. In January 1975, at the outset of the procedure ordering compulsory residence, the applicant could not yet claim that he was deprived of his liberty by reason of the 1956 and 1965 Acts; for he was still in detention on remand in connection with criminal investigations being carried out in his respect, he did not know whether the Milan Regional Court would approve the State prosecutor's proposal and he had no personal experience of the fate of individuals sent to Cala Reale (see paragraphs 9, 10 and 12 above).

On the other hand, as soon as he had arrived on Asinara, he did complain to the Court of Appeal of his situation on that island which, according to him, was not suitable for a proper application of the 1956 and 1965 Acts. He asserted that he was physically and psychologically a prisoner on Asinara and was vegetating there in conditions worse than those of his detention on remand. He even described Cala Reale as a "veritable concentration camp". He requested that an investigation be carried out on the spot and invited the Court of Appeal to quash in its entirety the first instance decision of 30 January 1975; in the alternative to limit it to special supervision without an order for compulsory residence; in the further alternative, to direct that he be transferred to a district in Northern Italy (see paragraphs 13 and 16 above).

The Court of Appeal dismissed the appeal on 12 March 1975. It found no good reason for regarding Asinara as an unsuitable locality for compulsory residence. It emphasised that the contested measure was designed to separate Mr. Guzzardi from his milieu and render his contacts with it more difficult. This requirement took precedence over other problems. Supervision of an individual as dangerous as the applicant was sufficiently important to justify the curtailment of other individual legal interests taken into account by the law (see paragraph 17 above).

Mr. Guzzardi then appealed to the Court of Cassation. In his memorial of 3 April 1975 (see paragraph 18 above), he asked that Court, inter alia, to hold, if need be after referring the matter to the Constitutional Court, that section 3 of the 1956 Act and in any event the Constitution did not permit compulsory residence to be ordered on any scrap of land, regardless of its area, such as Asinara. The appeal was dismissed on 6 October 1975.

Taken as a whole, these factors lead the Court, like the Commission, to conclude that Mr. Guzzardi did raise in substance before the courts of his country the issue of an infringement of his physical liberty.

72. The Government disputed the concept of a remedy being exercised "in substance". In their submission, this "extremely ambiguous" concept would render "empty" the protection afforded to States by Article 26 (art. 26) of the Convention since it would have the effect of "overturning" fundamental rules of domestic procedure; it would signify an "ectoplasm of a remedy" unknown to Italian law (see pp. 9-12, 14, 18 and 19 of the above-mentioned memorial of 15 March 1978).

The Court does not agree with this view. Admittedly, it is for each Contracting State to establish appropriate courts and tribunals, to set the limits on their jurisdiction and to lay down the conditions for bringing cases before them. However, Article 26 (art. 26), which refers to "the generally recognised rules of international law", should be applied with a certain degree of flexibility and without excessive regard for matters of form (see the Stögmüller judgment of 10 November 1969, Series A no. 9, p. 42, par. 11; the above-mentioned Ringeisen judgment, pp. 37-38, par. 89 and 92; the Deweer judgment of 27 February 1980, Series A no. 35, p. 17, 29 in fine; the Commission's decision of 11 January 1961 on the admissibility of application no. 788/60, Austria v. Italy, Yearbook of the Convention, vol. 4, pp. 170-176).

Both on appeal and in cassation Mr. Guzzardi complained of a series of factors which, taken together, could in the Court's opinion be regarded as a deprivation of liberty. He did not, it is true, rely expressly on Article 5 (art. 5) of the Convention; he confined himself to mentioning the Convention as a whole in the general context of the living conditions at Cala Reale. However, a more specific reference was not essential in the circumstances since it did not constitute the sole means of achieving the aim pursued. Before the Italian courts, the applicant adduced arguments such as to show that the manner in which the 1956 Act had been applied to him resulted in the measures restricting an individual's liberty authorised by that Act being transformed into a veritable deprivation of liberty suffered in a locality which he went so far as to describe as a concentration camp in which he was imprisoned. He therefore derived from the Italian legislation pleas equivalent, in the Court's view, to an allegation of a breach of the right guaranteed by Article 5 (art. 5) of the Convention (see paragraph 71 above). In so doing, he provided the national courts, in particular the Court of Appeal, with the opportunity which is in principle intended to be afforded to Contracting States by Article 26 (art. 26), namely the opportunity of putting right the violations alleged against them (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 29, par. 50; the Airey judgment of 9 October 1979, Series A no. 32, p. 10, par. 18). If his appeal to the Court of Cassation proved unsuccessful, on account of the impossibility

of emphasising the issue of deprivation of liberty with the degree of precision called for, this was probably due to the limits on the powers of that Court: having jurisdiction on issues of law, it could scarcely take cognisance as an issue of fact of the situation obtaining on Asinara nor find in the decision of the Court of Appeal any material on which it could determine whether there existed a condition of detention incompatible with Italian law, of which the Convention forms an integral part.

73. The Government further contended that in any event Mr. Guzzardi would have been arguing this point before courts lacking the appropriate jurisdiction.

The evidence shows, however, that far from declining jurisdiction the Court of Appeal and the Court of Cassation examined on the merits the submissions made before them. The Court of Appeal, after instructing its registry to obtain information from the carabinieri in Sassari, came to the conclusion that neither the applicant's state of health nor any other good reason caused Asinara to be unsuitable as a place for compulsory residence; the Court explained in detail why it judged a "curtailment of ... individual legal interests taken into account by the law" to be warranted on the facts (see paragraphs 14, 15 and 17 above). The Court of Cassation, for its part, accepted the submissions of the public prosecutor and dismissed the appeal as being devoid of foundation rather than inadmissible (see paragraph 19 above).

According to the Commission's Delegates, the designation of the district for compulsory residence, despite its character as an administrative act, emanated from the courts even though they normally made their decision on the basis of proposals from the Ministry of the Interior. On the other hand, the Government maintained that in this connection the courts confined themselves to recording the choice effected by the administrative authorities, subject to reviewing its lawfulness. Be that as it may, an irregularity may stem from the factual conditions prevailing in the locality specified by the police; in substance this was what Mr. Guzzardi pleaded had occurred in his case.

Besides, if the Court of Appeal and the Court of Cassation really did not have the power to exclude Asinara on account of the duty to respect the applicant's physical liberty, this would simply mean, as the Commission's Delegates rightly emphasised, that the remedies exercised before those courts are without relevance for the purposes of Article 26 (art. 26). In addition, the Government did not point with sufficient precision to any other legal remedy that might have been available in the matter to Mr. Guzzardi. No blame can therefore be attached to him in this respect.

74. The first branch of the objection of non-exhaustion thus proves not to be substantiated.

2. The second branch of the objection (request for a transfer)

75. Doubts could arise as to whether, once the proceedings relative to the measure complained of had terminated with the judgment of 6 October 1975, the applicant was still obliged to apply for a transfer in order to comply with Article 26 (art. 26). The Court has nevertheless also examined the second branch of the objection (see paragraph 66 above).

(a) Estoppel

76. From the very beginning, the Government contended that Mr. Guzzardi, by failing to await the outcome of his request of 14 November 1975 to the Milan Regional Court, had been premature in applying to the Commission (see their observations of 3 September 1976, 21 January 1977 and 21 February 1977). They further criticised him for not having challenged on appeal and then, if need be, in cassation the decision given by the Regional Court on 20 January 1976 (ibid.) This latter criticism, which was subsequently abandoned, was supplemented by another in a memorial which, being dated 21 February 1977, preceded the closure of the initial examination of admissibility (1 March 1977): the Government claimed, as they subsequently did before the Court, that the request in question was addressed to an authority lacking jurisdiction. There is thus no estoppel in respect of the second branch of their preliminary objection.

b) Whether the objection is substantiated

77. The fact that Mr. Catalano's first letter (17 November 1975) predated by a few weeks the decision of the Milan Regional Court (20 January 1976) is of little consequence for the purposes of Article 26 (art. 26) of the Convention; for that Court had already delivered its ruling when the Commission registered the application (2 February 1976) and, a fortiori, when it accepted the application (cf., mutatis mutandis, the above-mentioned Ringeisen judgment, pp. 36-38, par. 85-93).

78. Neither does the Court share the view that the Regional Court lacked jurisdiction. On 14 November 1975, Mr. Guzzardi had filed two distinct applications. The first was addressed to the President of the Milan Regional Court in his capacity of judge supervising the execution of sentences and requested him to cancel the compulsory residence order; the second invited the 2nd Chamber, a collegiate body, to replace Asinara by a district that satisfied certain conditions. Both applications were dealt with on 20 January 1976, in a single decision. The Regional Court first of all declared, in contrast to an Order by the Milan Court of Appeal (dated 27 October 1975), that the implementation of preventive measures was the responsibility of the police and not of the judge supervising the execution of sentences. It did not, however, confine itself to this remark and did not decline its own jurisdiction in the matter: exigencies of the protection of society, it added, justified the special form of isolation undergone by persons residing at Cala Reale. It was apparently for this reason of substance that the Regional Court

dismissed the applications (respin[s]e le istanze), whilst letting it be understood that the applicant's living conditions should be improved and directing that a copy of its decision be communicated to the Minister of the Interior and to the Sassari questore (see paragraph 20 above).

Besides, on 22 July 1976 the same Regional Court did order Mr. Guzzardi's transfer to Force, as requested by the Milan questore on the previous day (see paragraph 21 above).

79. Accordingly, the Government have not shown that the applicant ought to have directed his request for a change in his place of residence - or any complaint regarding his circumstances on Asinara - to the administrative rather than the judicial authorities, subject to having recourse to an ordinary or administrative court in the event of his representations being rejected. The Government were unable to cite any precedent in support of their submissions (see the verbatim record of the hearings of 29 January 1980 - the reply given to questions 2 and 4 put by the Court; cf. the above-mentioned Deweer judgment, p. 18, par. 32).

