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

COURT (PLENARY)

CASE OF OBSERVER AND GUARDIAN v. THE UNITED KINGDOM

(Application no. 13585/88)

JUDGMENT

STRASBOURG

26 November 1991

In the case of the Observer and Guardian v. the United Kingdom*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court* and composed of the following judges:

Mr R. Ryssdal, *President*,
Mr J. Cremona,
Mr Thór Vilhjálmsson,
Mrs D. Bindschedler-Robert,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr J. Pinheiro Farinha,
Mr L.-E. Pettiti,
Mr B. Walsh,
Sir Vincent Evans,
Mr R. Macdonald,
Mr C. Russo,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr J. De Meyer,
Mr N. Valticos,
Mr S. K. Martens,
Mrs E. Palm,
Mr I. Foighel,
Mr R. Pekkanen,
Mr A.N. Loizou,
Mr J. M. Morenilla,
Mr F. Bigi,
Mr A. Baka,

and also of Mr M.-A. Eissen, *Registrar*, and Mr H. Petzold, *Deputy Registrar*,

Having deliberated in private on 28 June and 24 October 1991,

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

The case is numbered 51/1990/242/313. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

* The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

PROCEDURE

1. The case was referred to the Court on 12 October 1990 by the European Commission of Human Rights ("the Commission") and on 23 November 1990 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 13585/88) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 27 January 1988 by two companies incorporated in England, The Observer Ltd and Guardian Newspapers Ltd, and five British citizens, Mr Donald Trelford, Mr David Leigh, Mr Paul Lashmar, Mr Peter Preston and Mr Richard Norton-Taylor.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application, to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) and also, in the case of the request, Articles 13 and 14 (art. 13, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. On 15 October 1990 the President of the Court decided, under Rule 21 para. 6 and in the interest of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the Sunday Times (no. 2) case[*].

The Chamber thus constituted included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 October 1990 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr F. Matscher, Mr R. Macdonald, Mr C. Russo, Mr R. Bernhardt and Mr R. Pekkanen (Article 43 in fine of the Convention[*] and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representatives of the applicants on

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Case no. 50/1990/241/312.

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

the need for a written procedure (Rule 37 para. 1) and the date of the opening of the oral proceedings (Rule 38).

In accordance with the President's orders and directions, the registry received, on 15 April 1991, the applicants' memorial and, on 18 April, the Government's. By letter of 31 May 1991, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 21 March 1991 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

6. On 25 March 1991 the President granted, under Rule 37 para. 2, leave to "Article 19" (the International Centre against Censorship) to submit written comments on a specific issue arising in the case. He directed that the comments should be filed by 15 May 1991; they were, in fact, received on that date.

7. As directed by the President, the hearing, devoted to the present and the Sunday Times (no.2) cases, took place in public in the Human Rights Building, Strasbourg, on 25 June 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mrs A. GLOVER, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,
Mr N. BRATZA, Q.C.,
Mr P. HAVERS, Barrister-at-Law, *Counsel*,
Mrs S. EVANS, Home Office,
Mr D. BRUMMELL, Treasury Solicitor, *Advisers*;

- for the Commission

Mr E. BUSUTTIL, *Delegate*;

- for the applicants in the present case

Mr D. BROWNE, Q.C., *Counsel*,
Mrs J. MCDERMOTT, Solicitor;

- for the applicants in the Sunday Times (no. 2) case

Mr A. LESTER, Q.C.,
Mr D. PANNICK, Barrister-at-Law, *Counsel*,
Mr M. KRAMER,
Ms K. RIMELL, Solicitors,
Mr A. WHITAKER, Legal Manager,
Times Newspapers Ltd, *Adviser*.

The Court heard addresses by Mr Bratza for the Government, by Mr Busuttil for the Commission and by Mr Browne and Mr Lester for the applicants, as well as replies to questions put by the President of the Court.

8. The applicants filed a number of documents on the occasion of the hearing.

On 23 July, 5 August and 2 September 1991, respectively, the registry received supplementary particulars of the applicants' claim under Article 50 (art. 50) of the Convention, the observations of the Government on that claim and the applicants' reply to those observations. By letter of 17 September, the Deputy Secretary to the Commission informed the Registrar that the Delegate left this matter to the Court's discretion.

AS TO THE FACTS

I. INTRODUCTION

A. The applicants

9. The applicants in this case (who are hereinafter together referred to as "O.G.") are (a) The Observer Ltd, the proprietors and publishers of the United Kingdom national Sunday newspaper Observer, Mr Donald Trelford, its editor, and Mr David Leigh and Mr Paul Lashmar, two of its reporters; and (b) Guardian Newspapers Ltd, the proprietors and publishers of the United Kingdom national daily newspaper The Guardian, Mr Peter Preston, its editor, and Mr Richard Norton-Taylor, one of its reporters. They complain of interlocutory injunctions imposed by the English courts on the publication of details of the book Spycatcher and information obtained from its author, Mr Peter Wright.

B. Interlocutory injunctions

10. In litigation where the plaintiff seeks a permanent injunction against the defendant, the English courts have a discretion to grant the plaintiff an "interlocutory injunction" (a temporary restriction pending the determination of the dispute at the substantive trial) which is designed to protect his position in the interim. In that event the plaintiff will normally be required to give an undertaking to pay damages to the defendant should the latter succeed at the trial.

The principles on which such injunctions will be granted - to which reference was made in the proceedings in the present case - were set out in American Cyanamid Co. v. Ethicon Ltd ([1975] Appeal Cases 396) and may be summarised as follows.

(a) It is not for the court at the interlocutory stage to seek to determine disputed issues of fact or to decide difficult questions of law which call for detailed argument and mature consideration.

(b) Unless the material before the court at that stage fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction, the court should consider, in the light of the particular circumstances of the case, whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

(c) If damages would be an adequate remedy for the plaintiff if he were to succeed at the trial, no interlocutory injunction should normally be granted. If, on the other hand, damages would not provide an adequate remedy for the plaintiff but would adequately compensate the defendant under the plaintiff's undertaking if the defendant were to succeed at the trial, there would be no reason to refuse an interlocutory injunction on this ground.

(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience arises.

(e) Where other factors appear evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

C. Spycatcher

11. Mr Peter Wright was employed by the British Government as a senior member of the British Security Service (MI5) from 1955 to 1976, when he resigned. Subsequently, without any authority from his former employers, he wrote his memoirs, entitled Spycatcher, and made arrangements for their publication in Australia, where he was then living. The book dealt with the operational organisation, methods and personnel of MI5 and also included an account of alleged illegal activities by the Security Service. He asserted therein, inter alia, that MI5 conducted unlawful activities calculated to undermine the 1974-1979 Labour Government, burgled and "bugged" the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad, and that Sir Roger Hollis, who led MI5 during the latter part of Mr Wright's employment, was a Soviet agent.

Mr Wright had previously sought, unsuccessfully, to persuade the British Government to institute an independent inquiry into these allegations. In 1987 such an inquiry was also sought by, amongst others, a number of prominent members of the 1974-1979 Labour Government, but in vain.

12. Part of the material in Spycatcher had already been published in a number of books about the Security Service written by Mr Chapman Pincher. Moreover, in July 1984 Mr Wright had given a lengthy interview to Granada Television (an independent television company operating in the United Kingdom) about the work of the service and the programme was shown again in December 1986. Other books and another television programme on the workings and secrets of the service were produced at

about the same time, but little Government action was taken against the authors or the media.

D. Institution of proceedings in Australia

13. In September 1985 the Attorney General of England and Wales ("the Attorney General") instituted, on behalf of the United Kingdom Government, proceedings in the Equity Division of the Supreme Court of New South Wales, Australia, to restrain publication of Spycatcher and of any information therein derived from Mr Wright's work for the Security Service. The claim was based not on official secrecy but on the ground that the disclosure of such information by Mr Wright would constitute a breach of, notably, his duty of confidentiality under the terms of his employment. On 17 September he and his publishers, Heinemann Publishers Australia Pty Ltd, gave undertakings, by which they abided, not to publish pending the hearing of the Government's claim for an injunction.

Throughout the Australian proceedings the Government objected to the book as such; they declined to indicate which passages they objected to as being detrimental to national security.

II. THE INTERLOCUTORY PROCEEDINGS IN ENGLAND AND EVENTS OCCURRING WHILST THEY WERE IN PROGRESS

A. The Observer and Guardian articles and the ensuing injunctions

14. Whilst the Australian proceedings were still pending, there appeared, on Sunday 22 and Monday 23 June 1986 respectively, short articles on inside pages of the Observer and The Guardian reporting on the forthcoming hearing in Australia and giving details of some of the contents of the manuscript of Spycatcher. These two newspapers had for some time been conducting a campaign for an independent investigation into the workings of the Security Service. The details given included the following allegations of improper, criminal and unconstitutional conduct on the part of MI5 officers:

(a) MI5 "bugged" all diplomatic conferences at Lancaster House in London throughout the 1950's and 1960's, as well as the Zimbabwe independence negotiations in 1979;

(b) MI5 "bugged" diplomats from France, Germany, Greece and Indonesia, as well as Mr Kruschev's hotel suite during his visit to Britain in the 1950's, and was guilty of routine burglary and "bugging" (including the entering of Soviet consulates abroad);

(c) MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis;

(d) MI5 plotted against Harold Wilson during his premiership from 1974 to 1976;

(e) MI5 (contrary to its guidelines) diverted its resources to investigate left-wing political groups in Britain.

The Observer and Guardian articles, which were written by Mr Leigh and Mr Lashmar and by Mr Norton-Taylor respectively, were based on investigations by these journalists from confidential sources and not on generally available international press releases or similar material. However, much of the actual information in the articles had already been published elsewhere (see paragraph 12 above). The English courts subsequently inferred that, on the balance of probabilities, the journalists' sources must have come from the offices of the publishers of Spycatcher or the solicitors acting for them and the author (see the judgment of 21 December 1987 of Mr Justice Scott; paragraph 40 below).

15. The Attorney General instituted proceedings for breach of confidence in the Chancery Division of the High Court of Justice of England and Wales against O.G., seeking permanent injunctions restraining them from making any publication of Spycatcher material. He based his claim on the principle that the information in the memoirs was confidential and that a third party coming into possession of information knowing that it originated from a breach of confidence owed the same duty to the original confider as that owed by the original confidant. It was accepted that an award of damages would have been an insufficient and inappropriate remedy for the Attorney General and that only an injunction would serve his purpose.

16. The evidential basis for the Attorney General's claim was two affidavits sworn by Sir Robert Armstrong, Secretary to the British Cabinet, in the Australian proceedings on 9 and 27 September 1985. He had stated therein, inter alia, that the publication of any narrative based on information available to Mr Wright as a member of the Security Service would cause unquantifiable damage, both to the service itself and to its officers and other persons identified, by reason of the disclosures involved. It would also undermine the confidence that friendly countries and other organisations and persons had in the Security Service and create a risk of other employees or former employees of that service seeking to publish similar information.

17. On 27 June 1986 ex parte interim injunctions were granted to the Attorney General restraining any further publication of the kind in question pending the substantive trial of the actions. On an application by O.G. and after an inter partes hearing on 11 July, Mr Justice Millett (sitting in the Chancery Division) decided that these injunctions should remain in force, but with various modifications. The defendants were given liberty to apply to vary or discharge the orders on giving twenty-four hours' notice.

18. The reasons for Mr Justice Millett's decision may be briefly summarised as follows.

(a) Disclosure by Mr Wright of information acquired as a member of the Security Service would constitute a breach of his duty of confidentiality.

(b) O.G. wished to be free to publish further information deriving directly or indirectly from Mr Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published.

(c) Neither the right to freedom of speech nor the right to prevent the disclosure of information received in confidence was absolute.

(d) In resolving, as in the present case, a conflict between the public interest in preventing and the public interest in allowing such disclosure, the court had to take into account all relevant considerations, including the facts that this was an interlocutory application and not the trial of the action, that the injunctions sought at this stage were only temporary and that the refusal of injunctive relief might cause irreparable harm and effectively deprive the Attorney General of his rights. In such circumstances, the conflict should be resolved in favour of restraint, unless the court was satisfied that there was a serious defence of public interest that might succeed at the trial: an example would be when the proposed publication related to unlawful acts, the disclosure of which was required in the public interest. This could be regarded either as an exception to the American Cyanamid principles (see paragraph 10 above) or their application in special circumstances where the public interest was invoked on both sides.

(e) The Attorney General's principal objection was not to the dissemination of allegations about the Security Service but to the fact that those allegations were made by one of its former employees, it being that particular fact which O.G. wished to publish. There was credible evidence (in the shape of Sir Robert Armstrong's affidavits; see paragraph 16 above) that the appearance of confidentiality was essential to the operation of the Security Service and that the efficient discharge of its duties would be impaired, with consequent danger to national security, if senior officers were known to be free to disclose what they had learned whilst employed by it. Although this evidence remained to be tested at the substantive trial, the refusal of an interlocutory injunction would permit indirect publication and permanently deprive the Attorney General of his rights at the trial. Bearing in mind, inter alia, that the alleged unlawful activities had occurred some time in the past, there was, moreover, no compelling interest requiring publication immediately rather than after the trial.

In the subsequent stages of the interlocutory proceedings, both the Court of Appeal (see paragraphs 19 and 34 below) and all the members of the Appellate Committee of the House of Lords (see paragraphs 35-36 below) considered that this initial grant of interim injunctions by Mr Justice Millett was justified.

19. On 25 July 1986 the Court of Appeal dismissed an appeal by O.G. and upheld the injunctions, with minor modifications. It referred to the

American Cyanamid principles (see paragraph 10 above) and considered that Mr Justice Millett had not misdirected himself or exercised his discretion on an erroneous basis. It refused leave to appeal to the House of Lords. It also certified the case as fit for a speedy trial.

As amended by the Court of Appeal, the injunctions ("the Millett injunctions") restrained O.G., until the trial of the action or further order, from:

> "1. disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from the said Peter Maurice Wright;
>
> 2. attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise."

The orders contained the following provisos:

> "1. this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr Chapman Pincher in published works, or in a television programme or programmes broadcast by Granada Television;
>
> 2. no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no. 4382 of 1985, is not prohibited from publication;
>
> 3. no breach of this Order shall be constituted by a fair and accurate report of proceedings in (a) either House of Parliament in the United Kingdom whose publication is permitted by that House; or (b) a court of the United Kingdom sitting in public."

20. On 6 November 1986 the Appellate Committee of the House of Lords granted leave to appeal against the Court of Appeal’s decision. The appeal was subsequently withdrawn in the light of the House of Lords decision of 30 July 1987 (see paragraphs 35-36 below).

