OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 6 February 1997 *

I — Introduction

1. In this case, the Court has been asked to rule whether the European Convention on Human Rights constitutes in its entirety an integral part of Community law and whether the Court itself therefore has jurisdiction to interpret all the provisions of the Convention in the context of a reference for a preliminary ruling pursuant to Article 177 of the EC Treaty.

II — Facts

2. The proceedings before the national court are concerned with a claim for compensation for the damage which Dr Kremzow considers he suffered on account of his unlawful detention by the Austrian authorities, since a judgment given by the Court of Human Rights on 21 September 1993 found that Dr Kremzow's right to defend himself within the meaning of Article 6(1) and (3)(c) of the European Convention on Human Rights ('the Convention') had been infringed. According to that judgment, the violation was committed by the Republic of Austria in so far as it failed to allow Dr Kremzow, who was charged with murder and found guilty at first instance, to defend himself personally on appeal.

3. According to the appellant, he is entitled to compensation under Article 5(5) of the Convention because he was unlawfully deprived of his liberty. The national court points out in this connection that on 3 April 1995 the Oberster Gerichtshof (Supreme Court) dismissed an application made by Dr Kremzow for a reduction in the sentence following the aforementioned judgment of the Strasbourg court.

At the stage reached in the litigation pending before the national court, it is therefore necessary to determine the effects of the provisions of the European Convention on Human Rights on Austrian procedural and administrative rules. The national court considers this to be necessary in order to determine whether the appellant in the main proceedings is entitled to compensation in this specific case.

4. In order to resolve that problem, the Oberster Gerichtshof therefore thought fit

* Original language: Italian.

to refer the following questions to the Court for a preliminary ruling:

'A. Are all or at least the substantive-law provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") — including the provisions of Articles 5, 6 and 53 of the Convention which are relevant to the proceedings before the Oberster Gerichtshof — part of Community law (Article 164 of the EEC Treaty), with the result that the Court of Justice of the European Communities may give a preliminary ruling on their interpretation pursuant to the first paragraph of Article 177 of the EEC Treaty?

B. The following further questions are referred to the Court of Justice of the European Communities for a preliminary ruling only in the event that Question A is answered in the affirmative — at least as regards Articles 5 and 6 of the Convention:

1. Are national courts bound by judgments of the European Court of Human Rights finding violations of the Convention at least in so far as they may not take the view that the conduct of State institutions to which the finding of a violation relates was in accordance with the Convention?

2. Are claims for compensation for damage based on Article 5(5) of the Convention precluded where the damage is derived from a decision of the Oberster Gerichtshof?

3. Is detention within the meaning of Article 5(1)(a) of the Convention contrary to the Convention *ex tunc* where the European Court of Human Rights has found that, in the criminal proceedings, the national court was in breach of the procedural safeguards enshrined in Article 6 of the Convention?

4. Is the legal entity against which proceedings have been brought for State liability entitled to plead that the punishment would have been on no different a scale if the violation of Article 6 of the Convention found by the European Court of Human Rights had not occurred, although the Austrian law of criminal procedure — to date — does not provide in such cases for proceedings for the revision of a judgment or other amending proceedings by means of which the procedural error could have been remedied?

5. Does the burden of proving the causal connection between the violation of Article 6 of the Convention and the deprivation of the plaintiff's

liberty fall on the plaintiff or does the burden of proof in respect of this defect fall on the defendant legal entity?'

III — Discussion of the dispute

(a) Admissibility of the observations submitted by the intervener

5. The intervener in the main proceedings, Dr Weh, has submitted in person — that is to say, without being represented by a lawyer — written and oral observations in the course of the preliminary-ruling proceedings before the Court. It also appears from the order for reference that Dr Weh, who is a lawyer by profession, represented himself and put his case in person, as intervener, during the proceedings before the national court.

Very recently, the Court has held, however, that '[I]t follows from the wording of the third paragraph of Article 17 of the Statute, and in particular from the use of the term "represented", that a "party" within the meaning of that provision, whatever his standing, is not authorized to act on his own before the Court of Justice, but must use the services of a third party, who must be authorized to practise before a court of a Member State or of a State which is a party to the EEA Agreement. Other provisions of the Statute and of the Rules of Procedure (see the first paragraph of Article 19 and Article 29 of the Statute, and Article 37(1), Article 38(3) and Article 58 of the Rules of Procedure) confirm that a party and his counsel cannot be one and the same person. Moreover, as the Court observed in *Vaupel* v *Court of Justice* ..., [1] neither the Statute nor the Rules of Procedure of the Court of Justice provide any derogation from or exception to that rule.' [2]

To my mind, however, the solution adopted in *Lopes* cannot be transposed as it stands to the present case. The particular features of the *Lopes* case lead me to consider that the Court's conclusion in that case is limited to a more restricted context. Dr Weh's procedural situation differs from that under consideration in the order in *Lopes*. In fact, I consider that, for procedural purposes, parties to preliminary-ruling proceedings should in any event be treated differently than parties to other types of proceedings before the Court.