80. The Court notes furthermore that in many instances the laws of the Contracting States enable an individual, whether or not he relies on changed circumstances, to seek a cancellation or mitigation of a decision in force, even a judicial decision, without being defeated by the rule of res judicata. Were Article 26 (art. 26) to make mandatory the taking of such steps, which by their very nature may be repeated an indefinite number of times, it might very well erect a permanent barrier to bringing matters before the Commission; the Delegates rightly stressed this point.

81. The second branch also of the objection of non-exhaustion is therefore not substantiated.

C. The plea as to the disappearance of the object of the proceedings

82. Mr. Guzzardi left Cala Reale for Force on July 1976, before the Commission had drawn up its report (7 December 1978) or even accepted the application (1 March 1977), and since November 1977 Asinara has no longer been used as a place for compulsory residence (see paragraphs 21 and 43 above). In the Government's submission, the proceedings had therefore become devoid of object in that Mr. Guzzardi had achieved the aim he was pursuing through his transfer request of 14 November 1975 (see paragraph 20 above) and his petition to the Commission; a judgment by the Court would not be able to afford him any greater relief, especially since the conditions for the application of Article 50 (art. 50) were not fulfilled.

83. No issue as to estoppel arises here, as both before and after 1 March 1977 the Government had argued the point before the Commission. The latter gave no ruling thereon (see the admissibility decision, in the section entitled "Submissions of the parties", par. 1-A, V-1 in fine and VI-1 in fine; and the report, paragraph 67).

84. Without expressly requesting the Court to strike the case out of the list, the Government relied on the De Becker judgment of 27 March 1962 (Series A no. 4) where such a course was taken. It is thus necessary to have regard to Rule 47 of the Rules of Court – the provision governing the matter -, the present wording of which dates from 27 August 1974.

85. Paragraph 1 of Rule 47 is concerned with a circumstance not relevant to the instant case, namely discontinuance by a State (see the above-mentioned Deweer judgment, p. 19, par. 36).

Paragraph 2 provides, subject to paragraph 3, that when "informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter" the Court may strike out of the list "a case brought before [it] by the Commission". There being no agreement - whether formal or otherwise - between the Government and the applicant, it is not possible in the circumstances to talk of either a friendly settlement or an arrangement (ibid., p. 19, par. 37). It remains to be ascertained whether there exists any "other fact of a kind to provide a solution of the matter".

As was recalled by the Commission's Delegates at the hearings, proceedings under the Convention frequently serve a declaratory purpose. The Commission and, at the later stage, the Court have dealt with numerous alleged breaches - isolated or continuing - which related entirely to a period prior to the institution of proceedings (the Delcourt, Tyrer, Schiesser, Deweer cases, etc.) or had ceased whilst the proceedings were in progress (the Lawless, Wemhoff, Neumeister, Stögmüller, Matznetter, Ringeisen, De Wilde, Ooms and Versyp, Golder, Sunday Times cases, etc.); the Court nonetheless ruled on these alleged breaches.

The subject-matter of contention in the present case lasted from 8 February 1975 to 22 July 1976, and the Government deny that it occasioned any violation of the Convention. Moreover, when directing on 22 July 1976 that the applicant be sent to Force, the Milan Regional Court relied solely on the requirements of a proper administration of criminal justice and of security on the island (see paragraph 21 above); it made no mention of the applicant's complaints (cf. the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, p. 15, par. 36). There thus remains a conflict of opinion between the interested parties which a judgment by the Court will serve the purpose of resolving. In addition, Mr. Guzzardi claimed to be entitled to just satisfaction under Article 50 (art. 50) (see his written observations of 8 November 1976, p. 7; of 11 January 1980, p. 4; of 29 April 1980, p. 2); if the Court finds that the Convention's requirements have not been observed, it will have to decide this claim. The "matter" has therefore received no "solution".

86. The Court's judgments also serve "to elucidate, safeguard and develop the rules instituted by the Convention thereby contributing to the observance ... of the engagements undertaken" by the Contracting States (see the above-mentioned Ireland v. the United Kingdom judgment, p. 62,

154, in connection with a point not even contested by the respondent State). The present case does rise - notably with regard to Article 5 (art. 5) - issues of interpretation sufficiently important to call for decision. For this reason as well, the Court does not consider that the proceedings have become devoid of object.

II. THE MERITS

A. Preliminary observation

87. The Government stressed that public order in Italy was currently menaced by serious threats, coming essentially from political terrorism and the mafia.

88. Without losing sight of the general context of the case, the Court recalls that, in proceedings originating in an individual application, it has to confine its attention, as far as possible, to the issues raised by the concrete case before it. Accordingly, the Court's task is to review under the Convention not the 1956 and 1965 Acts as such - the principle underlying them was anyway not challenged by the applicant - but the manner in which those Acts were actually applied to Mr. Guzzardi, namely the conditions surrounding his enforced stay on Asinara from 8 February 1975 until 22 July 1976 (see the above-mentioned Deweer judgment, p. 21, par. 40, the Schiesser judgment of 4 December 1979, Series A no. 34, p. 14, par. 32, etc.; cf. the above-mentioned Ireland v. the United Kingdom judgment, p. 60, par. 149).

B. The alleged breach of Article 5 par. 1 (art. 5-1)

89. Article 5 par. 1 (art. 5-1) of the Convention reads:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

1. The existence of a deprivation of liberty in the present case

90. The Commission was of the view that on Asinara the applicant suffered a deprivation of liberty within the meaning of the Article (art. 5); it attached particular significance to the extremely small size of the area where he was confined, the almost permanent supervision to which he was subject, the all but complete impossibility for him to make social contacts and the length of his enforced stay at Cala Reale (see paragraphs 94-99 of the report).

91. The Government disputed the correctness of this analysis. They reasoned as follows. The factors listed above were not sufficient to render the situation of persons in compulsory residence on the island comparable to the situation of prisoners as laid down by Italian law; there existed a whole series of fundamental differences that the Commission had wrongly overlooked. The distinguishing characteristic of freedom was less the amount of space available than the manner in which it could be utilised; a good many districts in Italy and elsewhere were less than 2.5 sq. km. in area. The applicant was able to leave and return to his dwelling as he wished between the hours of 7 a.m. and 10 p.m. His wife and son lived with him for fourteen of the some sixteen months he spent on Asinara; the inviolability of his home and of the intimacy of his family life, two rights that the Convention guaranteed solely to free people, were respected. Even as regards his social relations, he was treated much more favourably than someone in penal detention: he was at liberty to meet, within the boundaries of Cala Reale, the members of the small community of free people - about two hundred individuals - living on the island, notably at Cala d'Oliva; to go to Sardinia or the mainland if so authorised; to correspond by letter or telegram without any control; to use the telephone, subject to notifying the carabiniere of the name and number of his correspondent. The supervision of which he complained constituted the raison d'être of the measure ordered in his respect. Finally, the fact that more than sixteen months elapsed before his transfer to Force was of itself of no relevance (see paragraph 7 of the memorial of December 1979 and the oral pleadings of 29 January 1980).

92. The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating the physical liberty of the person;

its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2) which has not been ratified by Italy. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see the Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, par. 58-59).

93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 (art. 5) depends.

94. As provided for under the 1956 Act (see paragraphs 48-49 above), special supervision accompanied by an order for compulsory residence in a specified district does not of itself come within the scope of Article 5 (art. 5). The Commission acknowledged this: it focused its attention on Mr. Guzzardi's "actual position" at Cala Reale (see paragraphs 5, 94, 99, etc. of the report) and pointed out that on 5 October 1977 it had declared inadmissible application no. 7960/77 lodged by the same individual with regard to his living conditions at Force (see paragraph 93 of the report and paragraph 56 above).

It does not follow that "deprivation of liberty" may never result from the manner of implementation of such a measure, and in the present case the manner of implementation is the sole issue that falls to be considered (see paragraph 88 above).

95. The Government's reasoning (see paragraph 91 above) is not without weight. It demonstrates very clearly the extent of the difference between the applicant's treatment on Asinara and classic detention in prison or strict arrest imposed on a serviceman (see the above-mentioned Engel and others judgment, p. 26, par. 63). Deprivation of liberty may, however, take numerous other forms. Their variety is being increased by developments in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States (see notably the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 15-16, par. 31).

Whilst the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier, it covered no more than a tiny fraction of an island to which access was difficult and about nine-tenths of which was occupied by a prison. Mr. Guzzardi was

housed in part of the hamlet of Cala Reale which consisted mainly of the buildings of a former medical establishment which were in a state of disrepair or even dilapidation, a carabinieri station, a school and a chapel. He lived there principally in the company of other persons subjected to the same measure and of policemen. The permanent population of Asinara resided almost entirely at Cala d'Oliva, which Mr. Guzzardi could not visit, and would appear to have made hardly any use of its right to go to Cala Reale. Consequently, there were few opportunities for social contacts available to the applicant other than with his near family, his fellow "residents" and the supervisory staff. Supervision was carried out strictly and on an almost constant basis. Thus, Mr. Guzzardi was not able to leave his dwelling between 10 p.m. and 7 a.m. without giving prior notification to the authorities in due time. He had to report to the authorities twice a day and inform them of the name and number of his correspondent whenever he wished to use the telephone. He needed the consent of the authorities for each of his trips to Sardinia or the mainland, trips which were rare and, understandably, made under the strict supervision of the carabinieri. He was liable to punishment by "arrest" if he failed to comply with any of his obligations. Finally, more than sixteen months elapsed between his arrival at Cala Reale and his departure for Force (see paragraphs 11, 12, 21, 23-42 and 51 above).

It is admittedly not possible to speak of "deprivation of liberty" on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5 (art. 5). In certain respects the treatment complained of resembles detention in an "open prison" or committal to a disciplinary unit (see the above-mentioned Engel and others judgment, p. 26, par. 64). On 20 January 1976, the Milan Regional Court had let it be understood that it did not regard that treatment as satisfactory. The administrative authorities also had some misgivings for they investigated the possibility of taking remedial measures; since they did not pursue the matter in the face of the expense involved and the time needed, the Ministry of the Interior decided in August 1977 to strike Asinara out of the list of places for compulsory residence (see paragraphs 20 and 43 above). Two telegrams from the Ministry to the Milan Chief of Police, dated 19 and 23 August 1977 and concerning one Alberti Gerlando, establish that this decision was not unconnected with application no 7367/76 even though Mr. Guzzardi had already left Cala Reale; the Government appended these telegrams to their memorial of May 1980. Several items of the documentary evidence filed thus show that the island was not suitable for a normal application of the 1956 and 1965 Acts. This was eventually recognised by the Italian State.