B. The first-instance decision in Australia

21. The trial of the Government’s action in Australia (see paragraph 13 above) took place in November and December 1986. The proceedings were reported in detail in the media in the United Kingdom and elsewhere. In a judgment delivered on 13 March 1987 Mr Justice Powell rejected the Attorney General’s claim against Mr Wright and his publishers, holding that much of the information in Spycatcher was no longer confidential and that publication of the remainder would not be detrimental to the British Government or the Security Service. The undertakings not to publish were then discharged by order of the court.

The Attorney General lodged an appeal; after a hearing in the New South Wales Court of Appeal in the week of 27 July 1987, judgment was reserved. The defendants had given further undertakings not to publish whilst the appeal was pending.

C. Further press reports concerning Spycatcher; the Independent case

22. On 27 April 1987 a major summary of certain of the allegations in Spycatcher, allegedly based on a copy of the manuscript, appeared in the United Kingdom national daily newspaper The Independent. Later the same day reports of that summary were published in The London Evening Standard and the London Daily News.

On the next day the Attorney General applied to the Queen’s Bench Division of the High Court for leave to move against the publishers and editors of these three newspapers for contempt of court, that is conduct intended to interfere with or prejudice the administration of justice. Leave was granted on 29 April. In this application (hereinafter referred to as "the Independent case") the Attorney General was not acting - as he was in the breach of confidence proceedings against O.G. - as the representative of the Government, but independently and in his capacity as "the guardian of the public interest in the due administration of justice".

Reports similar to those of 27 April appeared on 29 April in Australia, in The Melbourne Age and the Canberra Times, and on 3 May in the United States of America, in The Washington Post.

23. On 29 April 1987 O.G. applied for the discharge of the Millett injunctions (see paragraph 19 above) on the ground that there had been a significant change of circumstances since they were granted. They referred to what had transpired in the Australian proceedings and to the United Kingdom newspaper reports of 27 April.

The Vice-Chancellor, Sir Nicolas Browne-Wilkinson, began to hear these applications on 7 May but adjourned them pending the determination of a preliminary issue of law, raised in the Independent case (see paragraph 22 above), on which he thought their outcome to be largely dependent, namely "whether a publication made in the knowledge of an outstanding injunction against another party, and which if made by that other party would be in breach thereof, constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction". On 11 May, in response to the Vice-Chancellor’s invitation, the Attorney General pursued the proceedings in the Independent case in the Chancery Division of the High Court and the Vice-Chancellor ordered the trial of the preliminary issue.

24. On 14 May 1987 Viking Penguin Incorporated, which had purchased from Mr Wright’s Australian publishers the United States publication rights

to Spycatcher, announced its intention of publishing the book in the latter country.

25. On 2 June 1987 the Vice-Chancellor decided the preliminary issue of law in the Independent case. He held that the reports that had appeared on 27 April 1987 (see paragraph 22 above) could not, as a matter of law, amount to contempt of court because they were not in breach of the express terms of the Millett injunctions and the three newspapers concerned had not been a party to those injunctions or to a breach thereof by the persons they enjoined. The Attorney General appealed.

26. On 15 June 1987 O.G., relying on the intended publication in the United States, applied to have the hearing of their application for discharge of the Millett injunctions restored (see paragraph 23 above). The matter was, however, adjourned pending the outcome of the Attorney General's appeal in the Independent case, the hearing of which began on 22 June.

D. Serialisation of Spycatcher begins in The Sunday Times

27. On 12 July 1987 the United Kingdom national Sunday newspaper The Sunday Times, which had purchased the British newspaper serialisation rights from Mr Wright's Australian publishers and obtained a copy of the manuscript from Viking Penguin Incorporated in the United States, printed - in its later editions in order to avoid the risk of proceedings for an injunction - the first instalment of extracts from Spycatcher. It explained that this was timed to coincide with publication of the book in the United States, which was due to take place on 14 July.

On 13 July the Attorney General commenced proceedings for contempt of court against Times Newspapers Ltd, the publisher of The Sunday Times, and Mr Andrew Neil, its editor (hereinafter together referred to as "S.T."), on the ground that the publication frustrated the purpose of the Millett injunctions.

E. Publication of Spycatcher in the United States of America

28. On 14 July 1987 Viking Penguin Incorporated published Spycatcher in the United States of America; some copies had, in fact, been put on sale on the previous day. It was an immediate best-seller. The British Government, which had been advised that proceedings to restrain publication in the United States would not succeed, took no legal action to that end either in that country or in Canada, where the book also became a best-seller.

29. A substantial number of copies of the book were then brought into the United Kingdom, notably by British citizens who had bought it whilst visiting the United States or who had purchased it by telephone or post from American bookshops. The telephone number and address of such bookshops

willing to deliver the book to the United Kingdom were widely advertised in that country. No steps to prevent such imports were taken by the British Government, which formed the view that although a ban was within their powers, it was likely to be ineffective. They did, however, take steps to prevent the book's being available at United Kingdom booksellers or public libraries.

F. Conclusion of the Independent case

30. On 15 July 1987 the Court of Appeal announced that it would reverse the judgment of the Vice-Chancellor in the Independent case (see paragraph 25 above). Its reasons, which were handed down on 17 July, were basically as follows: the purpose of the Millett injunctions was to preserve the confidentiality of the Spycatcher material until the substantive trial of the actions against O.G.; the conduct of The Independent, The London Evening Standard and the London Daily News could, as a matter of law, constitute a criminal contempt of court because publication of that material would destroy that confidentiality and, hence, the subject-matter of those actions and therefore interfere with the administration of justice. The Court of Appeal remitted the case to the High Court for it to determine whether the three newspapers had acted with the specific intent of so interfering (sections 2(3) and 6(c) of the Contempt of Court Act 1981).

31. The Court of Appeal refused the defendants leave to appeal to the House of Lords and they did not seek leave to appeal from the House itself. Neither did they apply to the High Court for modification of the Millett injunctions. The result of the Court of Appeal's decision was that those injunctions were effectively binding on all the British media, including The Sunday Times.

G. Conclusion of the interlocutory proceedings in the Observer, Guardian and Sunday Times cases; maintenance of the Millett injunctions

32. S.T. made it clear that, unless restrained by law, they would publish the second instalment of the serialisation of Spycatcher on 19 July 1987. On 16 July the Attorney General applied for an injunction to restrain them from publishing further extracts, maintaining that this would constitute a contempt of court by reason of the combined effect of the Millett injunctions and the decision in the Independent case (see paragraph 30 above).

On the same day the Vice-Chancellor granted a temporary injunction restraining publication by S.T. until 21 July 1987. It was agreed that on 20 July he would consider the application by O.G. for discharge of the Millett injunctions (see paragraph 26 above) and that, since they effectively bound

S.T. as well, the latter would have a right to be heard in support of that application. It was further agreed that he would also hear the Attorney General's claim for an injunction against S.T. and that that claim would fail if the Millett injunctions were discharged.

33. Having heard argument from 20 to 22 July 1987, the Vice-Chancellor gave judgment on the last-mentioned date, discharging the Millett injunctions and dismissing the claim for an injunction against S.T.

The Vice-Chancellor's reasons may be briefly summarised as follows.

(a) There had, notably in view of the publication in the United States (see paragraphs 28-29 above), been a radical change of circumstances, and it had to be considered if it would be appropriate to grant the injunctions in the new circumstances.

(b) Having regard to the case-law and notwithstanding the changed circumstances, it had to be assumed that the Attorney General still had an arguable case for obtaining an injunction against O.G. at the substantive trial; accordingly, the ordinary American Cyanamid principles (see paragraph 10 above) fell to be applied.

(c) Since damages would be an ineffective remedy for the Attorney General and would be no compensation to the newspapers, it had to be determined where the balance of convenience lay; the preservation of confidentiality should be favoured unless another public interest outweighed it.

(d) Factors in favour of continuing the injunctions were: the proceedings were only interlocutory; there was nothing new or urgent about Mr Wright's allegations; the injunctions would bind all the media, so that there would be no question of discrimination; undertakings not to publish were still in force in Australia; to discharge the injunctions would mean that the courts were powerless to preserve confidentiality; to continue the injunctions would discourage others from following Mr Wright's example.

(e) Factors in favour of discharging the injunctions were: publication in the United States had destroyed a large part of the purpose of the Attorney General's actions; publications in the press, especially those concerning allegations of unlawful conduct in the public service, should not be restrained unless this was unavoidable; the courts would be brought into disrepute if they made orders manifestly incapable of achieving their purpose.

(f) The matter was quite nicely weighted and in no sense obvious but, with hesitation, the balance fell in favour of discharging the injunctions.

The Attorney General immediately appealed against the Vice-Chancellor's decision; pending the appeal the injunctions against O.G., but not the injunction against S.T. (see paragraph 32 above), were continued in force.

34. In a judgment of 24 July 1987 the Court of Appeal held that:

(a) the Vice-Chancellor had erred in law in various respects, so that the Court of Appeal could exercise its own discretion;

(b) in the light of the American publication of Spycatcher, it was inappropriate to continue the Millett injunctions in their original form;

(c) it was, however, appropriate to vary these injunctions to restrain publication in the course of business of all or part of the book or other statements by or attributed to Mr Wright on security matters, but to permit "a summary in very general terms" of his allegations.

The members of the Court of Appeal considered that continuation of the injunctions would: serve to restore confidence in the Security Service by showing that memoirs could not be published without authority (Sir John Donaldson, Master of the Rolls); serve to protect the Attorney General's rights until the trial (Lord Justice Ralph Gibson); or fulfil the courts' duty of deterring the dissemination of material written in breach of confidence (Lord Justice Russell).

The Court of Appeal gave leave to all parties to appeal to the House of Lords.

35. After hearing argument from 27 to 29 July 1987 (when neither side supported the Court of Appeal's compromise solution), the Appellate Committee of the House of Lords gave judgment on 30 July, holding, by a majority of three (Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner) to two (Lord Bridge of Harwich - the immediate past Chairman of the Security Commission - and Lord Oliver of Aylmerton), that the Millett injunctions should continue. In fact, they subsequently remained in force until the commencement of the substantive trial in the breach of confidence actions on 23 November 1987 (see paragraph 39 below).

The majority also decided that the scope of the injunctions should be widened by the deletion of part of the proviso that had previously allowed certain reporting of the Australian proceedings (see paragraph 19 above), since the injunctions would be circumvented if English newspapers were to reproduce passages from Spycatcher read out in open court. In the events that happened, this deletion had, according to the Government, no practical incidence on the reporting of the Australian proceedings.

36. The members of the Appellate Committee gave their written reasons on 13 August 1987; they may be briefly summarised as follows.

(a) Lord Brandon of Oakbrook

(i) The object of the Attorney General's actions against O.G. was the protection of an important public interest, namely the maintenance as far as possible of the secrecy of the Security Service; as was recognised in Article 10 para. 2 (art. 10-2) of the Convention, the right to freedom of expression was subject to certain exceptions, including the protection of national security.

(ii) The injunctions in issue were only temporary, being designed to hold the ring until the trial, and their continuation did not prejudge the decision to be made at the trial on the claim for final injunctions.

(iii) The view taken in the courts below, before the American publication, that the Attorney General had a strong arguable case for obtaining final injunctions at the trial was not really open to challenge.

(iv) Publication in the United States had weakened that case, but it remained arguable; it was not clear whether, as a matter of law, that publication had caused the newspapers' duty of non-disclosure to lapse. Although the major part of the potential damage adverted to by Sir Robert Armstrong (see paragraph 16 above) had already been done, the courts might still be able to take useful steps to reduce the risk of similar damage by other Security Service employees in the future. This risk was so serious that the courts should do all they could to minimise it.

(v) The only way to determine the Attorney General's case justly and to strike the proper balance between the public interests involved was to hold a substantive trial at which evidence would be adduced and subjected to cross-examination.

(vi) Immediate discharge of the injunctions would completely destroy the Attorney General's arguable case at the interlocutory stage, without his having had the opportunity of having it tried on appropriate evidence.

(vii) Continuing the injunctions until the trial would, if the Attorney General's claims then failed, merely delay but not prevent the newspapers' right to publish information which, moreover, related to events that had taken place many years in the past.

(viii) In the overall interests of justice, a course which could only result in temporary and in no way irrevocable damage to the cause of the newspapers was to be preferred to one which might result in permanent and irrevocable damage to the cause of the Attorney General.

(b) Lord Templeman (who agreed with the observations of Lords Brandon and Ackner)

(i) The appeal involved a conflict between the right of the public to be protected by the Security Service and its right to be supplied with full information by the press. It therefore involved consideration of the Convention, the question being whether the interference constituted by the injunctions was, on 30 July 1987, necessary in a democratic society for one or more of the purposes listed in Article 10 para. 2 (art. 10-2).

(ii) In terms of the Convention, the restraints were necessary in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence and for maintaining the authority of the judiciary. The restraints would prevent harm to the Security Service, notably in the form of the mass circulation, both now and in the future, of accusations to which its members

could not respond. To discharge the injunctions would surrender to the press the power to evade a court order designed to protect the confidentiality of information obtained by a member of the Service.

(c) Lord Ackner (who agreed with the observations of Lord Templeman)

(i) It was accepted by all members of the Appellate Committee that: the Attorney General had an arguable case for a permanent injunction; damages were a worthless remedy for the Crown which, if the Millett injunctions were not continued, would lose forever the prospect of obtaining permanent injunctions at the trial; continuation of the Millett injunctions was not a "final locking-out" of the press which, if successful at the trial, would then be able to publish material that had no present urgency; there was a real public interest, that required protection, concerned with the efficient functioning of the Security Service and it extended, as was not challenged by the newspapers, to discouraging the use of the United Kingdom market for the dissemination of unauthorised memoirs of Security Service officers.

(ii) It would thus be a denial of justice to refuse to allow the injunctions to continue until the trial, for that would sweep aside the public-interest factor without any trial and would prematurely and permanently deny the Attorney General any protection from the courts.

(d) Lord Bridge of Harwich

(i) The case in favour of maintaining the Millett injunctions - which had been properly granted in the first place - would not be stronger at the trial than it was now; it would be absurd to continue them temporarily if no case for permanent injunctions could be made out.

(ii) Since the Spycatcher allegations were now freely available to the public, it was manifestly too late for the injunctions to serve the interest of national security in protecting sensitive information.

(iii) It could be assumed that the Attorney General could still assert a bare duty binding on the newspapers, but the question was whether the Millett injunctions could still protect an interest of national security of sufficient weight to justify the resultant encroachment on freedom of speech. The argument that their continuation would have a deterrent effect was of minimal weight.

(iv) The attempt to insulate the British public from information freely available elsewhere was a significant step down the road to censorship characteristic of a totalitarian regime and, if pursued, would lead to the Government's condemnation and humiliation by the European Court of Human Rights.

(e) Lord Oliver of Aylmerton

(i) Mr Justice Millett's initial order was entirely correct.

(ii) The injunctions had originally been imposed to preserve the confidentiality of what were at the time unpublished allegations, but that confidentiality had now been irrevocably destroyed by the publication of Spycatcher. It was questionable whether it was right to use the injunctive remedy against the newspapers (who had not been concerned with that publication) for the remaining purpose which the injunctions might serve, namely punishing Mr Wright and providing an example to others.