Moreover, in the past the Court has taken the view that it should defer to the procedural position which the parties have in the

1 — Order of the Court of 15 March 1984 in Case 131/83 *Vaupel* v *Court of Justice*, not published in the ECR.

2 — Order of 5 December 1996 in Case C-174/96 P *Lopes* v *Court of Justice* [1996] ECR I-6401.

main proceedings: a principle enshrined in Article 104(2) of the Rules of Procedure. For instance, the Court has interpreted that rule as meaning that a party to the main proceedings may appear in the proceedings personally and produce, without his being legally represented, his own pleadings and make written and oral observations where that possibility is allowed in the national proceedings. [3]

I therefore consider that the exception provided for in Article 104 of the Rules of Procedure enables Dr Weh to submit observations to the Court, even though they were produced without his being assisted and represented by a lawyer appointed for that purpose. This conclusion is based on the fact that the intervener was allowed to put his case in person in the main proceedings.

(b) The merits

6. Question A referred by the Oberster Gerichtshof can be answered unequivocally and certainly by reference to the case-law of the Court. It is therefore appropriate to refer thereto, albeit briefly.

The Court has held on a number of occasions [4] that, 'as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect .... It follows that, as the Court held in its judgment in Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.' [5]

According to the principle so declared, the Community Court may interpret the Convention. However, that interpretative task, as the Court has stated on a number of occasions, [6] comes into play and may be carried

3 — Case 39/75 *Coenen* [1975] ECR 1547 and Case 238/83 *Caisse d'Allocations Familiales* v *Meade* [1984] ECR 2631.

4 — Case C-260/89 *ERT* [1991] ECR I-2925 and Case C-159/90 *Grogan* [1991] ECR I-4685.

5 — Judgment in *ERT*, cited above.

6 — Joined Cases 60/84 and 61/84 *Cinéthèque* [1985] ECR 2605, Case 12/86 *Demirel* [1996] ECR I-3719, *ERT*, cited above, and Case C-144/95 *Maurin* [1996] ECR I-2909.

out only in regard to provisions connected with Community law, of which the Court is the supreme interpreter according to the Treaty.

The infringement of the rights of the defence found by the Court of Human Rights and the damages claim at issue in this case are concerned with the conduct of criminal proceedings which have no point of contact with Community law. In point of fact, the proceedings arose because of a ruling that a crime had been committed under Austrian law as a result of conduct which has nothing to do with Community provisions or with national provisions in any way related with Community law. For that reason, I consider that the Court has no jurisdiction to consider the questions referred by the national court.

7. The appellant's argument that the deprivation of his personal liberty constitutes a serious impediment to his exercising the rights and freedoms conferred on Community citizens by the European Union's legal order is of no assistance to him either, in my view. On the basis of that reasoning, the appellant maintains that the Court should declare that it has jurisdiction to entertain the case and hence to interpret the Convention. That argument cannot be accepted because it confuses the criminal sanction imposed by national law on persons committing the offence in question with the provision providing for the crime, which, as I have already observed, has no features connecting it with Community law. Moreover, were the appellant's reasoning to be followed, all sanctions consisting of terms of imprisonment or detention laid down by the legislation of a Member State would automatically fall within the field of application of Community law in so far as they deprived the accused or the sentenced person of his personal liberty, on the ground that they precluded, or at any event limited, enjoyment of the rights and facilities which Community law confers on the person concerned.

I cannot see what foundation that argument can have. The Community legal order is not all-embracing and hence, generally, [7] it does not interfere with the criminal law of the Member States. Moreover, if the appellant's argument were taken into account, criminal sanctions consisting of imprisonment and detention would in any event constitute deprivation of the fundamental freedoms enshrined in the Constitutions of the Member States, even before they could be considered contrary to the exercise of the Community freedoms. However, such sanctions are compatible with constitutionally guaranteed freedoms in so far as they perform, in the general interest of the community, a specific function of protecting the values violated by the unlawful acts in question.

7 — Case 203/80 *Casati* [1981] ECR 2595.

IV — Conclusion

8. In the light of the foregoing, I therefore propose that the Court should answer the question referred for a preliminary ruling by the Oberster Gerichtshof, Vienna, in the following terms:

The Court of Justice has no jurisdiction to review the compatibility with the European Convention of Human Rights of a Member State's domestic provisions where those provisions fall outside the field of application of Community law.