The Court considers on balance that the present case is to be regarded as one involving deprivation of liberty.

2. The compatibility of the deprivation of liberty found in the present case with paragraph 1 of Article 5 (art. 5-1)

96. It remains to be determined whether the situation was one of those, exhaustively listed in Article 5 par. 1 (art. 5-1) of the Convention (see the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 16, par. 37), in which the Contracting States reserve the right to arrest or detain individuals.

(a) Sub-paragraph (e) of Article 5 par. 1 (art. 5-1-e) (pleaded by the Government)

97. The Government relied, in the alternative, on sub-paragraph (e) of Article 5 par. 1 (art. 5-1-e), maintaining that mafiosi like the applicant were "vagrants" and "something else besides" (see paragraph 8 of the memorial of December 1979 and the oral pleadings of 29 January 1980). In paragraph 1 of section 1, the 1956 Act refers to "idlers and habitual vagrants who are fit for work", a phrase clarified by the Constitutional Court in its judgment no. 23 of 23 March 1964. In the Government's opinion, the imposition on a "vagrant" of preventive measures restricting, or even depriving him of, his liberty was justified, under the Convention and Italian law, not so much by his lack of a fixed abode as by the absence of any apparent occupational activity ("attività lavorativa palese") and, hence, the impossibility of identifying the source of his means of subsistence. The existence of this danger factor, the Government continued, was recognised by the Milan Regional Court in its decision of 30 January 1975 (see paragraph 12 above); in addition and above all, that Court took notice of the far more serious risk stemming from the applicant's links with mafia associations which engaged in kidnapping with a view to extracting ransoms. According to the Government, provision could not be made in an international instrument for the typically Italian phenomenon of the mafia, yet it would be an absurd conclusion to regard Article 5 par. 1 (e) (art. 5-1-e) as allowing vagrants but not presumed mafiosi to be deprived of their liberty.

98. The Court concurs with the Commission's contrary view (see paragraph 104 of the report and the oral pleadings of 29 January 1980).

There was no reference to paragraph 1 of section 1 of the 1956 Act in either the report of 23 November 1974 of the Milan Chief of Police or the State prosecutor's application of 14 January 1975 or the Regional Court's decision of 30 January 1975 (see paragraph 12 above) or the Court of Appeal's judgment of 12 March 1975. These authorities relied on the 1956 Act solely in combination with the 1965 Act which concerns individuals whom there are strong reasons to suspect of belonging to mafia-type associations (see paragraph 52 above). What is more, they in no way described or depicted Mr. Guzzardi as a vagrant. Admittedly, they noted, in passing, that there were serious doubts as to whether he really worked as a mason as he claimed, but they laid much greater stress on his record, his

illegal activities, his contacts with habitual criminals and still more his links with the mafia. The Chief of Police even said that no state of poverty, idleness or vagrancy furnished an explanation for this criminal conduct ("manifestazioni criminose che non hanno una causa giustificativa in uno stato di indigenza ovvero di ozio o di vagabondaggio").

Besides, the applicant's way of life at the time, as disclosed by the documentary evidence filed, is in no way consonant with the ordinary meaning of the word "vagrant", this being the meaning that has to be utilised for Convention purposes (see the above mentioned De Wilde, Ooms and Versyp judgment, p. 37, par. 68; cf., for the phrase "persons of unsound mind", the above-mentioned Winterwerp judgment, p. 17, par. 38). Although they denied it, the Government were in essence reasoning a fortiori; at the hearing of 9 February 1978 before the Commission, their Agent described Mr. Guzzardi as "a vagrant in the wide sense of the term", "a monied vagrant" (see p. 61 of the verbatim record: "vagabondo nel senso largo dell'espressione"; "vagabondo ricco"). However, the exceptions permitted by Article 5 par. 1 (art. 5-1) call for a narrow interpretation (see the above-mentioned Winterwerp judgment, p. 16, par. 37).

The Government's argument is open to a further objection. In addition to vagrants, sub-paragraph (e) (art. 5-1-e) refers to persons of unsound mind, alcoholics and drug addicts. The reason why the Convention allows the latter individuals, all of whom are socially maladjusted, to be deprived of their liberty is not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention. One cannot therefore deduce from the fact that Article 5 (art. 5) authorises the detention of vagrants that the same or even stronger reasons apply to anyone who may be regarded as still more dangerous.

(b) Other sub-paragraphs of Article 5 par. 1 (art. 5-1) (not pleaded by the Government)

99. The Court has also examined the matter under the other sub-paragraphs of Article 5 par. 1 (art. 5-1), which were not pleaded by the Government.

100. On a true analysis, the order for Mr. Guzzardi's compulsory residence was not a punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to crime (see paragraphs 9 and 12 above). According to the Commission, it must follow from this that, for the purpose of sub-paragraph (a) (art. 5-1-a), the measure did not constitute detention "after conviction by a competent court" (see paragraph 102 of the report).

In the Court's opinion, comparison of Article 5 par. 1 (a) (art. 5-1-a) with Articles 6 par. 2 and 7 par. 1 (art. 6-2, art. 7-1) shows that for Convention purposes there cannot be a "condamnation" (in the English text: "conviction") unless it has been established in accordance with the law that

there has been an offence - either criminal or, if appropriate, disciplinary (see the above-mentioned Engel and others judgment, p. 27, par. 68). Moreover, to use "conviction" for a preventive or security measure would be consonant neither with the principle of narrow interpretation to be observed in this area (see paragraph 98 above) nor with the fact that that word implies a finding of guilt.

The Court thus reaches the same conclusion as the Commission.

101. The deprivation of liberty complained of was not covered by sub-paragraph (b) (art. 5-1-b) either.

Admittedly, under the procedure laid down by the 1956 Act judicial decisions are a kind of sanction for failure to heed a prior warning (diffida), but the warning is not indispensable if, as in the present case, recourse is had to the 1965 Act; moreover, the warning is issued by the Chief of Police and so does not constitute an "order of a court" (see paragraphs 46 and 52 above).

As regards the words "to secure the fulfilment of any obligation prescribed by law", they concern only those cases where the law permits the detention of a person to compel him to fulfil a "specific and concrete" obligation which he has failed to satisfy (see the above-mentioned Engel and others judgment, p. 28, par. 69). However, as the Commission rightly emphasised, the 1956 and 1965 Acts impose general obligations (see paragraph 103 of the report).

102. Neither was the applicant in one of the situations dealt with by sub-paragraph (c) (art. 5-1-c).

It is true that there was "reasonable suspicion of [his] having committed an offence" and that he remained subject to charges throughout the time he spent on Asinara, but the decisions of the Regional Court (30 January 1975), the Court of Appeal (12 March 1975) and the Court of Cassation (6 October 1975) had no connection in law with the investigation being pursued in his respect: they were based on the 1956 and 1965 Acts which are applicable irrespective of whether or not there has been a charge and do not prescribe any subsequent appearance "before the competent legal authority" (see paragraphs 9, 11, 12, 17, 19, 21 and 45-52 above). Mr. Guzzardi’s detention on remand had terminated on 8 February 1975, on the expiry of the two years’ time-limit laid down by Article 272 (first paragraph, item 2) of the Code of Criminal Procedure (see paragraph 10 above). If - as the applicant insinuated but did not prove (see paragraph 73 in fine of the report) - the said Acts had been utilised in order to prolong the detention, it would not in that case have been "lawful"; whilst the French text of sub-paragraph (c), (art. 5-1-c) unlike that of sub-paragraphs (a), (b), (d), (e) and (f) (art. 5-1-a, art. 5-1-b, art. 5-1-d, art. 5-1-e, art. 5-1-f), does not contain the equivalent word "régulière", the English version does speak of "lawful" detention and the principle expressed by this adjective dominates the whole of Article 5 par. 1 (art. 5-1) (see the above-mentioned

Winterwerp judgment, pp. 17-18, par. 39-40). In addition, problems might have arisen in connection with paragraph 3 of Article 5 (art. 5-3), which has to be read together with paragraph 1 (c) (art. 5-1-c) (see the above-mentioned Ireland v. the United Kingdom judgment, p. 75, par. 199), and even with Article 18 (art. 18).

At first sight, a more likely hypothesis is that the measure complained of was taken because it was "reasonably considered necessary to prevent [Mr. Guzzardi's] committing an offence" or, at the outside, "fleeing after having done so". However, in that case as well a question would arise as to the measure's "lawfulness" since, solely on the basis of the 1956 and 1965 Acts, an order for compulsory residence as such, leaving aside the manner of its implementation, does not constitute deprivation of liberty (see paragraph 94 above). It would also be necessary to consider whether the requirements of paragraph 3 of Article 5 (art. 5-3) had been observed (see the Lawless judgment of 1 July 1961, Series A no. 3, pp. 51-53, par. 13-14). In any event, the phrase under examination is not adapted to a policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting States a means of preventing a concrete and specific offence. This can be seen both from the use of the singular ("an offence", "celle-ci" in the French text; see the Matznetter judgment of 10 November 1969, Series A no. 10, pp. 40 and 43, separate opinions of Mr. Balladore Pallieri and Mr. Zekia) and from the object of Article 5 (art. 5), namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see the above-mentioned Winterwerp judgment, p. 16, par. 37).

103. Finally, sub-paragraphs (d) and (f) of Article 5 par. 1 (art. 5-1-d, art. 5-1-f) are obviously not relevant.

(c) Conclusion

104. To sum up, from 8 February 1975 to 22 July 1976 the applicant was the victim of a breach of Article 5 par. 1 (art. 5-1).