(iii) The newspapers had presented their arguments on the footing that the Attorney General still had an arguable case for the grant of permanent injunctions and there was force in the view that the difficult and novel point of law involved should not be determined without further argument at the trial. However, in the light of the public availability of the Spycatcher material, it was difficult to see how it could be successfully argued that the newspapers should be permanently restrained from publishing it and the case of the Attorney General was unlikely to improve in the meantime. No arguable case for permanent injunctions at the trial therefore remained and the Millett injunctions should accordingly be discharged.

H. Conclusion of the Australian proceedings; further publication of Spycatcher

37. On 24 September 1987 the New South Wales Court of Appeal delivered judgment dismissing the Attorney General’s appeal (see paragraph 21 above); the majority held that his claim was not justiciable in an Australian court since it involved either an attempt to enforce indirectly the public laws of a foreign State or a determination of the question whether publication would be detrimental to the public interest in the United Kingdom.

The Attorney General appealed to the High Court of Australia. In view of the publication of Spycatcher in the United States and elsewhere, that court declined to grant temporary injunctions restraining its publication in Australia pending the hearing; it was published in that country on 13 October. The appeal was dismissed on 2 June 1988, on the ground that, under international law, a claim - such as the Attorney General’s - to enforce British governmental interests in its security service was unenforceable in the Australian courts.

Further proceedings brought by the Attorney General against newspapers for injunctions were successful in Hong Kong but not in New Zealand.

38. In the meantime publication and dissemination of Spycatcher and its contents continued worldwide, not only in the United States (around 715,000 copies were printed and nearly all were sold by October 1987) and in Canada (around 100,000 copies printed), but also in Australia (145,000 copies printed, of which half were sold within a month) and Ireland (30,000 copies printed and distributed). Nearly 100,000 copies were sent to various

European countries other than the United Kingdom and copies were distributed from Australia in Asian countries. Radio broadcasts in English about the book were made in Denmark and Sweden and it was translated into twelve other languages, including ten European.

III. THE SUBSTANTIVE PROCEEDINGS IN ENGLAND

A. Breach of confidence

39. On 27 October 1987 the Attorney General instituted proceedings against S.T. for breach of confidence; in addition to injunctive relief, he sought a declaration and an account of profits. The substantive trial of that action and of his actions against O.G. (see paragraph 15 above) - in which, by an amendment of 30 October, he now claimed a declaration as well as an injunction - took place before Mr Justice Scott in the High Court in November-December 1987. He heard evidence on behalf of all parties, the witnesses including Sir Robert Armstrong (see paragraph 16 above). He also continued the interlocutory injunctions, pending delivery of his judgment.

40. Mr Justice Scott gave judgment on 21 December 1987; it contained the following observations and conclusions.

(a) The ground for the Attorney General's claim for permanent injunctions was no longer the preservation of the secrecy of certain information but the promotion of the efficiency and reputation of the Security Service.

(b) Where a duty of confidence is sought to be enforced against a newspaper coming into possession of information known to be confidential, the scope of its duty will depend on the relative weights of the interests claimed to be protected by that duty and the interests served by disclosure.

(c) Account should be taken of Article 10 (art. 10) of the Convention and the judgments of the European Court establishing that a limitation of free expression in the interests of national security should not be regarded as necessary unless there was a "pressing social need" for the limitation and it was "proportionate to the legitimate aims pursued".

(d) Mr Wright owed a duty to the Crown not to disclose any information obtained by him in the course of his employment in MI5. He broke that duty by writing Spycatcher and submitting it for publication, and the subsequent publication and dissemination of the book amounted to a further breach, so that the Attorney General would be entitled to an injunction against Mr Wright or any agent of his, restraining publication of Spycatcher in the United Kingdom.

(e) O.G. were not in breach of their duty of confidentiality, created by being recipients of Mr Wright's unauthorised disclosures, in publishing

their respective articles of 22 and 23 June 1986 (see paragraph 14 above): the articles were a fair report in general terms of the forthcoming trial in Australia and, furthermore, disclosure of two of Mr Wright's allegations was justified on an additional ground relating to the disclosure of "iniquity".

(f) S.T., on the other hand, had been in breach of the duty of confidentiality in publishing the first instalment of extracts from the book on 12 July 1987 (see paragraph 27 above), since those extracts contained certain material which did not raise questions of public interest outweighing those of national security.

(g) S.T. were liable to account for the profits accruing to them as a result of the publication of that instalment.

(h) The Attorney General's claims for permanent injunctions failed because the publication and worldwide dissemination of Spycatcher since July 1987 had had the result that there was no longer any duty of confidence lying on newspapers or other third parties in relation to the information in the book; as regards this issue, a weighing of the national security factors relied on against the public interest in freedom of the press showed the latter to be overwhelming.

(i) The Attorney General was not entitled to a general injunction restraining future publication of information derived from Mr Wright or other members of the Security Service.

After hearing argument, Mr Justice Scott imposed fresh temporary injunctions pending an appeal to the Court of Appeal; those injunctions contained a proviso allowing reporting of the Australian proceedings (see paragraphs 19 and 35 above).

41. On appeal by the Attorney General and a cross-appeal by S.T., the Court of Appeal (composed of Sir John Donaldson, Master of the Rolls, Lord Justice Dillon and Lord Justice Bingham) affirmed, on 10 February 1988, the decision of Mr Justice Scott.

However, Sir John Donaldson disagreed with his view that the articles in the Observer and The Guardian had not constituted a breach of their duty of confidence and that the claim for an injunction against these two newspapers in June 1986 was not "proportionate to the legitimate aim pursued". Lord Justice Bingham, on the other hand, disagreed with Mr Justice Scott's view that S.T. had been in breach of duty by publishing the first instalment of extracts from Spycatcher, that they should account for profits and that the Attorney General had been entitled, in the circumstances as they stood in July 1987, to injunctions preventing further serialisation.

After hearing argument, the Court of Appeal likewise granted fresh temporary injunctions, pending an appeal to the House of Lords; O.G. and S.T. were given liberty to apply for variation or discharge if any undue delay arose.

42. On 13 October 1988 the Appellate Committee of the House of Lords (Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Goff of

Chieveley and Lord Jauncey of Tullichettle) also affirmed Mr Justice Scott's decision. Dismissing an appeal by the Attorney General and a cross-appeal by S.T., it held:

"(i) That a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others; that a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the world-wide publication of Spycatcher had destroyed any secrecy as to its contents, and copies of it were readily available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged.

(ii) (Lord Griffiths dissenting) that the articles of 22 and 23 June [1986] had not contained information damaging to the public interest; that the Observer and The Guardian were not in breach of their duty of confidentiality when they published [those] articles; and that, accordingly, the Crown would not have been entitled to a permanent injunction against both newspapers.

(iii) That The Sunday Times was in breach of its duty of confidence in publishing its first serialised extract from Spycatcher on 12 July 1987; that it was not protected by either the defence of prior publication or disclosure of iniquity; that imminent publication of the book in the United States did not amount to a justification; and that, accordingly, The Sunday Times was liable to account for the profits resulting from that breach.

(iv) That since the information in Spycatcher was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the Observer and The Guardian restraining them from reporting on the contents of the book; and that (Lord Griffiths dissenting) no injunction should be granted against The Sunday Times to restrain serialising of further extracts from the book.

(v) That members and former members of the Security Service owed a lifelong duty of confidence to the Crown, and that since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain the newspapers from future publication of any information on the allegations in Spycatcher derived from any member or former member of the Security Service."

B. Contempt of court

43. The substantive trial of the Attorney General's actions for contempt of court against The Independent, The London Evening Standard, the London Daily News (see paragraph 22 above), S.T. (see paragraph 27 above) and certain other newspapers took place before Mr Justice Morritt in

the High Court in April 1989. On 8 May he held, inter alia, that The Independent and S.T. had been in contempt of court and imposed a fine of £50,000 in each case.

44. On 27 February 1990 the Court of Appeal dismissed appeals by the latter two newspapers against the finding that they had been in contempt but concluded that no fines should be imposed. A further appeal by S.T. against the contempt finding was dismissed by the Appellate Committee of the House of Lords on 11 April 1991.

PROCEEDINGS BEFORE THE COMMISSION

45. In their application (no. 13585/88) lodged with the Commission on 27 January 1988, O.G. alleged that the interlocutory injunctions in question constituted an unjustified interference with their freedom of expression, as guaranteed by Article 10 (art. 10) of the Convention. They further claimed that, contrary to Article 13 (art. 13), they had no effective remedy before a national authority for their Article 10 (art. 10) complaint and that they were victims of discrimination in breach of Article 14 (art. 14).

46. The Commission declared the application admissible on 5 October 1989. In its report of 12 July 1990 (Article 31) (art. 31), it expressed the opinion:

(a) by six votes to five, that there had been a violation of Article 10 (art. 10) in respect of temporary injunctions imposed on O.G. for the period from 11 July 1986 to 30 July 1987;

(b) unanimously, that there had been a violation of Article 10 (art. 10) in respect of temporary injunctions imposed on O.G. for the period from 30 July 1987 to 13 October 1988;

(c) unanimously, that there had been no violation of Article 13 or Article 14 (art. 13, art. 14) .

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

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

47. At the hearing on 25 June 1991, the Government invited the Court to make the findings set out in their memorial, namely that there had been no breach of O.G.’s rights under Articles 10, 13 or 14 (art. 10, art. 13, art. 14).

[*] Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 216 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

48. O.G. alleged that, by reason of the interlocutory injunctions to which they had been subject from 11 July 1986 to 13 October 1988, they had been victims of a violation of Article 10 (art. 10) of the Convention, which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This allegation was contested by the Government. It was accepted by the Commission, by a majority as regards the period from 11 July 1986 to 30 July 1987 and unanimously as regards the period from 30 July 1987 to 13 October 1988.

49. The restrictions complained of clearly constituted, as was not disputed, an "interference" with O.G.'s exercise of their freedom of expression, as guaranteed by paragraph 1 of Article 10 (art. 10-1). Such an interference entails a violation of Article 10 (art. 10) if it does not fall within one of the exceptions provided for in paragraph 2 (art. 10-2); the Court must therefore examine in turn whether the interference was "prescribed by law", whether it had an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and whether it was "necessary in a democratic society" for the aforesaid aim or aims.

A. Was the interference "prescribed by law"?

50. O.G. did not deny that the grant of the interlocutory injunctions was in accordance with domestic law. Although they laid no emphasis on this point at the hearing, they did maintain in their memorial that the interference complained of was not "prescribed by law" for the purposes of Article 10 (art. 10). This contention was challenged by the Government and was not accepted by the Commission.

51. It is true that the Attorney General’s actions for breach of confidence raised issues of law which were not clarified until judgment had been given on the merits. However, O.G.’s complaint was not directed to this aspect of the case, but solely to the legal principles upon which the injunctions were granted, which principles were, in their submission, neither adequately accessible nor sufficiently foreseeable (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, para. 49).

52. In the Court’s view, no problem arises concerning accessibility, since the relevant guidelines had been enunciated by the House of Lords several years previously, in 1975, in American Cyanamid Co. v. Ethicon Ltd (see paragraph 10 above).

53. (a) As regards foreseeability, O.G. advanced three specific arguments.

(i) It was not clear whether the American Cyanamid decision had overruled certain earlier rules relating to the grant of injunctions in particular areas of the law. The Court notes, however, that O.G. themselves recognised that the principles laid down in that decision had been expressed to be applicable to all classes of action.

(ii) There had never been a case similar to theirs in which the American Cyanamid principles had been applied. This fact, in the Court’s view, is of little consequence in the present context: since the principles were expressed to be of general application, recourse had perforce to be had to them from time to time in novel situations, so that their utilisation on this occasion involved no more than the application of existing rules to a different set of circumstances.

(iii) It was not until judgment was given on the merits of the Attorney General’s actions (see paragraphs 39-42 above) that it became clear that an injunction would be granted in a case of this kind only on proof of potential detriment to the public interest. This, however, suggests that there was a greater likelihood of a restriction being imposed under the law as it stood previously.

(b) More generally, having examined the American Cyanamid principles in the light of its above-mentioned Sunday Times judgment (Series A no. 30), and especially paragraph 49 thereof, the Court entertains no doubt that they were formulated with a degree of precision that is sufficient in a matter of this kind. It considers that O.G. must have been able to foresee, to an extent that was reasonable in the circumstances, a risk that the interlocutory injunctions would be imposed.

54. The interference was accordingly "prescribed by law".

B. Did the interference have aims that are legitimate under Article 10 para. 2 (art. 10-2)?

55. The Government submitted that the interlocutory injunctions were designed to protect the Attorney General's rights at the substantive trial and therefore had the aim, that was legitimate in terms of paragraph 2 of Article 10 (art. 10-2), of "maintaining the authority of the judiciary". Before the Court, they also asserted that the injunctions indirectly served the aim of protecting national security, since the underlying purpose of the Attorney General's actions was to prevent the effective operation of the Security Service from being undermined.

Although O.G. expressed certain reservations on the second of these points, they did not seek to deny that the interference had a legitimate aim.

56. The Court is satisfied that the injunctions had the direct or primary aim of "maintaining the authority of the judiciary", which phrase includes the protection of the rights of litigants (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 34, para. 56). Perusal of the relevant domestic judgments makes it perfectly clear that the purpose of the order made against O.G. was - to adopt the description given by Lord Oliver of Aylmerton (Attorney General v. Times Newspapers Ltd [1991] 2 Weekly Law Reports 1019G) - "to enable issues between the plaintiff and the defendants to be tried without the plaintiff's rights in the meantime being prejudiced by the doing of the very act which it was the purpose of the action to prevent".

It is also incontrovertible that a further purpose of the restrictions complained of was the protection of national security. They were imposed, as has just been seen, with a view to ensuring a fair trial of the Attorney General's claim for permanent injunctions against O.G. and the evidential basis for that claim was the two affidavits sworn by Sir Robert Armstrong, in which he deposed to the potential damage which publication of the Spycatcher material would cause to the Security Service (see paragraph 16 above). Not only was that evidence relied on by Mr Justice Millett when granting the injunctions initially (see paragraph 18 (e) above), but considerations of national security featured prominently in all the judgments delivered by the English courts in this case (see paragraphs 18, 34, 36 and 40 above). The Court would only comment - and it will revert to this point in paragraph 69 below - that the precise nature of the national security considerations involved varied over the course of time.

57. The interference complained of thus had aims that were legitimate under paragraph 2 of Article 10 (art. 10-2).

C. Was the interference "necessary in a democratic society"?

58. Argument before the Court was concentrated on the question whether the interference complained of could be regarded as "necessary in a democratic society". After summarising the relevant general principles that emerge from its case-law, the Court will, like the Commission, examine this issue with regard to two distinct periods, the first running from 11 July 1986 (imposition of the Millett injunctions) to 30 July 1987 (continuation of those measures by the House of Lords), and the second from 30 July 1987 to 13 October 1988 (final decision on the merits of the Attorney General's actions for breach of confidence).