C. The other alleged violations

1. Preliminary observation

105. The Commission's report stated that, as regards Articles 3, 6, 8 and 9 (art. 3, art. 6, art. 8, art. 9), there was no foundation for the applicant's allegations.

According to the Government, it followed that the Court's task was confined to determining the issues under Article 5 (art. 5) (see paragraphs 4

and 5.4 of the memorial of December 1979 and the oral pleadings of 29 January 1980).

106. This view is not in conformity with the Court's established case-law and practice.

In its request of 8 March 1979 bringing the case before the Court, the Commission stated that its "object" was "in particular" - but not exclusively - to "invite the Court" to determine whether there had been deprivation of liberty and, if so, whether it "corresponded to one of the cases contemplated by Article 5 par. 1 (art. 5-1)". As the Principal Delegate made clear at the hearings, it was nonetheless the Commission's intention to submit to the Court the whole of the "case" originating in "application no. 7367/76".

The compass of the "case" is delimited not by the report but by the admissibility decision. Subject to Article 29 (art. 29) and, possibly, a partial striking out of the list, there is no room under the Convention for a subsequent narrowing of the scope of the dispute which may lead to a judicial decision. Within the framework so traced, the Court may take cognisance of all questions of fact or of law arising in the course of the proceedings instituted before it; the only matter falling outside its jurisdiction is the examination of complaints held by the Commission to be inadmissible, in the present instance the complaint formulated by Mr. Guzzardi at the outset under Article 2 of Protocol No. 1 (P1-2) (see the above-mentioned Winterwerp judgment, pp. 27-28, par. 71-72; the above-mentioned Schiesser judgment, p. 17, par. 41; paragraphs 53 and 55 above).

If the same applied to claims rejected in the Commission's opinion on the merits (Article 31) (art. 31) - in this case the claims concerning Article 3, 6, 8 and 9 (art. 3, art. 6, art. 8, art. 9) - the system established by Articles 44 (art. 44) et seq. would unduly favour respondent States to the detriment of applicant States or individuals. The Court has on occasion found violations in circumstances where the report either perceived none or expressed no opinion (see the above-mentioned Engel and others judgment, p. 37, par. 89; the above-mentioned Airey judgment, p. 17, par. 33; the above-mentioned Winterwerp judgment, pp. 27-29, par. 69-76). In addition, a good many cases in which the Commission concluded that there had been no violation at all have already been referred to the Court (the Lawless, Delcourt, National Union of Belgian, Police, Swedish Engine Drivers' Union, Schmidt and Dahlström, Kjeldsen, Busk Madsen and Pedersen, Handyside, Klass and others and Schiesser cases).

2. Article 3 (art. 3)

107. Mr. Guzzardi alleged that on Asinara he had to endure living conditions that were at least degrading, if not inhuman. The Commission did not agree.

Certain aspects of the situation complained of were undoubtedly unpleasant or even irksome (see paragraphs 23-42 above); however, having regard to all the circumstances, it did not attain the level of severity above which treatment falls within the scope of Article 3 (art. 3) (see the above-mentioned Ireland v. the United Kingdom judgment, p. 65, par. 162).

3. Article 6 (art. 6)

108. The Commission gave a negative reply to the question whether the 1975 proceedings that terminated in the Court of Cassation should, as Mr. Guzzardi argued, have been attended by the guarantees contained in Article 6 (art. 6).

In the Court's opinion, those proceedings did not involve the "determination ... of a criminal charge", even when these words are construed within the meaning of the Convention (see the above-mentioned Engel and others judgment, p. 34, par. 81). Whether the right to liberty, which was at stake (see paragraph 62 above), is to be qualified as a "civil right" is a matter of controversy (see the Golder judgment of 21 February 1975, Series A no. 18, p. 16, par. 33; the above-mentioned Ireland v. the United Kingdom judgment, p. 89, par. 235); in any event, the evidence does not reveal any infringement of paragraph 1 of Article 6 (art. 6-1).

4. Article 8 (art. 8)

109. The applicant further relied on his right to respect for his family life. However, quite apart from other relations by blood or by marriage, his wife and son lived with him for fourteen of the some sixteen months he spent at Cala Reale. The reason why they had to leave the island in October 1975 - rejoining the applicant there as soon as the beginning of December - was that he had not applied for renewal of their residence permits which had expired on 18 August 1975 (see paragraph 35 above). The reasons given by Mr. Guzzardi to explain his failure so to apply (see paragraph 72 of the report) disclose nothing contrary to Article 8 (art. 8) which could be attributed to the Italian State and, in the circumstances, the necessity for such permits proves to be compatible with that provision. More generally, the Court concurs with the remarks in paragraph 87 of the Commission's report.

5. Article 9 (art. 9)

110. Finally, Mr. Guzzardi complained of an infringement of his right to manifest his religion in worship. However, he did not claim either that he had requested that services be held in the chapel at Cala Reale or that he had sought authorisation to go to the church at Cala d'Oliva (see paragraphs 36-37 above and paragraph 89 of the report); accordingly, his complaint does not bear examination.

6. Conclusion

111. The conclusions thus reached by the Court on Articles 3, 6, 8 and 9 (art. 3, art. 6, art. 8, art. 9) dispense it from reopening the hearings in order to provide the Government with an opportunity of amplifying the arguments they had advanced on these issues before the Commission (see paragraphs 74 and 76-78 of the report).

D. On the application of Article 50 (art. 50)

112. At the hearings of 29 January 1980, the Delegates had reserved their position on the application of Article 50 (art. 50) since the applicant, who was not present, had not been able to supply them with the requisite details. On the Delegates' instructions, the Secretary to the Commission forwarded to the Registrar on 12 May two notes from Mr. Catalano, dated 11 January and 29 April. They indicated that Mr. Catalano claimed on his client's behalf "compensation for the prejudice suffered", "of an amount to be determined equitably". The Government, for their part, formulated certain observations on this point (see paragraph 6.3 of the memorial of December 1979 and the oral pleadings of 29 January 1980).

113. The Court considers the question to be ready for decision and recalls that the rule of exhaustion of domestic remedies is not applicable in the context of Article 50 (art. 50) (see the De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A no. 14, pp. 7-9, par. 15-16). Furthermore, Italian "internal law ... allows only partial reparation to be made for the consequences" of the violation found in the present case : complete reparation (restitutio in integrum) is prevented by the intrinsic nature of a wrong that consists of a deprivation of liberty contrary to Article 5 par. 1 (art. 5-1) (see, mutatis mutandis, the last-mentioned judgment, pp. 9-10, par. 20, and the König judgment of 10 March 1980, Series A no. 36, pp. 14-15, par. 15).

114. On the other hand, as is borne out by the adjective "just" and the phrase "if necessary", the Court enjoys a certain discretion in the exercise of the power conferred by Article 50 (art. 50).

Mr. Guzzardi has furnished no particulars and no prima facie evidence of the nature and scope of his alleged damage; in effect, he leaves the matter to the Court's discretion. Above all, his enforced stay at Cala Reale was markedly different from detention of the classic kind and involved far less serious hardships. What is more, in July 1976 - even before the Commission had accepted the application - the Milan Regional Court brought that stay to an and by ordering Mr. Guzzardi's transfer to the mainland; in August 1977, that is without awaiting the adoption of the report (7 December 1978), the Ministry of the Interior deleted Asinara from the list of districts used for compulsory residence, a decision which was apparently influenced by the

proceedings pending in Strasbourg (see paragraph 95 above). On the other hand, Mr. Guzzardi had to bear certain costs in connection with the submission of his complaints to the Italian courts and to the Commission, especially as he did not have the benefit of free legal aid before the latter.

Having regard to all the circumstances of the case, the Court affords the applicant under Article 50 (art. 50) a sum of one million (1,000,000) Lire.

FOR THESE REASONS, THE COURT

1. Rejects by sixteen votes to two the plea based by the Government on the ex officio examination of the case under Articles 5 and 6 (art. 5, art. 6);

2. Rejects by ten votes to eight the Government's objection that domestic remedies have not been exhausted;

3. Rejects by fifteen votes to three the Government's plea as to the disappearance of the object of the proceedings;

4. Holds by eleven votes to seven that there was in the instant case deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention;

5. Holds unanimously that the said deprivation of liberty was not justified under sub-paragraph (e) of Article 5 par. 1 (art. 5-1-e) or under sub-paragraph (b) (art. 5-1-b);

6. Holds by sixteen votes to two that the said deprivation of liberty was also not justified under sub-paragraph (a) (art. 5-1-a);

7. Holds by twelve votes to six that the said deprivation of liberty was not justified under sub-paragraph (c) (art. 5-1-c) either;

8. Holds, to sum up, by ten votes to eight, that from 8 February 1975 to 22 July 1976 the applicant was the victim of a breach of Article 5 par. 1 (art. 5-1);

9. Holds unanimously that in the instant case there was no breach of Articles 3, 6 or 9 (art. 3, art. 6, art. 9);

10. Holds by seventeen votes to one that there was also no breach of Article 8 (art. 8);

11. Holds by twelve votes to six that the Italian Republic is to pay to the applicant under Article 50 (art. 50) a sum of one million (1,000,000) Lire.

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

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The following separate opinions are 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:

- dissenting opinion of Mr. BALLADORE PALLIERI;

- dissenting opinion of Mr. ZEKIA;

- dissenting opinion of Mr. CREMONA;

- dissenting opinion of Sir Gerald FITZMAURICE;

- dissenting opinion of Mrs. BINDSCHEDLER-ROBERT;

- joint dissenting opinion of Mr. TEITGEN and Mr. GARCIA DE ENTERRIA;

- partly dissenting opinion of Mr. MATSCHER;

- dissenting opinion of Mr. PINHEIRO FARINHA.

G.W.
M.-A.E.

DISSENTING OPINION OF THE PRESIDENT, Mr. BALLADORE PALLIERI

(Translation)

I share the Court's opinion that "as provided for under the 1956 Act ..., special supervision accompanied by an order for compulsory residence in a specified district does not of itself come within the scope" of our Article 5 (art. 5) (see paragraph 94 of the judgment). I also agree with the Court's view that, for the purposes of exhaustion of domestic remedies, it is not necessary for the applicant to have pleaded before the national courts the Article of our Convention or perhaps even the corresponding domestic rules, such as the first and second paragraphs of Article 13 of the Italian Constitution which read:

> "Personal liberty shall be inviolable.
>
> No form of personal detention, inspection or search and no other restriction on personal liberty shall be permitted unless it is effected pursuant to a reasoned direction of the judicial authorities and save in the cases and forms prescribed by law."

However, in my view, it should at least be required that the applicant has complained of conduct on the part of the State that is contrary to the content of these Articles. In addition, once more in my opinion and contrary to that of the Court, account can be taken in this connection solely of the requests which the applicant addressed to the national courts. It is only by comparing the content of those requests with the content of the Articles in question that one can decide whether the applicant's intention was to complain of an infringement of the freedoms provided for in those Articles. To this end, it is not possible to rely, as the Court did, on mere sentences spoken or written in the course of the domestic proceedings.

If Mr. Guzzardi's request to the national courts are examined, it can be seen at once that they sought first and foremost revocation of the compulsory residence order: that was his principal request, even before the Court of Appeal. They thus bore on an issue that has no connection with the issue facing our Court which, as we have said previously, is not concerned with the lawfulness in abstracto of the Italian Act of 1956.

It is true that the applicant also complained, as regards his actual treatment on Asinara, of his inability to obtain on the island medical treatment required by his state of health and to live together with his family without hindrance. Here again, however, this is a matter of other freedoms and other rights which have no connection with Article 5 (art. 5) of the Convention, this being the only Article in respect of which the question of exhaustion of domestic remedies arises. Finally, it is also true that the applicant asserted that he was physically and mentally a prisoner on Asinara and was vegetating there in conditions worse than those of his detention on remand and that he described Cala Reale as a "veritable concentration camp". However, we can find an explanation of what he meant by these remarks in his appeal to the Court of Cassation: in that appeal he relied not on the first and second paragraphs of Article 13 of the Italian Constitution, which relate to the protection of individual liberty against any measure

involving detention, but on the fourth paragraph which stipulates: "The infliction of any physical or mental violence on persons subjected to any form of restriction on their liberty shall be a punishable offence."

Besides, confirmation that the applicant never had it in mind to complain of limitation of his liberty, within the meaning of the first two paragraphs of Article 13 of the Italian Constitution and Article 5 (art. 5) of our Convention, is to be found in the fact that he did not rely on Article 5 (art. 5) in his application to the Commission and that a complaint by him to that effect had to be entirely constructed by the Commission of its own motion.

Even if one were to accept the possibility of the new criterion of interpretation referred to by the Court, namely the "flexible" interpretation, I do not see how it could be applied to that fundamental right of the State which is safeguarded by prior exhaustion of domestic remedies. In any event, the interpretation should have been effected on the basis of objective data and not of a mere hunt for intentions.

Finally, account should be taken of the fact that when Mr. Guzzardi made two further applications to the Milan Regional Court on 14 November 1975 - applications that did actually concern the issue raised before us - he obtained a transfer elsewhere and the camp on Asinara was eventually closed. Had the matter been pleaded in the proper terms, the domestic remedy would thus have resulted in a finding in favour of the applicant and there would have been no call to institute proceedings before the international institutions.

DISSENTING OPINION OF JUDGE ZEKIA

The main issue involved in this case is whether the applicant Mr. Guzzardi was deprived of his liberty within the meaning of Article 5 § 1 (art. 5-1) of the Convention by becoming a compulsory resident on the island of Asinara and by having to put up with the restrictions imposed relating to his living conditions, social contacts, etc., during his stay on the island from 8 February 1975 to 22 July 1976.

The Court directed itself correctly in framing the question to be answered.

I have entertained some doubt as to whether the restrictions imposed on the applicant during his stay on Asinara, after taking into account all relevant aspects of his living conditions in a small area of a small island, amounted to deprivation of liberty envisaged under Article 5 § 1 (art. 5-1).

The restrictions imposed were based on the Italian Acts of 1956 and 1965.

It is the way those Acts were applied which matters in this case. We have to find whether the restrictions in question had the cumulative effect of depriving the person subject thereto of his liberty. That issue had to be decided on an overall assessment of the relevant facts available. This was a borderline case. A violation on the part of a Contracting State should be established as clearly as possible without admitting reasonable doubts. What is more, it is part of the established jurisprudence of this Court that a Contracting State is entitled to a margin of appreciation when the question whether it has committed a violation of the Convention is under consideration.

I agree with the finding that there was no breach of Articles 3, 6 and 9 (art. 3, art. 6, art. 9).

I disagree, however, with the view expressed as regards Article 8 (art. 8).

I am inclined to find that there was a breach of Article 8 (art. 8) which deals with rights to respect for private and family life, home and correspondence.

The main target and object of the proceedings in this case was Article 5 § 1 (art. 5-1). Article 8 (art. 8) might be regarded as an incidental or side issue because the right to respect for private life was not directly involved. I agree, but it is difficult to assume that the kind of restrictions imposed on liberty in this case did not in one way or another affect the right to respect for private life. I consider that such restrictions inevitably affect a person’s rights under Article 8 (art. 8) of the Convention.

Even if we regard the restrictions imposed on Mr. Guzzardi as not depriving him of his liberty, they may constitute encroachment on his rights under Article 8 (art. 8).

In that case we have to examine whether the restrictions were necessary for the prevention of crime as provided by paragraph 2 of the Article (art. 8-2) in question.

If we find the curtailment of his rights under Article 8 (art. 8) to be necessary, the next question which arises is whether the steps taken and the conditions imposed did or did not exceed the bounds of necessity. Anyone reading Article 8 together with Article 17 (art. 17+8), which refers to limitations on the rights set forth in the Convention, would entertain no doubt as to the correctness of the above approach.

In the circumstances of this case, and taking into account all its aspects and the nature and extent of the restrictions imposed, I find that such restrictions exceeded the bounds of necessity and that the Government have committed a breach of Article 8 (art. 8).

DISSENTING OPINION OF JUDGE CREMONA

With respect, I find myself in disagreement with the majority of the Court on the question of the exhaustion of domestic remedies in terms of Article 26 (art. 26) of the Convention.

This question can only be decided on the basis of the object and "cause" of the complaint or complaints before the domestic court or courts, and in deciding it I agree that express mention of the Article of the Convention alleged to have been violated is not indispensable so long as conduct contrary to it is actually set forth and complained of, which is after all what is really meant by raising the issue of a violation "in substance".

But in the present case it emerges that, with reference to his situation on Asinara, the applicant was essentially not complaining of conduct on the part of the State amounting to deprivation of liberty contrary even in substance to Article 5 (art. 5) to the Convention (which I consider to be the only relevant Article of the Convention in this case) or the comparable provisions (Article 13, paragraphs 1 and 2) of the Italian Constitution, but of certain conditions of his compulsory residence there, which might conceivably fall under other provisions of the Convention.

Rather than questioning the lawfulness of his detention on Asinara, the applicant questioned the lawfulness of the application of the Italian Act of 1956 to that particular locality and, as already stated, the conditions in which he was forced to live there. In this connection and without prejudice to what has been stated above concerning the non-indispensability of an express mention ut sic of the Article of the Convention alleged to have been violated, it is interesting to note that the Convention was in fact mentioned by other than that falling under Article 5 (art. 5) of the Convention, and the same applies also to the comparable provisions of the Italian Constitution.

Lastly, there is hardly any need to recall that in international law the local remedies rule is in fact based on the principle that the respondent State must in the first place have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the complainant. In the present case, in the light of the above and to the extent aforesaid, that is to say, with reference to Article 5 (art. 5) of the Convention, the applicant did not afford the Italian State such an opportunity, with the consequence that in this respect the whole purpose of the rule was frustrated.

DISSENTING OPINION OF JUDGE SIR GERALD FITZMAURICE

1. I have not found it possible to accept the majority view in this case, to the effect that the Italian Government is to be held responsible for a breach of the European Convention on Human Rights, and liable to any damages in the sum of one million Italian lire - even though this can be regarded as constituting little more than a token amount[1].

2. I will not recapitulate facts and arguments that can be found fully set out in the judgment of the Court, and I shall ignore all the issues in the case except one. That issue - the essential one (if I leave out of account the question of whether the applicant [Guzzardi] did or did not exhaust his possible legal remedies in the Italian courts)[2] - is whether his preventive detention on the island of Asinara - (or more accurately his compulsory residence under special supervision there) - amounted to a deprivation of liberty within the meaning of Article 5 § 1 (art. 5-1) of the Convention, or whether it did not, rather, consist simply of a restriction on "liberty of movement and freedom to choose ... residence" within the meaning of Article 2 § 1 of Protocol No. 4 (P4-2-1) to the Convention, - the point being that this Protocol (P4), like the other Protocols to the Convention, needs separate ratification in order to be binding, and Italy has not ratified it. If, therefore, the applicant was not deprived of his liberty as such - i.e. stricto sensu - but only restricted in his freedom of movement and choice of residence, there can have been no breach of the Convention, - and what might, otherwise, have involved a breach of Protocol No. 4 (P4) cannot do so because this Protocol (P4) is not binding upon Italy.

3. At this point a preliminary question arises which, though not in itself decisive for the actual main issue, is closely related to it. Certainly before the Italian courts, the applicant does not appear to have challenged the legality of his preventive detention as such, but merely to have complained of the conditions of his banishment on Asinara - (that the area within which he had to stay was too small, that there was no available work for him to do, that he could not have his family with him, that he could not attend a place of religious worship, etc., etc.)[3]. In the proceedings before the European Commission of Human Rights (to which the case of course went in the first place), it seems uncertain whether the applicant took his complaint much further, or whether he ever definitely invoked Article 5 (art. 5) of the Convention or alleged any breach of it as such. Certainly his original complaints were exclusively based on Articles 3, 8 and 9 (art. 3, art. 8, art.