1. General principles

59. The Court's judgments relating to Article 10 (art. 10) - starting with Handyside (7 December 1976; Series A no. 24), concluding, most recently, with Oberschlick (23 May 1991; Series A no. 204) and including, amongst several others, Sunday Times (26 April 1979; Series A no. 30) and Lingens (8 July 1986; Series A no. 103) - enounce the following major principles.

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

(c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review

under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

60. For the avoidance of doubt, and having in mind the written comments that were submitted in this case by "Article 19" (see paragraph 6 above), the Court would only add to the foregoing that Article 10 (art. 10) of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's Sunday Times judgment of 26 April 1979 and its markt intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989 (Series A no. 165). On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

2. The period from 11 July 1986 to 30 July 1987

61. In assessing the necessity for the interference with O.G.'s freedom of expression during the period from 11 July 1986 to 30 July 1987, it is essential to have a clear picture of the factual situation that obtained when Mr Justice Millett first imposed the injunctions in question.

At that time O.G. had only published two short articles which, in their submission, constituted fair reports concerning the issues in the forthcoming hearing in Australia; contained information that was of legitimate public concern, that is to say allegations of impropriety on the part of officers of the British Security Service; and repeated material which, with little or no action on the part of the Government to prevent this, had for the most part already been made public.

Whilst substantially correct, these submissions do not tell the whole story. They omit, in the first place, O.G.'s acknowledgment, before Mr Justice Millett, that they wished to be free to publish further information deriving directly or indirectly from Mr Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published (see paragraph 18 (b) above). What they also omit is the fact that in July 1986 Spycatcher existed only in manuscript form. It was not then known precisely what the book would contain and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say

something new. And it was not unreasonable to suppose that where a former senior employee of a security service - an "insider", such as Mr Wright - proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service; it has to be borne in mind that in such a context damaging information may be gleaned from an accumulation of what appear at first sight to be unimportant details. What is more, it was improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security.

62. Mr Justice Millett’s decision to grant injunctions - which, in the subsequent stages of the interlocutory proceedings, was accepted as correct not only by the Court of Appeal but also by all the members of the Appellate Committee of the House of Lords (see paragraph 18 in fine above) - was based on the following line of reasoning. The Attorney General was seeking a permanent ban on the publication of material the disclosure of which would, according to the credible evidence presented on his behalf, be detrimental to the Security Service; to refuse interlocutory injunctions would mean that O.G. would be free to publish that material immediately and before the substantive trial; this would effectively deprive the Attorney General, if successful on the merits, of his right to be granted a permanent injunction, thereby irrevocably destroying the substance of his actions and, with it, the claim to protect national security.

In the Court’s view, these reasons were "relevant" in terms of the aims both of protecting national security and of maintaining the authority of the judiciary. The question remains whether they were "sufficient".

63. In this connection, O.G. objected that the interlocutory injunctions had been granted on the basis of the American Cyanamid principles which, in their opinion, were incompatible with the criteria of Article 10 (art. 10). They maintained that, in a case of this kind, those principles were unduly advantageous to the plaintiff since he had to establish only that he had an arguable case and that the balance of convenience lay in favour of injunctive relief; in their submission, a stricter test of necessity had to be applied when it was a question of restricting publication by the press on a matter of considerable public interest.

The American Cyanamid case admittedly related to the alleged infringement of a patent and not to freedom of the press. However, it is not the Court’s function to review those principles in abstracto, but rather to determine whether the interference resulting from their application was necessary having regard to the facts and circumstances prevailing in the specific case before it (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 41, para. 65).

In any event, perusal of the relevant judgments reveals that the English courts did far more than simply apply the American Cyanamid principles inflexibly or automatically; they recognised that the present case involved a

conflict between the public interest in preventing and the public interest in allowing disclosure of the material in question, which conflict they resolved by a careful weighing of the relevant considerations on either side.

In forming its own opinion, the Court has borne in mind its observations concerning the nature and contents of Spycatcher (see paragraph 61 above) and the interests of national security involved; it has also had regard to the potential prejudice to the Attorney General's breach of confidence actions, this being a point that has to be seen in the context of the central position occupied by Article 6 (art. 6) of the Convention and its guarantee of the right to a fair trial (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 34, para. 55). Particularly in the light of these factors, the Court takes the view that, having regard to their margin of appreciation, the English courts were entitled to consider the grant of injunctive relief to be necessary and that their reasons for so concluding were "sufficient" for the purposes of paragraph 2 of Article 10 (art. 10-2).

64. It has nevertheless to be examined whether the actual restraints imposed were "proportionate" to the legitimate aims pursued.

In this connection, it is to be noted that the injunctions did not erect a blanket prohibition. Whilst they forbade the publication of information derived from or attributed to Mr Wright in his capacity as a member of the Security Service, they did not prevent O.G. from pursuing their campaign for an independent inquiry into the operation of that service (see paragraph 14 above). Moreover, they contained provisos excluding certain material from their scope, notably that which had been previously published in the works of Mr Chapman Pincher and in the Granada Television programmes (see paragraph 19 above). Again, it was open to O.G. at any time to seek - as they in fact did (see paragraphs 23 and 26 above) - variation or discharge of the orders.

It is true that although the injunctions were intended to be no more than temporary measures, they in fact remained in force - as far as the period now under consideration is concerned - for slightly more than a year. And this is a long time where the perishable commodity of news is concerned (see paragraph 60 above). As against this, it may be pointed out that the Court of Appeal (see paragraph 19 above) certified the case as fit for a speedy trial - which O.G. apparently did not seek - and that the news in question, relating as it did to events that had occurred several years previously, could not really be classified as urgent. Furthermore, the Attorney General's actions raised difficult issues of both fact and law: time was accordingly required for the preparation of the trial, especially since, as Lord Brandon of Oakbrook pointed out (see paragraph 36 (a) (v) above), they were issues on which evidence had to be adduced and subjected to cross-examination.

65. Having regard to the foregoing, the Court concludes that, as regards the period from 11 July 1986 to 30 July 1987, the national authorities were

entitled to think that the interference complained of was "necessary in a democratic society".

3. The period from 30 July 1987 to 13 October 1988

66. On 14 July 1987 Spycatcher was published in the United States of America (see paragraph 28 above). This changed the situation that had obtained since 11 July 1986. In the first place, the contents of the book ceased to be a matter of speculation and their confidentiality was destroyed. Furthermore, Mr Wright's memoirs were obtainable from abroad by residents of the United Kingdom, the Government having made no attempt to impose a ban on importation (see paragraph 29 above).

67. In the submission of the Government, the continuation of the interlocutory injunctions during the period from 30 July 1987 to 13 October 1988 nevertheless remained "necessary", in terms of Article 10 (art. 10), for maintaining the authority of the judiciary and thereby protecting the interests of national security. They relied on the conclusion of the House of Lords in July 1987 that, notwithstanding the United States publication: (a) the Attorney General still had an arguable case for permanent injunctions against O.G., which case could be fairly determined only if restraints on publication were imposed pending the substantive trial; and (b) there was still a national security interest in preventing the general dissemination of the contents of the book through the press and a public interest in discouraging the unauthorised publication of memoirs containing confidential material.

68. The fact that the further publication of Spycatcher material could have been prejudicial to the trial of the Attorney General's claims for permanent injunctions was certainly, in terms of the aim of maintaining the authority of the judiciary, a "relevant" reason for continuing the restraints in question. The Court finds, however, that in the circumstances it does not constitute a "sufficient" reason for the purposes of Article 10 (art. 10).

It is true that the House of Lords had regard to the requirements of the Convention, even though it is not incorporated into domestic law (see paragraph 36 above). It is also true that there is some difference between the casual importation of copies of Spycatcher into the United Kingdom and mass publication of its contents in the press. On the other hand, even if the Attorney General had succeeded in obtaining permanent injunctions at the substantive trial, they would have borne on material the confidentiality of which had been destroyed in any event - and irrespective of whether any further disclosures were made by O.G. - as a result of the publication in the United States. Seen in terms of the protection of the Attorney General's rights as a litigant, the interest in maintaining the confidentiality of that material had, for the purposes of the Convention, ceased to exist by 30 July 1987 (see, mutatis mutandis, the Weber judgment of 22 May 1990, Series A no. 177, p. 23, para. 51).

69. As regards the interests of national security relied on, the Court observes that in this respect the Attorney General's case underwent, to adopt the words of Mr Justice Scott, "a curious metamorphosis" (Attorney General v. Guardian Newspapers Ltd (no. 2) [1990] 1 Appeal Cases 140F). As emerges from Sir Robert Armstrong's evidence (see paragraph 16 above), injunctions were sought at the outset, inter alia, to preserve the secret character of information that ought to be kept secret. By 30 July 1987, however, the information had lost that character and, as was observed by Lord Brandon of Oakbrook (see paragraph 36 (a) (iv) above), the major part of the potential damage adverted to by Sir Robert Armstrong had already been done. By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps.

The Court does not regard these objectives as sufficient to justify the continuation of the interference complained of. It is, in the first place, open to question whether the actions against O.G. could have served to advance the attainment of these objectives any further than had already been achieved by the steps taken against Mr Wright himself. Again, bearing in mind the availability of an action for an account of profits (see paragraphs 39-42 above), the Court shares the doubts of Lord Oliver of Aylmerton (see paragraph 36 (e)(ii) above) as to whether it was legitimate, for the purpose of punishing Mr Wright and providing an example to others, to use the injunctive remedy against persons, such as O.G., who had not been concerned with the publication of Spycatcher. Above all, continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.

70. Having regard to the foregoing, the Court concludes that the interference complained of was no longer "necessary in a democratic society" after 30 July 1987.

D. Conclusion

71. To sum up, there was a violation of Article 10 (art. 10) from 30 July 1987 to 13 October 1988, but not from 11 July 1986 to 30 July 1987.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

72. O.G. complained that newspapers published abroad, which could be freely imported into the United Kingdom, were not bound by the

interlocutory injunctions; they thus had an advantage over the Observer and The Guardian in that country as well as in the latter's overseas markets. O.G. alleged that on this account they had been victims of a violation of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10), the former provision reading as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

73. The factual basis for the foregoing complaint was in part contested by the Government, who maintained that the publishers and distributors of foreign newspapers within the United Kingdom would, by operation of the law of contempt of court (see paragraph 30 above), equally have been subject to the restraints in question. In any event, the Court agrees with the Government and the Commission that this complaint has to be rejected.

Article 14 (art. 14) affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see, for example, the Fredin judgment of 18 February 1991, Series A no. 192, p. 19, para. 60). If and in so far as foreign newspapers were subject to the same restrictions as O.G., there was no difference of treatment. If and in so far as they were not, this was because they were not subject to the jurisdiction of the English courts and hence were not in a situation similar to that of O.G.

74. There was thus no violation of Article 14 taken in conjunction with Article 10 (art. 14+10).

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

75. O.G. complained of the fact that the English courts did not apply the proper principles in relation to Article 10 (art. 10) and that neither that provision nor the case-law relevant thereto had been incorporated into English law. They alleged that on this account they had been victims of a violation of Article 13 (art. 13) of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

76. The Court agrees with the Government and the Commission that this allegation has to be rejected.

The thrust of O.G.'s complaint under the Convention was that the imposition of interlocutory injunctions constituted an unjustified interference with their freedom of expression and it is clear that they not only could but also did raise this issue in substance before the domestic

courts. And it has to be recalled that the effectiveness of a remedy, for the purposes of Article 13 (art. 13), does not depend on the certainty of a favourable outcome (see the Soering judgment of 7 July 1989, Series A no. 161, p. 48, para. 122).

As regards the specific matters pleaded, the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law (see, for example, the James and Others judgment of 21 February 1986, Series A no. 98, p. 47, para. 84). Again, Article 13 (art. 13) does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see the same judgment, p. 47, para. 85).

77. There has accordingly been no violation of Article 13 (art. 13).

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

78. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

O. G. made no claim for compensation for damage, but they did seek underalso o this provision reimbursement of their legal costs and expenses in the domestic and the Strasbourg proceedings, in a total amount of £212,430.28.

The Court has examined this issue in the light of the criteria established in its case-law and of the observations submitted by the Government and the applicants.

A. The domestic proceedings

79. The claim in respect of the domestic proceedings totalled £137,825.05. It did not extend to the 1987 hearing before the Vice-Chancellor (see paragraphs 32-33 above), the costs of which had already been paid by the Government to the applicants. Its breakdown is as follows:

(a) for the Court of Appeal hearing ended on 25 July 1986 (see paragraph 19 above): £55,624.11 (composed of £23,526.23 for the fees and disbursements of the applicants' solicitors and counsel, £17,364.29 for interest thereon for the period from 25 July 1986 to 25 June 1991 and £14,733.59 for the costs and interest paid by the applicants to the Attorney General);

(b) for the Court of Appeal hearing ended on 24 July 1987 (see paragraph 34 above): £31,098.20 (composed of £14,310.29 for the fees and

disbursements of the applicants' solicitors and counsel, £8,421.50 for interest thereon for the period from 24 July 1987 to 25 June 1991 and £8,366.41 for the costs and interest paid by the applicants to the Attorney General);

(c) for the House of Lords hearing ended on 30 July 1987 (see paragraphs 35-36 above): £51,102.74 (composed of £43,102.74 for the fees and disbursements of the applicants' solicitors and counsel and £8,000 for the costs paid by the applicants to the Attorney General).

80. The Court's observations on this claim are as follows.

(a) Having found no violation in respect of the period from 11 July 1986 to 30 July 1987 (see paragraphs 61-65 and 71 above), it agrees with the Government that no award should be made in respect of costs referable to the 1986 Court of Appeal hearing. However, the same does not apply to those referable to the 1987 Court of Appeal hearing: although the latter proceedings took place within the period in question, they post-dated the publication of Spycatcher in the United States of America (see paragraphs 28-29 above) and, like those before the House of Lords in 1987, are to be regarded as an attempt to obtain, through the domestic legal order, prevention of the violation that the Court has found to have occurred in the period from 30 July 1987 to 13 October 1988 (see paragraphs 66-71 above).

(b) The Court is unable to accept the Government's submission that the extra costs attributable to the fact that the Observer applicants and the Guardian applicants were represented by different firms of solicitors should be disallowed. They were entitled to instruct such lawyers as they chose. Nevertheless, bearing in mind that the interests of both sets of applicants were substantially the same, the Court shares the Government's view that the charges for the services of the total number of fee earners involved cannot all be considered to have been "necessarily" incurred.

(c) The Court also agrees with the Government's submission that the costs charged by the solicitors concerned cannot be regarded as reasonable as to quantum for the purposes of Article 50 (art. 50); furthermore, it also accepts that some reduction should be made in the amount claimed for counsel's fees before the House of Lords.