[1] A little under 500 pounds sterling at present rates.

[2] The Convention cannot of course validly be invoked unless the domestic remedies available under the local law have been exhausted.

[3] A number of these complaints were in fact lacking in any real substance, or were remedied in the course of the applicant's stay on the island.

9) - (inhuman or degrading treatment, absence of respect for private and family life, and absence of freedom to manifest his religion in worship, etc.). There seem to be some grounds for thinking that it was largely the Commission, acting proprio motu, which decided that his complaint came under or involved Article 5 (art. 5) (deprivation of liberty), and which proceeded accordingly. This is significant because, since the Commission was unable to find any contravention of Articles 3, 8 and 9, (art. 3, art. 8, art. 9), Article 5 (art. 5) was left as the only one under which a breach of the Convention could be held to have occurred.

4. In view of the uncertainty however, I do not wish to criticize as such the course taken by the Commission, but simply to register a general point of principle which I do not think is adequately dealt with in the relevant paragraphs of the Court's judgment (nos. 58-63). The ultra petita (or as it is sometimes called, the ex, or extra, petita) rule precludes that an international tribunal or equivalent body should deal with matters that are not the subject of the complaint brought before it, and still more that it should give a decision on those matters against the defendant party in the case. If it does this, proprio motu, it is acting ultra vires. It would be perfectly proper for the Commission, if satisfied that a certain complaint has both definitely been made and was justified, to hold that a breach of a given Article of the Convention was involved, even though the complainant, while making the complaint, did not invoke that particular Article or allege a breach of it. It would be quite another thing, however, for an international tribunal or equivalent body to hold a sort of roving commission over the facts of a case in order to see whether, if established, some of them could be regarded as entailing an illegality or breach of treaty, - and then in due course to find that they could and did, although they were not matters (or not the actual matters) of which the plaintiff had complained or alleged any illegality or breach. This would be tantamount to saying to the plaintiff "We do not think you have a good case in regard to the particular matters you have complained of, but we perceive other matters (or aspects of the case) which you did not complain of, but of which in our view you justifiably could have complained, and so we shall be happy to find in your favour in those respects." Of course it would never be put so crudely, but it might well in practice amount to that, however carefully wrapped up. The distinction involved can admittedly be a fine one, but is none the less real and important.

* * *

5. Assuming for the purposes of the argument that there was what amounted to, or implied, a complaint of deprivation of liberty, the question then is whether what occurred was truly of that kind, or was essentially in the nature of a restriction on freedom of movement and choice of residence.

Some of the arguments for and against are summarized in paragraphs 90 and 91 of the judgment, and although there is much more to be said, I see no point in embarking on an elaborate analysis of what must in the long run remain a matter of appreciation and opinion, - namely whether the condition of the applicant's existence on Asinara were sufficiently stringent to amount to a sort of imprisonment, even though a mild one as imprisonments go, or whether, on the other hand, there was no more than a banishment accompanied by measures of confinement to house and grounds but, subject to that, without any restriction on movement within an area of at least a half-mile radius, or more according to some accounts. This could be argued about endlessly and either view is reasonably maintainable - for the issue is essentially one of degree. What, to me, decisively tilts the balance is the fact of Article 2 § 1 of Protocol No. 4 (P4-2-1) to the Convention (see paragraph 2 above) – to which paragraph 92 of the Court's judgment refers, but only ephemerally and without bringing out the real point.

6. Article 2 of this Protocol (P4-2) states in terms that

> "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

Put negatively, this prohibits restrictions on movement or place of residence, and from it certain deductions relevant to the present case can be drawn:

(a) The existence of this provision shows either that those who originally framed the Convention on Human Rights did not contemplate that its Article 5 (art. 5) should go beyond preventing actual deprivation of liberty, or extend to mere restrictions on freedom of movement or choice of residence; - or else that the Governments of the Council of Europe did not see Article 5 (art. 5) as covering measures of "deprivation of liberty" where the basic character of those measures consisted primarily of restrictions on movement and place of residence, - or they would not have considered it necessary to draw up a separate Protocol about that. The resulting picture is that Article 5 (art. 5) of the Convention guaranteed the individual against illegitimate[4] imprisonment, or confinement so close as to amount to the same thing - in sum against deprivation of liberty stricto sensu - but it afforded no guarantee against restrictions (on movement or place of residence) falling short of that. The latter was effected only by the Protocol, so that in those countries (of which Italy is one) that have not ratified it, such restrictions are not prohibited.

(b) It follows that if Article 5 (art. 5) of the Convention is not to impinge on ground intended to be covered by Article 2 of the Protocol (P4-2), and is

[4] I use this term to exclude cases covered by sub-paragraphs (a) to (f) of paragraph 1 of Article 5 (art. 5-1-a, art. 5-1-b, art. 5-1-c, art. 5-1-d, art. 5-1-e, art. 5-1-f), whereby acts that would otherwise constitute a deprivation of liberty, contrary to that Article (art. 5), become legitimated so far as the Convention is concerned.

not to do double duty with the latter, it (Article 5) (art. 5) must be interpreted strictly and regarded as limited to cases of actual imprisonment or to detention close enough and strict enough to approximate to a virtually complete deprivation of liberty. This was certainly not the situation in regard to the applicant in the present case.

(c) If Article 5 (art. 5) of the Convention were to be interpreted so widely as to include instances of what was basically restriction on freedom of movement or choice of residence, then not only would Article 2 of the Protocol (P4-2) be rendered otiose, but an indirect means would be afforded of making Governments subject to the obligations of the latter, despite the fact that they had not ratified the Protocol. This could not have been intended, but it is a possibility that can only be avoided by a strict interpretation of Article 5 (art. 5) that confines it to its proper sphere.

7. It is of course obvious that all deprivation of liberty, especially if it takes the form of actual imprisonment or other close confinement, must imply restricting freedom of movement and choice of residence. It is inherently in its character to do so. But the reverse is not true. Mere exile or banishment, for instance, does not in itself involve deprivation of liberty, - or at any rate it is something that, per se, falls clearly on that side of the line which is occupied by the concept of restriction on movement and place of residence. Equally clearly, such restriction may be accompanied by conditions that turn it into a deprivation of liberty, as the Court has found to be the fact in the present case. Between the one concept and the other there may be many different degrees of circumstances and situation, so that it is always a question of where to draw the line which, as mentioned earlier, must in the last resort be a question of personal appreciation. Deducing, as I have done, from the existence of Article 2 of the Protocol (P4-2) that the concept of deprivation of liberty under Article 5 (art. 5) of the Convention must be interpreted fairly strictly, I come to the conclusion that the conditions of the applicant's residence on Asinara do not bring his case within that concept, or at any rate that the Italian Government must be given the benefit of any doubt that may exist, as exist it does.

8. Basically what happened to the applicant was not that he was imprisoned or confined, but that he was banished to an island on which he was assigned a place of residence (an ordinary house) and restricted to an area sufficiently big for him to be able to live a normal life except that he could not leave it without permission and was (and for that purpose had to be) under surveillance. To me all this has very much more the flavour of Article 2 of the Protocol (P4-2) than of Article 5 (art. 5) of the Convention, even if a residue of doubt may remain, - but in that event, is it right to condemn a Government for breach of the Convention in the presence of a very reasonable doubt as to whether any has occurred?

9. There is another test that can be applied which, though not in itself conclusive, is highly relevant, and that is to ask what were the intentions of

the Italian authorities in sending the applicant to Asinara? As I understand it, they could validly under Italian law have arrested and kept him in prison on suspicion of the offences in the nature of terrorism for which (subsequent to his preventive relegation to Asinara, and afterwards to Force) he was eventually condemned to 18 years' imprisonment. The irony is that, had the authorities dealt with him in that way, no contravention of the Convention would have been involved because the matter would have been covered by one of the sub-paragraphs to Article 5 § 1 (art. 5-1) to which reference has been made in footnote 4 above. The Italian Government is therefore being condemned by the judgment of the Court for treating the applicant in a much more lenient way than the altogether harsher one they could legitimately have adopted without any infraction of the Convention. There is a manifest injustice here that could easily have been avoided. This situation also constitutes one of the many absurdities of the case - (and see further paragraph 12 below).

10. What the Italian authorities clearly intended to do, and thought they were doing, was to put the applicant out of circulation so to speak, by sending him to reside in a place where, and under conditions which, would ensure that he could not do any serious harm, - but not otherwise to prevent him living a normal life, which was certainly not the normal life of a prisoner as is quite clear from the recorded facts. The case is therefore evidently one of obligatory residence in a certain place, accompanied by restrictions on any movement outside the general area of that place. The Court could easily have so held, and the judgment does not, in my opinion, furnish any convincing explanation of why it did not do so. But until the Court modifies the general trend of its present policy in the interpretation of the Convention, this sort of thing will doubtless continue, - and one of the consequences will be that, provided they keep within the letter of the Convention, governments will have no particular inducement to conform to its spirit - since, as this case shows, doing so can be penalized as much as not so doing.

11. In this connexion, and in general, I consider that the Court failed to give any adequate weight - if weight at all - to the fact that the applicant was a terrorist and mafioso. Naturally these factors would not justify treating him in a manner clearly, or at any rate substantially, contrary to the Convention. But where there are grounds for genuine doubt whether any contravention has in fact occurred, such factors, though in no way conclusive per se, may legitimately be taken into account (I do not put it any higher than that) in deciding how to set about resolving the doubt - again I put it no higher. In the present case, however, the Court completely ignored the plea of the Italian Government to the effect that public order in Italy at this time was seriously menaced by threats coming essentially from political terrorism and the mafia, and that the authorities were under strong pressure to combat these evils by draconian measures - pressure which they had so

far resisted, as was exemplified in the case of Guzzardi by the relative leniency of his original treatment as described in paragraph 8 above. This very much sharpens the moral of the conclusion suggested in the last few lines of paragraph 10.

12. The process of simply ignoring the whole context in which a case occurs is bound to lead to injustices and absurdities, one instance of which was given supra in paragraph 9. The present case in fact bristles with absurdities. Another instance of this is that, as pointed out by the Italian Government, whereas by reason of sub-paragraph (e) of Article 5 § 1 (art. 5-1-e) of the Convention, a vagrant can, merely by reason of his being such, be placed under detention without any contravention of the Convention, a known terrorist cannot even have his movements restricted under the conditions applied to Guzzardi without such a breach resulting – if the judgment of the Court is correct. To be sure, modern terrorism was an evil not specifically present to the minds of those who drafted the Convention, or they would doubtless have provided for it. Again, it is admittedly for governments and none other to remedy this defect: the Court cannot do so by deeming a terrorist to be a vagrant even though he is in fact much worse than a vagrant (who may well be a harmless individual, which a terrorist never is). But this does not alter the fact that, according to the order of things resulting from the Court's judgment, a terrorist may be much better off than a vagrant. (He may even be paid a million lire!). All these absurdities could have been avoided by an attitude of greater realism against the background of the case, leading to the conclusion – for which there was ample warrant on the facts - that the case was basically one of restriction on movement and place of residence and not one of deprivation of liberty under Article 5 (art. 5) of the Convention, interpreted, as it has to be, in the light of the existence of Article 2 of Protocol No. 4 (P4-2).

* * *

13. It is therefore with regret (especially as this is the last occasion on which I shall be delivering an opinion in my present capacity) that I feel obliged to regard the judgment of the Court as involving a serious and avoidable miscarriage of justice - not the less so because a Government not an individual was affected, and though I know that none was intended. This outcome is, I think, compounded by the monetary award made to the applicant, which carries matters into that region of the absurd to which the English expression of "cloud-cuckoo land" applies. In my view, the fact that a decision should have been given in his favour in such a debatable case and on the basis of an, at most, technical breach of the Convention, lacking in any real substance - this constituted in itself a more than sufficient satisfaction that did not require any embroidery.

DISSENTING OPINION OF JUDGE BINDSCHEDLER-ROBERT

(Translation)

The Court considered that it had to reject the preliminary objection based on non-exhaustion of domestic remedies and conclude, as regards the merits of the case, that there had been a violation of Article 5 (art. 5) of the Convention. I regret that I disagree with the majority of my colleagues on these two points. I shall endeavour to set out as briefly as possible the reasons for my dissent.

1. As regards the exhaustion of domestic remedies, I should like to take the liberty of making a preliminary observation to which I attach importance. The judgment applies to the proceedings on appeal and in cassation, in other words to the domestic proceedings, the principle that the rule of exhaustion must be interpreted "with a certain degree of flexibility and without excessive regard for matters of form" (§ 72). This principle is certainly correct if one applies it to the international rule itself when one is in the process of determining its scope. On the other hand, to apply it to domestic law in order to determine and interpret the conditions laid down there under in the matter of remedies amounts to endowing the international court with jurisdiction to interpret that law and, in the final analysis, to base itself on a domestic law that does not exist. Reference back to domestic law by the rule of exhaustion of domestic remedies can only mean a reference back to that law as interpreted by domestic case-law [see, on this point, Jacobs, The European Convention on Human Rights, Oxford, 1975, p. 240]. I thus conclude that there was no call to enquire whether "in the Court's view" the pleas advanced by the applicant on appeal and in cassation were equivalent to an allegation of a breach of the right to individual liberty. What should have been done, in my view, was to determine whether, in the light of Italian legislation and case-law, Mr. Guzzardi had exercised such remedies and adduced such arguments as were capable of leading to the reversal of the decision he was challenging. I would add that the case-law of the Court and the Commission relied on by the judgment in support of its extensive interpretation definitely does not corroborate that interpretation; indeed, in each of the cases mentioned the principle that the rule of exhaustion of domestic remedies should be flexibly interpreted concerns the scope of the international obligation and not the interpretation of domestic law.

Having said that and turning now to the question whether or not remedies were exhausted in this particular case, I cannot do better than to refer to the dissenting opinion of the President, Mr. Balladore Pallieri, the national judge, with which I entirely agree.

2. As regards the merits of the case, I am not convinced that, as the judgment has it, "the difference between deprivation of and restriction upon liberty is ... merely one of degree or intensity, and not one of nature or substance". Of course, I have no difficulty in accepting that the restrictions on liberty of movement to which Mr. Guzzardi was subjected were particularly severe. However, I do not detect in those restrictions the features which would make it possible to speak of "deprivation" of liberty. Mr. Guzzardi was not confined within the perimeter of a prison and his living conditions - albeit far from agreeable - were in striking contrast with those that obtain in prison: thus, he could spend his time as he chose, he was not obliged to work, and, for the greater part of his stay on Asinara, he was able to live together with his wife and his son - and even for a while with his parents-in-law. One could add to this list. I am therefore inclined to the view that the compulsory residence order imposed on Mr. Guzzardi did not constitute deprivation of liberty.

3. However, even if I assumed for the sake of argument that there had been deprivation of liberty, I would not hold that there had been a violation of Article 5 (art. 5) of the Convention, since this measure would have been justified under sub-paragraph (c) of paragraph 1 of that Article (art. 5-1-c). It is particularly in this connection that I find it imperative to take account of the "general context of the case"; the judgment refers to this aspect of the matter without, however, drawing there from any real consequences, whereas its importance is rightly emphasised by Judge Matscher in his dissenting opinion.

In making provision for compulsory residence the Italian Acts of 1956 and 1965 are designed to separate from their habitual milieu certain individuals, such as members of the mafia, who, although this cannot actually be proved, obviously live off criminal activities, the object being to prevent them from continuing such activities. There can be no doubt that these purposes are consonant with the aims recognised as legitimate by Article 5 § 1 (c) (art. 5-1-c); this is especially true of the second reason mentioned in that provision: "when it is reasonably considered necessary to prevent his committing an offence". The judgment rejects this possibility on the ground that the sub-paragraph (art. 5-1-c), which speaks of "an" offence, is not adapted to a "policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime" (§ 102). This narrow interpretation is not without paradoxical results: it means that one is entitled to imprison persons presumed to have committed the occasional crime but that one is forbidden to imprison persons belonging to criminal associations, whose particularly dangerous character resides precisely in the fact that it is extremely difficult to obtain evidence of their criminal activities which is sufficient in law and who can be prevented only by certain restrictive measures from pursuing those activities. The wording of Article 5 § 1 (c)

(art. 5-1-c) probably denotes that this problem was not fully thought through; it does not, however, prevent a democratic State from taking the requisite protective measures when organised crime threatens to destroy its legal institutions. The very terminology employed in the sub-paragraph (art. 5-1-c), which clearly refers to activities that are manifestly criminal and not to activities covered by the rights and freedoms guaranteed by the Convention, renders groundless the fear that a less restrictive interpretation would favour the institution of a police state.

The judgment also throws doubt on the lawfulness under sub-paragraph (c) (art. 5-1-c) of the measure in question, on the ground that, leaving aside the manner of its implementation, an order for compulsory residence as such does not constitute deprivation of liberty. As a general statement, this last observation is certainly correct. However, it must not be forgotten that Italian case-law has recognised that an order for compulsory residence in part of a district, such as Asinara, was in conformity with the law. That the Court should now classify the measure as "deprivation of liberty" in no way alters its "lawfulness" under Italian law.

Finally, the requirements of Article 5 § 3 (art. 5-3) were satisfied in the present case. In fact, as soon as he had been released from detention on remand, Mr. Guzzardi was brought, under arrest, before a court and that court issued the compulsory residence order; there was thus no reason for requiring that he be brought before a court another time. What Mr. Guzzardi might have claimed - always on the assumption that he had been deprived of his liberty - was compliance with Article 5 § 4 (art. 5-4), a provision which anyway was not alleged to have been violated.

I therefore conclude from the above that in any event Italy has not violated Article 5 (art. 5), but that the Court should have refrained from ruling on the merits of the case.

JOINT DISSENTING OPINION OF JUDGES TEITGEN AND GARCIA DE ENTERRIA

(Translation)

I. For the reasons set out by the President, Mr. Balladore Pallieri, in his dissenting opinion with which we agree entirely, we consider that Guzzardi's application was inadmissible on account of failure to exhaust domestic remedies.

II. On the violation of Article 5 (art. 5) of the Convention

The Court's judgment states: "The difference between deprivation of and restriction upon liberty is ... merely one of degree or intensity, and not one of nature or substance. ... the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion."

Taking this statement of principle as our starting-point, as does the judgment, we consider for our part that on Asinara Guzzardi was not "deprived of his liberty" within the meaning of Article 5 (art. 5) of the Convention.

Although he could move around within no more than a limited sector of the island, he was able to live there with his family - as indeed he did for fourteen months out of sixteen -, to talk freely with his companions, to telephone outside the island subject to police supervision and even to go to Sardinia and the mainland. Assessing this situation as an issue of fact, we think that it did not fall within the ambit of the prohibition contained in Article 5 (art. 5) of the Convention (but it was probably a borderline case).

III. In the alternative

As the Court acknowledges in its judgment, it was not called upon in the present case to review the Italian Acts of 1956 and 1965 under the Convention but solely to determine the concrete issue before it. This means that it had to enquire whether the living conditions to which, by virtue of those Italian Acts, Guzzardi was subjected on the island of Asinara amounted, in the context of the case, to a violation of the Convention. However, in assessing the facts, the judgment leaves aside one of the concrete aspects of this issue.

Guzzardi's situation on Asinara was not that of a person who is simply suspected by the police of having committed an offence or of being about to do so.

In 1973, he had been lawfully charged by the judicial authorities with conspiracy and being an accomplice to the abduction of a businessman who had been freed only after payment of a substantial ransom; after being charged, he had been detained in prison on remand.