(d) The Court notes that, as regards the 1987 Court of Appeal hearing, the Government have raised no objection to the applicants' claim for interest and that the sum paid by the latter to the Attorney General itself included interest.

81. Having regard to the foregoing, the Court awards to the applicants, in respect of their own costs (including interest on those incurred in the Court of Appeal) and the amounts paid by them to the Attorney General, the sum of £65,000.

B. The Strasbourg proceedings

82. On the applicants' claim in respect of costs and expenses referable to the Strasbourg proceedings (totalling £74,605.23), the Court's observations are as follows.

(a) A reduction should be made to reflect the fact that no violation was found to have occurred in the period from 11 July 1986 to 30 July 1987. On the other hand, it would not be appropriate to make a significant reduction in respect of the unsuccessful complaints of breach of Articles 13 and 14 (art. 13, art. 14) (see paragraphs 72-77 above), since the bulk of the work done by the applicants' advisers related to Article 10 (art. 10) (see, mutatis mutandis, the Granger judgment of 28 March 1990, Series A no. 174, p. 21, para. 55).

(b) The remarks in paragraph 80(c) above concerning the solicitors' charges apply equally to the Strasbourg proceedings.

The Court also considers that, in the circumstances, certain of the amounts claimed by way of counsel's fees exceed what can be regarded as reasonable as between the parties.

83. Having regard to the foregoing, the Court awards the sum of £35,000.

C. Conclusion

84. The total amount to be paid to the applicants is accordingly £100,000. This figure is to be increased by any value-added tax that may be chargeable.

FOR THESE REASONS, THE COURT

1. Holds by fourteen votes to ten that there was no violation of Article 10 (art. 10) of the Convention during the period from 11 July 1986 to 30 July 1987;

2. Holds unanimously that there was a violation of Article 10 (art. 10) during the period from 30 July 1987 to 13 October 1988;

3. Holds unanimously that there has been no violation of Article 13 (art. 13) or of Article 14 taken in conjunction with Article 10 (art. 14+10);

4. Holds unanimously that the United Kingdom is to pay, within three months, to the applicants jointly the sum of £100,000 (one hundred thousand pounds), together with any value-added tax that may be chargeable, for costs and expenses;

5. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 November 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Pettiti, joined by Mr Pinheiro Farinha;

(b) partly dissenting opinion of Mr Walsh;

(c) partly dissenting opinion of Mr De Meyer (concerning prior restraint), joined by Mr Pettiti, Mr Russo, Mr Foighel and Mr Bigi;

(d) separate opinion of Mr De Meyer (concerning domestic remedies), joined by Mr Pettiti;

(e) separate opinion of Mr Valticos;

(f) partly dissenting opinion of Mr Martens;

(g) partly dissenting opinion of Mr Pekkanen; (h) partly dissenting opinion of Mr Morenilla.

R.R.
M.-A.E.

PARTLY DISSENTING OPINION OF JUDGE PETTITI, JOINED BY JUDGE PINHEIRO FARINHA

(Translation)

I voted for a violation of Article 10 (art. 10) also in respect of the first period, unlike the majority. In my view there was a violation as much for the first period concerning the Observer and The Guardian as for the second which also concerned The Sunday Times. Indeed I consider it to be contradictory to adopt a different position on these two periods while reaffirming the fundamental value in a democracy of the freedom of expression.

The injunction originated in the proposal to publish in Australia in 1985 Mr Wright's memoirs which included material already revealed by the books of Mr Pincher and by the Granada television programmes in the United Kingdom. "Secret agents" often publish their memoirs after their retirement and this does not in general give cause for concern to the States in question. The pretext for the proceedings instituted in Australia was not a betrayal of State secrets but a breach of confidentiality. The articles in the Observer and The Guardian of June 1986 concerned similar facts. The courts concluded that the source of the material was Spycatcher's publishers. The proceedings instituted by the Attorney General were founded on the breach of confidentiality. The interlocutory injunction issued by Mr Justice Millett in July 1986, based on a failure to comply with the duty of discretion, already constituted in my view an infringement of the freedom of expression. That freedom cannot be made subject to the criterion of confidentiality, otherwise there would no longer be any literature.

In any event the extension of the injunction beyond a few days or weeks (until October 1988) constituted an additional infringement of the freedom of expression, because where the press is concerned a delay in relation to items of current affairs deprives a journalist's article of a large part of its interest. The publication in America and in Europe of more significant memoirs by the heads of secret services has never given rise to a similar prohibition (see in France the books of Mr de Maranches and Mr Marion).

One gets the impression that the extreme severity of Mr Justice Millett's injunction and of the course adopted by the Attorney General was less a question of the duty of confidentiality than the fear of disclosure of certain irregularities carried out by the security service in the pursuit of political rather than intelligence aims.

In this respect there was a violation of the right to receive information, which is the second component of Article 10 (art. 10). To deprive the public of information on the functioning of State organs is to violate a fundamental democratic right.

However, the majority of the Court concerned itself with the first aspect rather than the second.

If the State believes that a publication puts at risk State secrets or national security, there are other procedural means at its disposal. If the State contests a failure to comply with the duty of discretion on the part of a retired civil servant, appropriate procedures are available. In the present case the State did not prosecute Mr Wright.

However, the United Kingdom should, by virtue of the positive obligation imposed by the European Convention, have secured the public's right to be informed. At the hearing the Government did not enlarge upon this issue.

An interim injunction, not subsequently lifted after a short period, is in effect a disguised means of instituting censure or restraint on the freedom of the press (other disguised means used in other countries include prosecution for alleged tax offences). The violation is in my view all the more patent in that it is confirmed by the decision finding a violation as regards the second period.

The majority's reasoning is indeed based on interference with the freedom of expression; but to explain the contrary decision concerning the first period the Court confines itself to stating as follows:

> "What they also omit is the fact that in July 1986 Spycatcher existed only in manuscript form. It was not then known precisely what the book would contain and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say something new. And it was not unreasonable to suppose that where a former senior employee of a security service - an 'insider', such as Mr Wright - proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service; it has to be borne in mind that in such a context damaging information may be gleaned from an accumulation of what appear at first sight to be unimportant details. What is more, it was improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security." (see paragraph 61 of the judgment)

The contradiction in the way the two periods were viewed is in my opinion the following: on the one hand, a decision imposing a restriction based on mere suppositions or assumptions by the Attorney General and the competent court is regarded as justified; on the other, the publication of the book in the United States and then its partial circulation are said to have rendered the continuation of the injunction unjustified.

But freedom of expression in one country cannot be made subject to whether or not the material in question has been published in another country. In the era of satellite television it is impossible to partition territorially thought and its expression or to restrict the right to information of the inhabitants of a country whose newspapers are subject to a prohibition.

The publication abroad was not truly material to the pretext invoked initially, namely confidentiality, because that had already been breached by Mr Pincher's books and the Granada programmes before Mr Justice Millett's order and because it was in any case very relative. It is possible, with hindsight, to measure the weakness of the Attorney General's argument, although he persisted with the proceedings in 1987 and in 1988. This requirement of confidentiality, which according to him was of major importance, was as it turned out regarded as insignificant by the courts as soon as the information had become known abroad and the book Spycatcher reached the United Kingdom clandestinely in the luggage of a few citizens and tourists.

It is true that in the decision on the merits Mr Justice Scott, in keeping with the great liberal and judicial tradition of the United Kingdom, found that the Observer and The Guardian had not infringed the duty of discretion, but he did so belatedly, not until 21 December 1987.

On 13 October 1988 the House of Lords rightly decided that it was not necessary to restrain the Observer and The Guardian from disseminating the contents of the book.

These contradictory decisions of eminent judges show the lack of clarity of the position adopted by the Attorney General. The first decision of the United Kingdom courts remains a surprising one. If the majority of the Court had reasoned on the basis of the "right to receive information" aspect, it would undoubtedly have found a violation for both periods.

It may be recalled that in the Elliniki Radiophonia Tiléorassi - Anonini Etairia case (Case no. 260/89), Mr Lenz, Advocate General at the Court of Justice of the European Communities, made the following observations in his Opinion: (unofficial translation)

"49. The Rules of the Convention must be regarded as an integral part of the Community legal system. Television Directive ... indicates in this connection that the first paragraph of Article 10 (art. 10) of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by all the Member States, applied to the broadcasting and distribution of television services, is likewise a specific manifestation in Community law of a more general principle, namely the freedom of expression. This right must therefore be observed by the Community organs.

50. However, it is also clear that the Court of Justice is not required to rule in the first instance on alleged or real violations by the Member States of the human rights secured under that Convention (that is the role of the organs so designated by the European Convention on Human Rights); ..."

The judgment of the Court of Justice of the European Communities, delivered on 18 June 1991, contains the following passage: (unofficial translation)

> "41. As regards Article 10 (art. 10) of the European Convention on Human Rights ..., it should be noted in the first place 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. In so doing, the Court draws inspiration from constitutional traditions common to the Member States and from indications provided by the international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories (see, inter alia, the judgment of 14 May 1974, Nold, Case no. 4/73 ECR [1974] 491, at paragraph 13). In this connection the European Convention on Human Rights is of particular significance (see, inter alia, the judgment of 15 May 1986, Johnston Case no. 222/84, ECR [1986] 1651, paragraph 18). It follows that, as the Court affirmed in the judgment of 13 July 1989, Wachauf (Case no. 5/88, ECR [1989] 2609, at paragraph 19), measures incompatible with the respect for the human rights therein recognised and secured are not permissible in the Community."

The eminent judge Lord Bridge appositely observed in the House of Lords in his dissenting opinion:

"Freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of the ban, as more and more copies of the book Spycatcher enter this country and circulate here, will seem more and more ridiculous. If the Government are determined to fight to maintain the ban to the end, they will face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg. Long before that they will have been condemned at the bar of public opinion in the free world." ([1987] 1 Weekly Law Reports 1286F)

The same line of thought is reflected in the words of Mr Redwood, a United Kingdom Secretary of State, when he gave vent to his anxiety concerning the "current flood of restrictive directives from the EEC which threatens the freedom of expression" (Le Monde, 3 November 1991).

The protection afforded by Article 10 (art. 10) is therefore essential; this has always been the approach of the European Court in its judgments: Sunday Times I, Barthold, Lingens.

The defence of democracy cannot be achieved without the freedom of the press. The countries of Eastern Europe which have thrown off the shackles of totalitarian rule have well understood this. The European Court through all its earlier judgments has shown its attachment to the protection of freedom of expression and the priority which this is acknowledged to have.

To remain consistent with its case-law it should, in my view, have found a violation for both periods.

The Council of Europe has together with the organs of the European Convention a crucial task: this is to introduce true freedom of expression in all its forms and at the same time guarantee the public's right to receive information. This acquired democratic right must be preserved if we wish to protect freedom of thought!

PARTLY DISSENTING OPINION OF JUDGE WALSH

1. I agree with the majority of the Court that in respect of the period 30 July 1987 to 13 October 1988 there was a violation of Article 10 (art. 10) of the Convention by reason of the injunctions imposed on the applicants in respect of that period.

2. Unlike the majority of the Court I am of opinion that there was also a breach of Article 10 (art. 10) in respect of the period 11 July 1986 to 30 July 1987.

3. Freedom of the press is not totally unrestricted. The press in its pursuit of news is not free to counsel or to procure the commission of acts which are illegal, and may be restrained in appropriate cases from publishing material so gained, or may be liable in damages or may suffer both restraint and damages. In so far as breach of confidentiality amounts to an illegality either on the criminal side or on the civil side the newspapers will be so liable in respect of matters the revelation of which they have counselled or procured.

4. Their liability is not necessarily the same when their news gathering has benefited from windfall revelations which may have resulted from some breach of confidence for which they have no responsibility. It is a legitimate activity of the press to follow up such news and to publish the results of their inquiries provided in so doing they do not come in conflict with, say, national security. However that cannot be invoked to gain a restriction simply by an expression of opinion on the part of the authorities as was the case here. The issues of breach of confidence and national security were joined by the Government in the present case to the extent that the lines between them were blurred in the initial application for an injunction. The truth or falsity of the "revelations" was not put in issue. It appears to me that for the purposes of Article 10 (art. 10) of the Convention the publication of "revelations" cannot be restrained without at least an allegation of their truth by the moving party. If, as was done in the Australian hearing, the Government simply "admits the truth" for the purposes of the case the application to restrain becomes moot. Sufficient of the allegations by Mr Wright had already become public to enable the truth or otherwise of them to be ascertained. The identification of Mr Wright as the source did not affect that issue.

Even if the truth of the principal allegations is to be assumed, namely that the Security Service agents had indulged in illegal activities, that had already been publicly aired in a manner which left no doubt that Mr Wright, by his writings, conversations and television interview, was at least one source of the allegations. The applicant newspapers campaigned for an investigation of the allegations and their subsequent conduct was in furtherance of that campaign. They were not engaged directly or indirectly in debriefing Mr Wright on other knowledge he had gained as a secret

service agent. There was no indication that the newspapers were intent on publishing any material other than what was directly related to information already published and which it had not been sought to restrain. The "revelation" that Mr Wright was personally involved in the commission of the alleged illegal activities could scarcely be regarded as a restrainable piece of information in the light of all that was already known.

5. In view of the fact that the claim of confidentiality made in support of the initial application for a restraining order never made clear that a true breach of confidentiality was imminent, namely that true facts were threatened with disclosure, the Attorney General's position, which it was sought to protect, was never really made known at that stage. In my opinion the circumstances were insufficient to bring the case within the area of restrictions permitted by Article 10 para. 2 (art. 10-2) of the Convention.

It is clear that the matters the applicants had wished to deal with were of great interest to the public and perhaps even of concern. The public interest invoked by the Government appears to be equated with Government policy. That policy may very well justify, in the Government's view, making every effort to stem leakages from the Security Service or indeed in the interests of that service to take no action at all to deal with the allegations or indeed to pursue Mr Wright in any way available. These are policy matters and are not grounds for invoking the restrictions permitted by Article 10 para. 2 (art. 10-2) . Equally it may be understandable that, as was evident, the main objective of the proceedings was to act as a deterrent to those who in the future might be tempted to reveal secrets gained from their work as agents or members of the Security Service. That, however, is not a consideration which can justify the application of the restrictions on the press permitted by Article 10 para. 2 (art. 10-2). The relief sought against the applicants, as distinct from Mr Wright, has not been shown to have been, in all the circumstances, necessary in the democratic society which is the United Kingdom.

PARTLY DISSENTING OPINION OF JUDGE DE MEYER (concerning prior restraint), JOINED BY JUDGES PETTITI, RUSSO, FOIGHEL AND BIGI

I cannot endorse the Court's reasoning concerning prior restraint upon publications. Nor can I agree with its finding that, in the present case, the applicants' right to freedom of expression was not violated before the end of July 1987.