His detention on remand was authorised by sub-paragraph (c) of paragraph 1 of Article 5 (art. 5-1-c) of the Convention and, according to

paragraph 3 of the same Article (art. 5-3), could have continued throughout the "reasonable time" required for the conclusion of the proceedings instituted against him, that is to say for probably more than two years in view of the serious difficulties encountered in the case of proceedings directed against the mafia.

Nevertheless, after two years and pursuant not to the Convention but to Article 272 of the Italian Code of Criminal Procedure, the judicial authorities had been obliged to terminate Guzzardi's imprisonment; at that point, however, they had subjected him to an order for compulsory residence on Asinara, pursuant to the 1956 and 1965 Acts.

Of course, whilst he was on the island he remained charged with a crime for which he was, in fact, subsequently sentenced to eighteen years' imprisonment.

Accordingly, the concrete question which the Court had to determine was the following:

Have the judicial authorities, which could have held Guzzardi in a remand prison for more than two years without violating the Convention, violated it by substituting for his imprisonment his compulsory residence on Asinara in the living conditions to which he was subjected there?

It seems to us that a negative reply was called for. In fact, the judgment does not expressly state the contrary, but it asserts, by reference to the system of the "double barrier", that the factual conditions of detention on Asinara violated the provisions of the Italian Acts of 1956 and 1965 and thereby indirectly violated the Convention, since Article 5 (art. 5) authorises detention only if in the first place it is lawful under domestic law.

However, if it was a question of interpreting, and of reviewing the application of, the Italian legislation, could the Milan Court of Appeal's judgment of 12 March 1975 and the Court of Cassation's judgment of 6 October 1975 be disregarded? These were judgments on appeals lodged by Guzzardi and in turn they held that the living conditions to which he was subjected on Asinara did not constitute a violation of Italian law. It appears to us that it was not appropriate to set against these judgments nothing more than bare assertions.

In the absence of more persuasive reasons, we consider, on the assumption that Guzzardi was actually "deprived" of his liberty on Asinara, that such deprivation of liberty should have been regarded as authorised, in the present case, by sub-paragraph (c) of paragraph 1 of Article 5 (art. 5-1-c) of the Convention.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

1. On two points, concerning the merits of the present case, I am unable to share the opinion of the majority of the Court. I have a principal and also a secondary reason for arriving at a final conclusion that there has not been a violation of Article 5 § 1 (art. 5-1) of the Convention.

2. In its observations preceding the examination of the merits of the case and after a brief reference to the background circumstances, the Court observes that it must avoid "losing sight of the general context of the case" (see paragraph 88 of the judgment). I agree entirely with this statement and it has also guided me in my approach to the application of Article 5 (art. 5) of the Convention to the instant case.

The nature of the Convention system is such that in the first place it is left to the Governments of the Contracting States to take the measures they deem appropriate for the accomplishment of their tasks. Amongst those tasks, the protection of the fundamental rights of the general public plays a pre-eminent role. At the same time, it is for the Convention institutions to review those measures in order to determine whether or not they are in conformity with the requirements of the Convention. In the course of this review, the provisions of the Convention should not be interpreted in a vacuum; the measures complained of must always be put back into the general setting to which they belong.

The principle that account must be taken of the general context of the case when examining an application concerning the alleged violation of a fundamental right does not in any way mean that - save for the possibility referred to in Article 15 (art. 15) of the Convention - exceptional circumstances allow the Contracting States to take measures that are not compatible with the requirements of the Convention. On the other hand, I do deduce from this principle that certain measures which, from the viewpoint of the Convention, might be seen as open to considerable criticism in a so-called normal situation are less open to criticism and can be considered as being in conformity with the Convention when there is a crisis over-shadowing public order and notably when rights of others, which are also guaranteed by the Convention, are being threatened by the activities of certain dangerous and anti-social elements. Such a crisis was obtaining in Italy at the time when the present case began.

Furthermore, the aim pursued by the authorities of a respondent State in adopting a particular measure can also not be left entirely out of account when that measure is being reviewed under a given provision of the Convention. It should be stressed that in the present case it was a question of a democratic State struggling to protect the fundamental rights of the

general public and that the measures complained of were fully consistent with this aim.

After all, it was similar reasoning that led the Court to conclude that the Convention had not been violated in the Klass case (see the judgment of 6 September 1978, Series A no. 28, especially paragraphs 48, 59 and 60, pp. 23 and 27-28).

3. In reviewing the measure applied to Mr. Guzzardi, the judgment concludes that, taken as a whole, it constituted not just a restriction but a deprivation of liberty within the meaning of Article 5 § 1 (art. 5-1) of the Convention. I do not agree.

It is obvious to me that the concept of "deprivation of liberty" is not a matter for formal and precise criteria; quite the contrary – it is a concept of some complexity, having a core which cannot be the subject of argument but which is surrounded by a "grey zone" where it is extremely difficult to draw the line between "deprivation of liberty" within the meaning of Article 5 § 1 (art. 5-1) and mere restrictions on liberty that do not come within the ambit of that provision.

In fact, the Convention system has itself introduced (in Article 2 of Protocol No. 4) (P4-2), alongside the concept of "deprivation of liberty", the concept of "restrictions on liberty of movement" and, as the Court has rightly observed (see paragraph 93 of the present judgment), the difference between the two is merely one of degree or intensity, and not one of nature or substance. In addition, the bounds that Article 5 (art. 5) requires the Contracting States not to exceed in their judicial, disciplinary and police systems may vary from one situation to another (see the Engel judgment of 8 June 1976, Series A no. 22, p. 25, § 59).

Accordingly, only a careful analysis of the various factors which together made up Mr. Guzzardi's situation on Asinara can provide an answer to the question whether or not that situation fell within the concept of "deprivation of liberty" within the meaning of Article 5 § 1 (art. 5-1). Since this is a matter of opinion, different views are clearly tenable.

Personally, I do not attach quite the same weight as the majority of the Court to these various factors (they are set out in paragraph 95 of the present judgment and it thus seems to me superfluous to repeat them here), taken individually and together. In addition, I take the "general context of the case" into account. The whole leads me to the conclusion that the measure applied to Mr. Guzzardi amounted to a serious restriction on his liberty, which was motivated by perfectly understandable reasons and was also in conformity with Italian law, but that it did not attain the level and intensity that would cause it necessarily to be classified as a deprivation of liberty within the meaning of Article 5 § 1 (art. 5-1) of the Convention.

4. As a purely secondary point, the measure taken against Mr. Guzzardi could be regarded as covered by sub-paragraph (c) of Article 5 § 1 (art. 5-1-c). The Court reviewed the position under this sub-paragraph (art. 5-1-c),

but came to a negative conclusion. Here again, I do not share the views of the majority, for the following reasons:

On account of the rule in Article 272, first paragraph, of the Italian Code of Criminal Procedure, Mr. Guzzardi's detention on remand within the meaning of that Code had had to terminate on 8 February 1975. However, he remained subject to criminal charges throughout his enforced stay on Asinara.

As the Court itself pointed out, it is true that there was "reasonable suspicion of [Mr. Guzzardi's] having committed an offence"; it would also be difficult to deny that it was "reasonably considered necessary to prevent his ... fleeing after having done so". The conditions which constitute, probably under the laws of all the States, the "classic" reasons for detention on remand were thus satisfied in Mr. Guzzardi's case. Besides, it seems that the Italian authorities as well saw his situation in this light: they selected Asinara as the place for compulsory residence because that island was particularly well suited for separating the applicant from his apparently Mafioso milieu (see the Milan Court of Appeal's judgment of 12 March 1975 and the Court of Cassation's judgment of 6 October 1975: paragraphs 17 and 19 of the present judgment); the authorities were extremely cautious about granting authorisations for visits to Sardinia or the mainland since they feared that he might make use of such occasions in order to escape (see paragraph 14 of the present judgment). In short, these were reasons which underlie detention on remand.

It remains to determine whether the order for Mr. Guzzardi's compulsory residence, seen from this viewpoint, was "lawful" under Italian law, within the meaning of Article 5 § 1 (c) (art. 5-1-c) of the Convention. Here, doubts could arise as to the compatibility of the second reason (danger of flight) with the aim of the Italian Acts of 1956 and 1965 with which, as a matter of form, the order for Mr. Guzzardi's residence on Asinara had to comply. On the other hand, the first reason (separation from other supposedly criminal elements) was perfectly consonant with the aim of these Acts.

In addition, according to the settled case-law of the Italian courts, an order for compulsory residence could under certain conditions, which were satisfied in the present case, refer even to a given locality within a district and, under the same conditions, the "curtailment" of, and the "undoubted limitations" on, the "various rights" which compulsory residence on Asinara entailed for Mr. Guzzardi, were also in conformity with Italian law (see paragraph 19 of the present judgment).

The conditions laid down in paragraphs 2 and 3 of Article 5 (art. 5-2, art. 5-3) of the Convention were also satisfied in this instance: it must be presumed - and there was no allegation to the contrary - that, when Mr. Guzzardi had been arrested and charged on 8 February 1973, he had been informed of the reasons for his arrest and of the charges against him and that he had been brought promptly before the investigating judge, the transfer to

Asinara on 8 February 1975 being in substance but a prolongation of the applicant's detention on remand.

I conclude from the above that Mr. Guzzardi's compulsory residence on Asinara from 8 February 1975 to 22 July 1976, even if one considered that it should be classified as a deprivation of liberty within the meaning of Article 5 § 1 (art. 5-1) of the Convention, was covered by sub-paragraph (c) of that Article (art. 5-1-c).

DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. Mr. Guzzardi obtained satisfaction, before the Commission adopted its report, by being transferred to the mainland.

The Ministry of the Interior decided in August 1977 to strike the island of Asinara out of the list of places for compulsory residence.

The Commission's report is dated 7 December 1978.

I consider that the case should be struck out of the list (disappearance of the object of the proceedings).

2. In my view, Mr. Guzzardi was not deprived of his liberty; his liberty was simply restricted (on this point I agree with paragraphs 2 and 3 of Judge Matscher's opinion).

3. There being no violation, the applicant should not be afforded any sum under Article 50 (art. 50).