In my view, it was violated not only after that date and until the case was concluded in October 1988, but already from the very beginning of the proceedings in June 1986, when the Attorney General set about seeking injunctions against them.

My reasons for so finding are simple.

I firmly believe that "the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraint"[*]: in a free and democratic society there can be no room, in time of peace, for restrictions of that kind, and particularly not if these are resorted to, as they were in the present case, for "governmental suppression of embarrassing information"[*] or ideas.

Of course, those who publish any material which a pressing social need required should remain unpublished may subsequently be held liable in court, as may those acting in breach of a duty of confidentiality. They may be prosecuted if and in so far as this is prescribed by penal law, and they may in any case be sued for compensation if damage has been caused. They may also be subject to other sanctions provided for by law, including, as the case may be, confiscation and destruction of the material in question and forfeiture of the profit obtained.

Under no circumstances, however, can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a "time of war or other public emergency threatening the life of the nation" and, even then, only "to the extent strictly required by the exigencies of the situation"[*].

Justice Black, joined by Justice Douglas, in the case, very similar to the present one, of the Pentagon Papers, New York Times v. U.S. and U.S. v. Washington Post (1971), 403 U.S. 713, at 717. Although they were there used in the context of the Constitution of the United States of America, these words perfectly express the general principle to be applied in this field.

[*] Justice Douglas, joined by Justice Black, in the same case, at 723-724.

[**] Article 15 (art. 15) of the Convention.

SEPARATE OPINION OF JUDGE DE MEYER (concerning domestic remedies), JOINED BY JUDGE PETTITI

I cannot subscribe to the third sub-paragraph of paragraph 76 of this judgment.

The reasons given in the second sub-paragraph suffice to conclude that there was, in the present case, no violation of the right of the applicants to an "effective remedy before a national authority".

The question whether a certain treaty is, or is not, "incorporated into domestic law" may be of some interest as regards other kinds of treaties. It has no relevance when fundamental rights are concerned: these are of such a nature that it cannot be necessary to have them formally "incorporated into domestic law".

As I stated already on another occasion, the object and purpose of the European Convention on Human Rights was not to create, but to recognise rights which must be respected and protected even in the absence of any instrument of positive law[*]. It has to be accepted that, everywhere in Europe, these rights "bind the legislature, the executive and the judiciary, as directly applicable law"[*] and as "supreme law of the land, ... anything in the constitution or laws of any State to the contrary notwithstanding"[*].

See my opinion concerning the Belilos case, Series A no. 132, p. 36. See also Article 1 (art. 1) of the Convention, particularly in the French text.

[*] See Article 1, section 3, of the Basic Law of the Federal Republic of Germany.

[**] See Article VI, section 2, of the Constitution of the United States of America.

SEPARATE OPINION OF JUDGE VALTICOS

(Translation)

While in full agreement with the foregoing judgment, I wish to comment on a passage which appears at paragraph 76 of the text. It is recalled therein, at the third sub-paragraph, that "the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law". This statement is correct, but remains somewhat over-succinct.

It cannot of course be disputed that under international law the strict obligation incumbent on States which ratify a convention concerning their legislation and their practice is to give effect to the convention at national level and that this does not necessarily mean that the actual terms of the convention must as such be transposed into the domestic legal system. What is essential is that the convention is, in one way or another, complied with. All this is beyond question and indeed elementary.

There is however in this connection a tendency towards over-simplification which leads to confusion. The starting point is that the formal effects which the ratification of a convention entails at domestic level naturally depend on the national constitutional system or practice and that, in this respect, under the said system (or practice) in several countries (moreover an increasing number of them) that ratification entails the incorporation of the ratified text into domestic law, while in others the two orders (international and municipal) remain distinct, even though sometimes the ratifying statute expressly enacts this incorporation. It is also worth noting that such incorporation is moreover effective, at least directly, only if the convention provisions are - according to the generally accepted expression - self-executing, in other words capable of execution without implementation by more specific (national) rules. All this is well-known and calls to mind old academic quarrels, happily mostly forgotten, and I trust that I shall be forgiven for recalling these self-evident truths.

I consider nevertheless that it is necessary to return, at least indirectly, to this question here because I wish to draw the following conclusion: yes, the Court is right when it affirms once again that States are not bound to incorporate the actual terms of the Convention into their national legal system. This statement should however be supplemented by adding: "but they are of course under a duty to give it effect". Some will say that this is only to state the obvious. Indeed it is, but the affirmation should be further qualified by: "and the obligation to give it effect is often best fulfilled where the terms of the Convention are transposed into the domestic legal system". This has nothing to do with national constitutional systems or with the old "monist" v. "dualist" quarrels. What is suggested is that the States whose constitutional system does not automatically effect such incorporation should carry it out by an express measure, whether legislative or otherwise,

following the ratification, accompanying it, if necessary, by provisions intended either to implement the provisions of a general nature or to adapt the national system to the new standards. Who would dispute that the national courts, whose attention would thus be drawn to the very terms of the Convention, which will have become national law, would find in the provisions, even the general ones, of the Convention, elements and criteria rendering their full application easier, and this may be the case even where the Government concerned consider that the existing legislation or case-law already gives effect to the Convention standards?

Although such a measure is not obligatory, it is nevertheless highly desirable with a view to ensuring not only better knowledge of the Convention but certainly also a more complete implementation thereof. This is the general conclusion which I have arrived at after more than thirty years of practice in the sphere of application of international conventions concerning human rights. It is, in the instant case, the necessary addition to the principle briefly set out by the Court.

PARTLY DISSENTING OPINION OF JUDGE MARTENS

A. Introduction

1. Like the majority of the Court, I consider that the interim injunctions, as maintained by Mr Justice Millett in his judgment of 11 July 1986, constituted an interference with O.G.'s exercise of their freedom of expression, within the meaning of paragraph 1 of Article 10 (art. 10-1). Unlike the majority, however, I find myself unable to accept that this interference was justified under paragraph 2 of that Article (art. 10-2) even during the period from 11 July 1986 to 30 July 1987.

More specifically, I am not satisfied that the requirement of necessity was met.

B. Particular features of the present case

2. The interim injunctions sought by the Attorney General against O.G. formed part of the legal campaign on which the British Government embarked when they learned that Mr Wright intended to publish his memoirs. This campaign started with the Attorney General's claim in the Australian courts for an injunction to restrain publication of the book. It continued when, after publishing short articles giving details of some of the contents of the book, O.G. refused to give undertakings that were acceptable to the Attorney General: he then sought permanent injunctions against any publication by O.G. of Spycatcher material and, within the ambit of these proceedings, interim injunctions to the same effect. Such interim injunctions were granted ex parte on 27 June 1986 and then continued, with some modifications, by Mr Justice Millett in his aforementioned judgment.

3. In legal terms, this campaign was based on the proposition that the disclosure by Mr Wright of information derived by him from his work for the Security Service would constitute a breach of a duty of confidentiality, as would disclosure by O.G., since they had obtained the information knowing that it originated from that breach. However, the Government's principal concern was - as Mr Justice Millett put it - "not with what Mr Wright says, but with the fact that it is a former senior officer of the Security Service who says it". Accordingly, their campaign was mainly designed to secure implementation of the idea that members of the Security Service - to quote the same judge - "simply cannot be allowed to write their memoirs". The appearance of confidentiality being essential to the effective operation of the Security Service, the damage caused by the news that one of its former senior members was contemplating publishing his memoirs could - to borrow again from Mr Justice Millett's judgment - "be undone

only if he was swiftly and effectively stopped, and seen to be stopped" (emphasis added). This applied to all indirect publication as well.

4. O.G., however, wished to be free to publish information which might come into their possession, even if it derived directly or indirectly from Mr Wright, in so far as it disclosed misconduct or unlawful activities on the part of members of the Security Service. Like Mr Wright in the Australian proceedings, they claimed that it was in the public interest that evidence of such misconduct should be published, part of such evidence being that the allegations thereof were made by a former senior officer of the service on the basis of information acquired by him whilst employed by it.

5.1 It follows from paragraph 4 that the impugned interim injunctions do constitute what is commonly called a "prior restraint".

5.2 When giving judgment on the appeal from Mr Justice Millett's decision, the Master of the Rolls started by saying, somewhat deprecatingly: "'Prior Restraint' are two of the most emotive words in the media vocabulary." There is, however, no ground for deprecating the emotion these words tend to generate, because they designate, especially with regard to the media, what undoubtedly is, after censorship, the most serious form of interference with a freedom which, as this Court has rightly emphasised time and again, constitutes one of the essential foundations of a democratic society (see, as the most recent example, the Oberschlick judgment of 23 May 1991, Series A no. 204, paras. 57 et seq.). In the present case the prior restraint concerned, moreover, possible comment by two "responsible newspapers" (I quote again from the Master of the Rolls) "in the context of public debate on a political question of general interest" (borrowed from paragraph 60 of the Oberschlick judgment). Its consequences were all the more dramatic since, under the doctrine of contempt of court as understood (apparently for the first time) by the Court of Appeal in the Independent case, it gagged not only O.G. but all media within the jurisdiction of the English courts.

C. The Court's task when reviewing necessity

6. In its Handyside judgment of 7 December 1976 (Series A no. 24, pp. 23-24, para. 50) the Court had already made it clear that when reviewing the "necessity" of an interference it had to decide, on the basis of the different data available, "whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient under Article 10 para. 2 (art. 10-2)" (idem: the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 38, para. 62, and the Barthold judgment of 25 March 1985, Series A no. 90, p. 25, para. 55). Recently, in paragraph 60 of its aforementioned Oberschlick judgment, the Court specified that this test implies that it has to satisfy itself that the national authorities "did apply standards which were in conformity with

these principles" - i.e. the principles to be derived from Article 10 (art. 10) - "and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts".

D. Application of this test

7. Accordingly, in order to determine whether the prior restraint can be held justified it is necessary to examine very carefully: (a) whether, in deciding to impose this exceptional measure, the national authorities did apply standards which were in conformity with the principles to be derived from Article 10 (art. 10); and (b) whether, in doing so, they based themselves on an acceptable assessment of the relevant facts.

In my opinion, such examination cannot but lead to the conclusion that both limbs of this question must be answered in the negative. I will explain why.

E. The standards used

8. I start with the first limb: what standards were applied (paragraphs 9 and 10) and are they in conformity with the principles to be derived from Article 10 (art. 10) (paragraph 11)? I note that, in addressing these two questions, it is sufficient to analyse the judgment of Mr Justice Millett, because in the subsequent stages of the interlocutory proceedings not only was his decision held to be justified, but also no fundamental criticism was levelled as to the legal principles on which he had based it.

9.1 Mr Justice Millett started from the assumption that there was at best a conflict of two legitimate public interests: on the one hand, the (incontestable) interest the public has in the maintenance of confidentiality within any organisation as a condition for its efficiency and, on the other, the (possible) interest of the public in being informed of unlawful acts or other misconduct. He held that the applications to discharge the ex parte injunctions could be granted only if O.G. had satisfied him that the latter interest existed and outweighed the former.

9.2 Leaving aside (as immaterial for the present purposes) the complication that interim injunctions had already been granted ex parte so that it was O.G. who had to apply for their discharge, the conclusion must be that the standard used by the national judge for deciding whether or not to impose a prior restraint was: an interim injunction sought for the purpose of preserving confidentiality should be granted unless the defendant satisfies the court that (a) disclosure is in the public interest and (b) this interest outweighs the interest in preserving confidentiality.

10.1 Mr Justice Millett left open the question whether the standard he used was an exception to or an application of the American Cyanamid principles (see, for these principles, paragraph 10 of the Court’s judgment),

but held that he was satisfied that pecuniary compensation to either party would be wholly inappropriate. He continued by saying that, "in resolving the conflict" of interests, one of the particular facts he had to take into account was that "a refusal of injunctive relief may cause irreparable harm and effectively deprive the plaintiff of his right".

10.2 In my opinion, one can only infer from these and similar passages that the judge did apply the American Cyanamid principles, at least to the extent of tacitly assuming that the material before him did not disclose that the Attorney General did not have any real prospect of succeeding in his claim for a permanent injunction.

11.1 Are these standards in conformity with the principles to be derived from Article 10 (art. 10)? I do not think so.

11.2 I take first Mr Justice Millett’s starting-point, namely that there was at best a conflict between two legitimate public interests, one in the maintenance of confidentiality, the other in receiving information about misconduct or impropriety. Evidently, for him these two interests had, in principle, the same weight. This is, however, incompatible with Article 10 (art. 10). Under that provision the interest in freely receiving information clearly in principle outweighs the interest in "preventing the disclosure of information received in confidence": the latter interest is not in itself sufficient to justify an interference with the right to freedom of expression, but does so only if and in so far as the interference is "necessary in a democratic society". Similarly, under Article 10 (art. 10) it is not for the press, if threatened by a prior restraint, to ward off the interference by satisfying the court that (a) there is a public interest in imparting and receiving the information with regard to which the injunction is sought, and (b) this interest outweighs the interest in preserving the confidentiality of that information. That is to turn things topsy-turvy: under Article 10 (art. 10), freedom of the press is the rule and this implies that what has to be justified is the interference; therefore it is for the party seeking the restraint - in this case the Attorney General - to satisfy the court that the requirements of paragraph 2 are met, i.e. that the restraint can be said to be "necessary in a democratic society" (in the rather strict meaning these words have according to this Court’s settled case-law) for the preservation of confidentiality.

11.3 Thus, the standard used unduly tipped the balance in advance in favour of the Attorney General, the party who was seeking to restrict freedom of expression. This is all the more serious because, when applying that standard, Mr Justice Millett - following the American Cyanamid principles as he did (see paragraph 10.2 above) - again favoured the Attorney General in a way which is incompatible with the principles to be derived from Article 10 (art. 10).

11.4 When applying the above standard, Mr Justice Millett was, as he pointed out, taking into account "that this is an interlocutory application and

not the trial". Yet, without more ado, he also took into account that refusal of injunctive relief might "deprive the plaintiff of his right". In particular, he did so without going explicitly into the question whether the plaintiff in fact had any right and without inquiring what the Attorney General's chances were of obtaining permanent injunctions at the trial. As I have already said in paragraph 10.2 above, it must be inferred that the judge confined himself to ascertaining that, on the material before him, it could not be said that on the face of it the Attorney General's claim did not have any real chance of success.

11.5 When assessing whether this approach is in conformity with the principles to be derived from Article 10 (art. 10), it is important to realise that the interim injunction sought by the Attorney General in the interlocutory proceedings was merely a derivative from the permanent injunction sought by him in the main proceedings. I say "merely a derivative" because the interim injunction did not serve an independent purpose, but was intended solely to prevent (further) indirect publication until the court had had the opportunity to take a final decision as to whether indirect publication would be allowed or not.

11.6 It is also to be noted that under Article 10 (art. 10) both the interim and the permanent injunction could be granted only if they could be said to be "necessary in a democratic society". Just as the interim injunction is merely a derivative from the permanent one, so the necessity requirement for granting the former is but a derivative from that for granting the latter. Accordingly, the application for the interlocutory prior restraint could be granted only if the court were satisfied at that stage that the Attorney General's claim in the main proceedings would probably meet the requirement of necessity. It could hold the interlocutory injunction to be "necessary", within the meaning of Article 10 para. 2 (art. 10-2), only if it were satisfied that the claim for a permanent injunction would probably be accepted. If that was open to serious doubts or even merely uncertain, the interference could hardly be qualified as necessary: this, as the Court has repeatedly and rightly stressed, is a rather strict requirement, especially where the freedom of expression of the press in matters of public interest is at stake.

11.7 It follows that: (a) to comply with the principles to be derived from Article 10 (art. 10), Mr Justice Millett should have imposed the interim prior restraint only if the Attorney General had satisfied him that the claim for a permanent injunction would probably succeed; and (b) by confining himself to examining whether it was evident that that claim did not have any real chance of success, the judge in fact applied a standard which was at variance with those principles.

F. The assessment of the facts

12.1 I now turn to the second limb of the question outlined in paragraph 7 above: was Mr Justice Millett's decision based on an acceptable assessment of the relevant facts? And I note that the expression "the relevant facts" implies (inter alia) reviewing whether facts that should have been taken into account under Article 10 (art. 10) were indeed duly considered. In this respect, I recall that the injunctions sought by the Attorney General against O.G. formed part of the legal campaign on which the British Government embarked when they learned that Mr Wright intended to publish his memoirs. Within the ambit of this campaign the relationship between the English and the Australian proceedings was similar to that which existed between the interlocutory and the main proceedings in England, as outlined in paragraphs 11.5 and 11.6 above: just as the Attorney General started the interim proceedings in order to preserve his position in his claim for a permanent injunction restraining all indirect publication of Spycatcher material, so he made that claim in order to preserve his position in the Australian case, where he asked for an injunction restraining publication of the book itself.

It follows that the probable outcome of the English proceedings (the relevance of which has been discussed in paragraphs 11.4 - 11.7 above) would depend to a large extent on that of the Australian proceedings: would the Attorney General's endeavours to stop the imminent publication of the memoirs be likely to succeed? If their success would have been open to serious doubts, the same would have applied to the prospects of his claim for a permanent injunction against O.G. If, at the moment when the English courts would have to decide whether or not to grant that claim, his action concerning direct publication had already failed or was likely to do so shortly, those courts would hardly be in a position to hold that a permanent injunction against indirect publication should nevertheless be regarded as necessary.

12.2 These considerations show that Mr Justice Millett should have asked himself whether it was likely that the Government would attain what he - after a judicious analysis of the allegations made and the evidence submitted by the Attorney General - rightly considered as their goal, namely to stop swiftly and effectively Mr Wright's attempts to publish memoirs which should not even have been written (see paragraph 3 above). The learned judge failed, however, to do so and therefore cannot be said to have based his decision on an acceptable assessment of the relevant facts (see paragraph 6 above).

12.3 There is a second and, to my mind, still more important ground for so holding, namely that, if the question whether the Government would succeed in effectively keeping Spycatcher from the public had been considered, it should have been answered in the negative.

As the Government had been advised, proceedings to restrain publication of the book in the United States of America would fail (see paragraph 28 of the judgment). It was likely (and the events in 1987 clearly confirmed this) that Mr Wright had been similarly advised. It does not appear that Mr Justice Millett considered the repercussions of these facts and yet, within the context of the relationship between the English and the Australian proceedings, they are of decisive importance. The impossibility of preventing publication in the United States highlights that in this "age of information" information and ideas just cannot be stopped at frontiers any longer. Article 10 para. 1 (art. 10-1) has explicitly drawn the legal consequences of this situation. Accordingly, under Article 10 (art. 10) the impossibility of restraining publication in the United States perforce implied that restraint in Australia could not be held to be "necessary", within the meaning of paragraph 2. It is immaterial whether the Australian courts would have drawn this conclusion when confronted with that impossibility. For it is the conclusion which a court in a member State should have drawn and that is what should have been deemed decisive in the context of the dispute between O.G. and the United Kingdom.

These considerations suggest that one of the respects in which I differ from the majority of the Court comes down to this: whereas for them the fact that the book had been published in the United States in the meantime is the sole decisive reason for holding that prior restraint on indirect publication in England was thenceforth no longer justified, for me the fact that the book could be legally published in the United States made it, even at the time when the Attorney General introduced his breach of confidence actions, so unlikely that Mr Wright could effectively be stopped that the interim injunction should never have been granted. But Mr Justice Millett did not take this factor into account, just as he did not consider what chances the Attorney General had of winning the Australian case.

G. Conclusion

13. To sum up: in my opinion, Mr Justice Millett's decision was based on standards that were not in conformity with the principles to be derived from Article 10 (art. 10) and also on a factual assessment which, in the light of this provision, is incomplete to a decisive degree. I therefore find myself unable to accept that, even during the period from 11 July 1986 to 30 July 1987, the interference was "necessary" under paragraph 2 of that Article (art. 10-2).

PARTLY DISSENTING OPINION OF JUDGE PEKKANEN

I regret that I am unable to agree with the majority of the Court that there was no violation of Article 10 (art. 10) of the Convention on account of the temporary injunctions binding on the applicants in the period from 11 July 1986 to 30 July 1987.

I agree with the majority that Article 10 (art. 10) does not prohibit the imposition on the press of prior restraints, as such, on the publication of certain news or information. However, taking into account the vital importance in a democratic society of freedom of expression and freedom of the press, the State's margin of appreciation in these cases is very narrow indeed. The use of prior restraints must be based, in my opinion, on exceptionally relevant and weighty reasons which clearly outweigh the public's legitimate interest in receiving news and information without hindrance. This leads me to the general conclusion that prior restraints can be imposed on the press only in very rare and exceptional circumstances and usually only for very short periods of time.

The aim of the temporary injunctions in this instance was to preserve the status quo during judicial proceedings. As such, this is a legitimate aim. But was there a pressing social need for these measures in a democratic society and were they proportionate to the aims pursued?

First of all, I would stress that in today's world news and information travel very quickly and easily from country to country and that it is practically impossible to stop this. As the present case shows, temporary injunctions imposed on the Observer and Guardian applicants - which were binding on all the British media through the operation of the doctrine of the contempt of court - could not prevent the flow of the information in question from abroad. Prior restraint was, therefore, not an effective means of achieving the aim of preserving the status quo. Furthermore, before the temporary injunctions were granted, the confidentiality of the material concerned had to a large extent already been destroyed by previous publications and television interviews. Accordingly, there was no need for the restrictions on this occasion.

These considerations alone show, in my opinion, that in the instant case there was no pressing social need for so drastic a measure as prohibiting the press from disseminating information.

PARTLY DISSENTING OPINION OF JUDGE MORENILLA

1. I agree with the majority of the Court that the interlocutory injunctions imposed on the Observer and Guardian applicants ("O.G.") by Mr Justice Millett on 11 July 1986 ("the Millett injunctions") forbidding the publication of information obtained by Mr Peter Wright in his capacity as a member of the British Security Service - which injunctions extended to all the British media, including The Sunday Times, by virtue of the law of contempt of court and remained in force until 13 October 1988 - constituted an interference with O.G.'s freedom of expression and their right to hold opinions and to receive and impart information and ideas, guaranteed by Article 10 para. 1 (art. 10-1) of the Convention.

I also agree, but not without some hesitation, that this interference was "prescribed by law", as this expression is understood in the case-law of our Court (see the Sunday Times judgment of 26 April 1979, Series A no. 30, pp. 30-31, paras. 47-49): in accordance with the common-law system, it was based on judicial precedents and they were adequately accessible and the result of their application sufficiently foreseeable. Again, I share the majority's view that the injunctions were designed to protect the position of the Attorney General as a litigant pending the trial of his breach of confidence actions against O.G. and also served the purpose of protecting national security by preventing further dissemination of confidential information on the operation of the Security Service. Both of these aims are legitimate under paragraph 2 of Article 10 (art. 10-2).

I must, however, record my disagreement on the key issue, namely the necessity of such restrictions in a democratic society. At no time, in my opinion, were these temporary injunctions justified by a "pressing social need" or proportionate to any legitimate aims pursued. I must, therefore, dissent from the majority's conclusion regarding the period from 11 July 1986 to 30 July 1987.

2. In my view, this central issue should not have been separated into two periods, as was done by the Commission, "for the sake of clarity", and the majority of the Court. All the decisions, from that of Mr Justice Millett to that of the House of Lords in 1987, were part of the same interlocutory proceedings and O.G. were subject to essentially the same restrictions throughout the period from July 1986 to October 1988. Separating it into two has led to the somewhat inconsistent outcome of finding those restrictions to be partly in accordance with and partly in violation of the Convention.

On 29 April 1987 O.G. applied for the discharge of the Millett injunctions, notably because of reports that had appeared in three other English newspapers (see paragraphs 22-23 of the judgment). On 12 July 1987, a date intended to coincide with that of the publication of Spycatcher in the United States of America, The Sunday Times published a first extract

from the book (see paragraphs 27-28 of the judgment). Nevertheless, the House of Lords decided to maintain the injunctions and, as a result of the law of contempt of court, they bound all the British media, including The Sunday Times.

The publication of Spycatcher in the United States and the world-wide diffusion of Mr Wright's disclosures on the activities of MI5 are not "relevant", in my opinion, either to O.G.'s claim under Article 10 (art. 10) or to the breach of confidentiality that the Government imputed to them: they merely confirmed that to attempt to prevent the dissemination in English-speaking countries of information of general interest by imposing a judicial restraint on the British media was neither realistic nor effective.

3. The major principles emerging from the Court's case-law on Article 10 (art. 10) - with which principles I fully agree - are conveniently summarised in paragraph 59 of the present judgment and I do not need to elaborate on that summary here.

The Government have recalled the Court's observation, in its markt intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989 (Series A no. 165, p. 21, para. 37), that it should not substitute its own evaluation for that of the national courts where the latter, on reasonable grounds, have considered restrictions to be necessary. They have also submitted that the margin of appreciation to be afforded to the national authorities, in assessing whether the protection of national security demands the imposition of temporary restraints on publications, is a wide one.

The Court's observations in the markt intern case, which related to the publication in a specialised sector of the press of information of a commercial nature, do not in any way establish an exception to its supervisory jurisdiction, which is described in paragraph 59 (d) of the present judgment.

In the Convention system, the Court has been empowered to draw the line between the competence of the national courts and its own competence, while at the same time maintaining their respective responsibilities to secure the guaranteed rights and freedoms, according to Articles 1 and 19 (art. 1, art. 19). It is true that the State's margin of appreciation is wider when it is a question of protecting national security than when it is a question of maintaining the authority of the judiciary by safeguarding the rights of the litigants (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 36, para. 59, and the Leander judgment of 26 March 1987, Series A no. 116, p. 25, para. 59). However, the margin of appreciation concept must always be applied, taking into account the circumstances of each case, on the basis of a coherent interpretation of Article 10 (art. 10) in accordance with the European case-law and certainly not in a manner that could destroy the substance of freedom of expression.

4. The overriding importance of freedom of expression, the vital role of the press in a democratic society and the right of the public to receive

information on matters of general concern, all of which factors have been repeatedly emphasized in the case-law of this Court, required in the present case the application of a very strict test of necessity. When seeking to justify the restrictions imposed on O.G. on the grounds of the interests of national security and of preserving the Attorney General's rights until the trial, the Government have, in my opinion, failed to "establish convincingly" (see paragraph 59 (a) of the present judgment) that such a test was satisfied.

A. The interests-of-national-security issue

5. Like the members of the majority of the Commission, Mr Frowein, Mr Busuttil and Mr Weitzel, I am of the opinion that the primary concern of the English courts in the present case was not the protection of national security but the protection of confidentiality. The danger for national security was alleged indirectly, as resulting from the loss of confidentiality and the impairment of the efficiency and reliability of the Security Service. Thus, Mr Justice Millett said in his judgment (transcript, p. 11E-F): "It is obvious that a Security Service must be seen to be leak-proof. The appearance of confidentiality is essential for its proper functioning. Its members simply cannot be allowed to write their memoirs."

The interlocutory injunctions had the consequences that (1) a restraint was imposed without a full hearing of the plaintiff's arguments; and (2) the ban extended to all the media by operation of the common-law doctrine of criminal contempt of court. And, in fact, contempt of court proceedings were instituted against The Independent, The London Evening Standard, the London Daily News and The Sunday Times (see paragraphs 22 and 27 of the judgment).

The national judges were well aware of the gravity of the measure. Mr Justice Millett said in his judgment (transcript, p. 6B-C) that "prior restraint of publication is a serious interference with the freedom of the Press and the important constitutional right to freedom of speech". In the Court of Appeal on 25 July 1986, Sir John Donaldson began his judgment (transcript, p. 3A) by stating that "'Prior Restraint' are two of the most emotive words in the media vocabulary. Accordingly The Guardian and the Observer reacted swiftly and forcefully to news that Mr Justice MacPherson had granted an ex parte injunction on 27 June 1986 ...".

6. In fact, distrust for these provisional restraints on the press is long-established in the common-law tradition. Blackstone wrote in 1765 in his "Commentaries on the Law of England" a sentence which it has become obligatory to quote: "The liberty of the Press is indeed essential to the nature of a free State: but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published."

The United States case-law cited by "Article 19", the International Centre against Censorship (see paragraph 6 of the present judgment), has consistently held that the principal purpose of the First Amendment's guarantee is to prevent prior restraints. With regard to the national-security aim the United States Supreme Court declared in Near v. Minnesota (283 U.S./718) that: "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."

The other leading decisions of that Court, such as those in New York Times Co. Ltd v. the U.S., 403 U.S./713 (1971) (the Pentagon Papers case), Landmark Communications Inc. v. Virginia, 425 U.S./829 (1978) (the Landmark case), Nebraska Association v. Stuart, 427 U.S./ 593 (1976) and U.S. v. The Progressive, 486 F. supp. 990 (1979) (the Hydrogen Bomb case), have consistently required that very strict conditions ("all but totally absolute") must be satisfied before prior restraints can be imposed on the publication of information on matters related to national security. In the words of the Nebraska judgment, "the thread running through all these cases is that prior restraints on speech or publication are the most serious and least tolerable infringement on the First Amendment rights ... A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraints 'freeze' it, at least for a time." Justice Brennan, concurring with the judgment, stated "although variously expressed it was evident that even the exception was to be construed very, very narrowly: when disclosure 'will surely result in direct, immediate and irreparable damage to our nation or its people'".

7. While sharing the view of the majority expressed in paragraph 60 of the present judgment, I believe that restrictions on freedom of expression such as those imposed on O.G. allegedly to protect national security are very far from fulfilling these standards. The Government have not shown the "direct, immediate and irreparable damage" to the security of the United Kingdom that was or would have been occasioned by the articles published by O.G. or from the disclosures which it was feared at the time that Mr Wright might make. Mr Justice Millett said in his judgment (transcript, p. 10F): "It is clear from those passages [in Sir Robert Armstrong's affidavits] that the true nature of the Attorney General's objection is not to the fresh dissemination of allegations about past activities of the Security Service of the kind outlined in the recent articles published by the defendants. They are ancient history and have been the subject of widespread previous publicity."

The "appearance of confidentiality" may be "essential to the effective operation of the Security Service" - as it is to other public services - but, for the purposes of Article 10 para. 2 (art. 10-2) of the Convention, it does not,

in my opinion, of itself justify the imposition, on the grounds of protecting national security, of a prior restraint that impairs freedom of the press and the right of the public to be properly informed. Dissemination of the information in question could be restricted "only if it appeared absolutely certain" that its diffusion would have the adverse consequence legitimately feared by the State (see, mutatis mutandis, the above-mentioned Sunday Times judgment, Series A no. 30, pp. 41-42, para. 66).

The two Law Lords who dissented from the decision of the House of Lords of 30 July 1987 expressed their views on this point. Lord Bridge of Harwich said that "freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road" (Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1286F). Lord Oliver of Aylmerton stated that "to attempt, even temporarily, to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but involves taking the first steps upon a very perilous path" (ibid., 1321D).

8. When considering whether the injunctions imposed on O.G. by the national authorities were necessary for and proportionate to the aim of protecting national security, I see the following circumstances as militating against the necessity of so serious a restriction.

(a) The Government had neither indicated precisely what information in the articles published by O.G. imperilled British security operations nor demonstrated the imminent or substantial danger for national security they created.

(b) The articles, which appeared on the inside pages of the newspapers, were short and fair reports on the issues in the Australian proceedings. The allegations about the activities of MI5 had, according to Mr Justice Scott (Attorney General v. Guardian Newspapers Ltd (No. 2) [1990] 1 Appeal Cases 128-138), been divulged before in twelve books and three television programmes, and especially in two books written by Mr Chapman Pincher in 1981 and 1984 and in a television interview with Mr Wright himself that had been publicly announced in advance. And, as the Vice-Chancellor, Sir Nicolas Browne-Wilkinson, stated (Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1264C), "in the present case, it is not suggested, nor could it be, that The Guardian and the Observer have in any sense been involved in any activity with Mr Wright leading to the publication of his book ... . They have not aided and abetted Mr Wright in his breach of duty." He concluded that if "a third party who is not a participator in the confidant’s breach of duty receives information which at

the time of receipt is in the public domain - that is to say, he gets it from the public domain - in my judgment he would not, as at present advised, come under any duty of confidence" (ibid., 1265E).

(c) The Government had neither taken any steps to prosecute Mr Wright or the authors or editors of the earlier publications under the Official Secrets Act 1911 nor brought civil actions for breach of confidence seeking a declaration, damages or an account of profits.

(d) The claim for permanent injunctions against the newspapers was based on rather hypothetical grounds, for example: (1) their information was obtained directly or indirectly from Mr Wright; (2) they wished to publish further disclosures about the activities of the Security Service; (3) this would endanger the efficient operation of the Service and its "appearance of confidentiality"; and (4) this would also encourage other members or former members of the Service to publish confidential information.

(e) The evidence adduced by the Attorney General at the interlocutory stage was the two affidavits sworn by Sir Robert Armstrong in the Australian proceedings, which emphasized that the preservation of the appearance of confidentiality was essential to the effective operation of the Security Service. It deserves to be stressed that, in fact, as the Commission pointed out in its report (paragraph 89), "the evidence upon which the House of Lords based its decision on the merits in October 1988 was substantially available at the outset in July 1986 and fully available by July 1987".

B. The maintenance-of-the-authority-of-the-judiciary issue

9. As stated before, one aim of the temporary injunctions was the preservation of the rights of the Attorney General pending the substantive trial. The Government contended that the imposition of an interlocutory injunction to restrain publication of material which is the subject-matter of an action might, if publication in advance of the trial would destroy the substance of the action, in principle be considered necessary in a democratic society for maintaining the authority of the judiciary, in terms of the Court's above-mentioned Sunday Times judgment (Series A no. 30, p. 42, para. 66). While accepting in abstracto such a proposition, I consider, nevertheless, that in the circumstances of the present case the Government have failed to show that the grant of an injunction on this ground responded to any "pressing social need" or that the measure was proportionate to the aim pursued.

10. Interlocutory injunctions provisionally restrain the parties to a civil suit from taking any action that could endanger the final decision of the court. They are thus designed to preserve the status quo until the trial in order to ensure, in a case where an award of damages would not compensate for the injury caused by the defendant, that the judgment will be effective.

The general principles governing the grant of interlocutory injunctions were enunciated by the House of Lords in American Cyanamid Co. v. Ethicon Ltd ([1975] Appeal Cases 396; see paragraph 10 of the present judgment), a case relating to the alleged infringement of a patent. On that occasion the House modified the former criteria by directing that, instead of examining whether the evidence disclosed a prima facie case of infringement, the court should only check whether the plaintiff's claim for a permanent injunction had any real prospect of success, that is whether he had an arguable case. If the claim was not "frivolous or vexatious", the question whether an injunction should be granted was to be determined in the light of the "balance of convenience" between the conflicting interests of the litigants.

It was on the basis of these American Cyanamid rules that the Millett injunctions were granted and subsequently upheld in the interlocutory proceedings. 11. The application of these revised criteria clearly favours a plaintiff who seeks a temporary injunction because, without having a full trial on the main issue of whether or not the alleged confidential information may be published, he can succeed merely by showing that his case is "arguable".

Indeed, in the present case the rigid application of the American Cyanamid principles led to the "inevitable" imposition of a prior restraint on the media, which directly impaired O.G.'s freedom of expression and the right of the public to be informed quickly about matters of legitimate general concern, such as allegedly unlawful activities on the part of the Security Service.

Consequently, the legal strategy of the Attorney General turned out to be in conflict with the "necessity" test under Article 10 para. 2 (art. 10-2) of the Convention and the national courts, when balancing the conflicting interests at issue, did not give sufficient weight to the fundamental importance in a democratic society of freedom of expression.

The particular circumstances of the case, to which I have already referred in section A above, and the following factors, which were all clearly apparent when the claims for interlocutory injunctions were determined, meant that the restrictions on the media sought by the Government were not justified under Article 10 para. 2 (art. 10-2) for the aim of maintaining the authority of the judiciary.

(a) For the first time the Attorney General was instituting private-law proceedings relating to a breach by a former employee of the Security Service of his duty of confidence and, relying on a commercial-law precedent, was seeking an interlocutory injunction to preserve his claim for a permanent injunction as the sole means of protecting that duty of confidence. Lord Oliver of Aylmerton said, "I have not been able to find nor have your Lordships been referred to any previously reported decision which could be said to be even remotely parallel to the instant case"

(Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1315G).

(b) In June 1986 Mr Wright's disclosures were already in the public domain and the information was no longer confidential because, as stated above, they had been published in several books and divulged by him in a television interview, with no reaction on the part of the Government. Mr Justice Millett was very explicit on this point when saying in his judgment, "the allegations themselves may be compiled from a number of published sources by anyone who takes the trouble to go to them" and "the objection is not to the allegations themselves, but to Mr Wright's input. It is true that Mr Wright has provided information on previous occasions, once in a television interview and, if footnotes to certain published works are to be believed, by collaborating with their author" (transcript, pp. 5C and 13B).

(c) As a consequence, the aim of preserving the status quo could not be attained because of the leakage of the confidential information and the absence of any previous reaction by the Government.

(d) The application of the American Cyanamid principles to a case of breach of confidence involving matters of legitimate public concern had the consequence of imposing on the media - without a full hearing on the issue of whether or not the information might be published - a prior restraint implying, because of the threat of contempt of court proceedings, a partial self-censorship.

In fact, the rationale of the Millett injunctions was to maintain the "appearance of confidentiality" of the Security Service by forbidding - through the imposition on the media, albeit temporarily, of an immediate restraint - the publication of anticipated further disclosures or "leakages" in the Service.

The English courts arrived at this decision after applying the "balance of convenience" test and this resulted in a serious limitation on freedom of expression. Mr Justice Millett said on this point (transcript, p. 8D) that "it makes no difference that the claim to suppress publication is made by the Government and not by a private litigant; the principles remain the same". However, while that test may be correct under English law, it is not acceptable when it comes to deciding whether a limitation of freedom of expression of the kind involved in this case is justified under Article 10 para. 2 (art. 10-2) of the Convention. I agree with the majority of the Commission that, when it is the Government which seek to restrict the dissemination of information that is of considerable public interest, the need for a temporary injunction "should be established with particular clarity and certainty" because of the predominant place occupied by freedom of expression and the international obligation incumbent on the public authorities not to interfere with it.

(e) The fact that, as noted in the interlocutory decisions, O.G. were in no way involved in Mr Wright's proposed publication was overshadowed by

their admission that they wished to publish credible information, of legitimate public concern, relating to the unlawful operation of the Security Service or the misconduct of its members. Mr Justice Millett's opinion that "disclosures to the proper authorities may be sufficient in some cases" also seems inconsistent with the right to receive and impart information and ideas enshrined in Article 10 (art. 10). The public has a right to be promptly informed on such matters, irrespective of whether a report is made to the proper authorities with a view to prosecution and punishment. Since a limitation on freedom of the press was involved, greater weight should have been given to the "iniquity defence" (the right to report misconduct) relied on by O.G.

The dangers of so rigid an application of this precedent were pointed out by Lord Oliver of Aylmerton when he said: "The guidelines laid down by this House in American Cyanamid Co. v. Ethicon Ltd ... have come to be treated as carved on tablets of stone, so that a plaintiff seeking interlocutory relief has never to do more than show that he has a fairly arguable case. Thus the effect in a contest between a would-be publisher and one seeking to restrain the publication of allegedly confidential information is that the latter, by presenting an arguable case, can effectively through the invocation of the law of contempt, restrain until the trial of the action, which may be two or more years ahead, publication not only by the defendant but by anyone else within the jurisdiction and thus stifle what may, in the end, turn out to be perfectly legitimate comment until it no longer has any importance or commands any public interest" (Attorney General v. Times Newspapers Ltd [1991] 2 Weekly Law Reports 1022B).

(f) The discretionary grant of an interlocutory injunction should not prejudice the final determination of the action, but the court, under the American Cyanamid principles, has to consider if the plaintiff has shown an "arguable case" or if he has a "good cause". The fumus boni iuris of the main action is thus an important element in the exercise of the discretion.

The circumstances of the present case did not show, or at least did not show with sufficient clarity, that the Attorney General had an arguable case for a permanent injunction. All the interlocutory decisions nevertheless reached the opposite conclusion and consequently the temporary injunctions were granted to preserve his rights pending trial.

Today, however, with the benefit of hindsight and after the judgments on the merits delivered at three levels, it is easy to affirm that such a "good cause" did not exist. The terms used by the judges leave no doubt on this issue. In his very thorough judgment of 21 December 1987 Mr Justice Scott said: "It is equally unacceptable that the government's assertion of what national security requires should suffice to decide the limitations that must be imposed on freedom of speech or of the press"; "In my view the articles represented the legitimate and fair reporting of a matter that the newspapers were entitled to place before the public, namely the court action in

Australia"; and he concluded categorically: "The Guardian and the Observer were not in breach of confidence in publishing the articles about the Australian Spycatcher case in their respective editions of 23 June 1986 and 22 June 1986." (Attorney General v. Guardian Newspapers Ltd (No. 2) [1990] 1 Appeal Cases 144B, 167H and 172H).

Likewise, when the House of Lords gave judgment on 13 October 1988, Lord Keith of Kinkel said (ibid., 264A): "I consider that on balance the prospects are that the Crown would not have been held entitled to a permanent injunction. Scott J. and the majority of the Court of Appeal took that view, and I would not be disposed to differ from them." Lord Brightman affirmed (ibid., 266E): "I agree with the majority of your Lordships that, despite the reprehensible leakage of information which was the source of these articles about the then forthcoming Australian proceedings, the articles were not in fact damaging to the public interest and are not therefore a proper foundation for any case by the Crown against these newspapers." And Lord Goff of Chieveley expressed himself in similar terms (ibid., 290C): "the articles were very short: they give little detail of the allegations: a number of the allegations had been made before: and in so far as the articles went beyond what had previously been published, I do not consider that the judge erred in holding that, in the circumstance, the claim to an injunction was not proportionate to the legitimate aim pursued."

(g) The "temporary" and "provisional" nature of the interlocutory measures cannot justify under the Convention the restriction imposed on O.G.. As they asserted, "in many media cases, an interlocutory injunction is effectively a final injunction, because news is perishable ; a delay of weeks, months or more is equivalent to no publication". To "postpone" - the word used in the domestic judgments - information for more than two years could result in finding that the content had volatilised because of the transient character of the news.

(h) Finally, it was also obvious that the injunctions did not correspond to a "pressing social need" because, as the facts of this case have demonstrated, they were useless and unreal. It was plainly unreal to seek, by a judicial order, to restrain dissemination of news of general interest, or to seek, by an injunction against the media, to discourage members of State authorities who have access to secret, classified or simply confidential information of general interest from publishing it. And this unreality is even more evident when the news is written or broadcast in English: information is diffused universally in this language, notably by American or foreign publications or broadcasts that are sold or received in the United Kingdom. In today’s circumstances such an injunction is an illusory measure since many of these media are outside the jurisdiction of the English courts.

Like the Vice-Chancellor in his judgment of 22 July 1987 (see paragraph 33 of the present judgment), I think that "there is a limit to what can be

achieved by orders of the court. If the courts were to make orders manifestly incapable of achieving their avowed purpose, such as to prevent the dissemination of information which is already disseminated, the law would to my mind indeed be an ass ... The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere. But whilst the news is international, the jurisdiction of this court is strictly territorial" (Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1269F and H).

This pragmatic reasoning is, in my opinion, sufficient to demonstrate that what is clearly impracticable cannot be considered "necessary". Likewise, the very limited effect of the ban on the British media shows that the restraints imposed on O.G. were manifestly disproportionate.

12. Consequently, taking all these factors separately and as a whole, I must depart from the majority’s conclusion (see paragraph 65 of the judgment) that the national authorities were entitled to think that the interference complained of was necessary in a democratic society. Furthermore, I believe that the reasons expressed in paragraphs 68 and 69 of the judgment for finding a violation in the period after 30 July 1987 were also valid as regards the earlier period, when such of the information published in Spycatcher as was relevant was already known to the public (see paragraph 12 of the judgment).

I therefore conclude that there was a violation of Article 10 (art. 10) of the Convention in the period from 11 July 1986 to 30 July 1987, as well as in that from 30 July 1987 to 13 October 1988.