European Court of Human Rights

CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

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

FIFTH SECTION

CASE OF SCHWABE AND M.G. v. GERMANY

(Applications nos. 8080/08 and 8577/08)

JUDGMENT

STRASBOURG

1 December 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Schwabe and M.G. v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 8 November 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The cases originated in two applications (nos. 8080/08 and 8577/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two German nationals, Mr Sven Schwabe ("the first applicant") and Mr M.G. ("the second applicant"), on 8 February 2008 and 11 February 2008 respectively. On 23 August 2010 the President of the Chamber acceded to the second applicant's request dated 7 July 2010 not to have his identity disclosed (Rule 47 § 3 of the Rules of Court).

2. The first applicant was initially represented before the Court by Ms K. Ullmann, a lawyer practising in Hamburg, and subsequently by Ms A. Luczak, a lawyer practising in Berlin. The second applicant was also represented before the Court by Ms A. Luczak. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling Vogel, *Ministerialdirigentin,* and by their permanent Deputy Agent, Mr H.-J. Behrens, *Ministerialrat,* of the Federal Ministry of Justice.

3. The applicants alleged, in particular, that their detention for preventive purposes during a G8 summit, which had prevented them from participating in demonstrations, had violated Articles 5 § 1, 10 and 11 of the Convention.

4. On 30 November 2009 the President of the Fifth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were both born in 1985 and live in Bad Bevensen and Berlin respectively.

A. Background to the case

1. The authorities' assessment of the security situation and the security measures taken during the G8 summit

6. From 6 to 8 June 2007 a G8 summit of Heads of State and Government was held in Heiligendamm, in the vicinity of Rostock.

7. The police considered that there was a threat of terrorist attacks, in particular by Islamist terrorists, during the summit. Furthermore, having regard to the experience of previous G8 summits, they considered that there was a risk of property damage by left-wing extremists. The latter were found to have planned to protest against, block and sabotage the summit.

8. The police estimated that there would be around 25,000 participants at an international demonstration in Rostock on 2 June 2007, 2,500 of whom were ready to use violence, and that there would be around 15,000 demonstrators present during the summit, 1,500 of whom would be ready to use violence.

9. On 2 June 2007 serious riots broke out in Rostock city centre, involving well-organised violent demonstrators, forming what has been termed a "black block", who attacked the police with stones and baseball bats. 400 policemen were injured.

10. According to a press release of the Mecklenburg Western-Pomerania Ministry of the Interior dated 28 June 2007, some 17,000 police officers had been involved in ensuring that the G8 summit could be held without disruption and in protecting its participants from attacks by terrorists or anti globalisation demonstrators prepared to use violence. During the summit, 1,112 people had been detained in holding pens for prisoners (*Gefangenensammelstellen*). The courts had been asked to confirm the detainees' detention in 628 cases; they had done so in respect of 113 individuals.

2. The applicants' arrest

11. In June 2007 the applicants drove to Rostock in order to participate in demonstrations against the G8 summit in Heiligendamm.

12. On 3 June 2007 at around 10.15 p.m. the applicants' identity was checked and established by the police in a car park in front of Waldeck prison, where they were standing next to a van in the company of seven other people. No other people were present in the car park. The police submitted that the first applicant had physically resisted the identity check. He

had allegedly hit the arms of a policeman who had attempted to determine the second applicant's identity. He had also kicked another policeman's shin in order to prevent his own identity from being determined. The applicants submitted that the second applicant had himself been hit by the police, although he had already been holding his identity card in his hand ready for inspection. The police searched the van and found folded-up banners bearing the inscriptions "freedom for all prisoners" and "free all now". The applicants were arrested. It appears that the banners found were seized.

B. The proceedings at issue

1. The proceedings before the District Court

13. In two separate decisions taken on 4 June 2007 at 4.20 a.m. and at 4.00 a.m., respectively, the Rostock District Court, having examined both applicants in person, ordered the applicants' detention (*amtlicher Gewahrsam*) until 9 June 2007, 12.00 a.m. at the latest.

14. Relying on sections 55(1) paragraph 2(a) and 56(5) of the Mecklenburg Western-Pomerania Public Security and Order Act (*Gesetz über die öffentliche Sicherheit und Ordnung in Mecklenburg-Vorpommern* – "the PSOA", see paragraphs 37-38 below), the District Court found that the applicants' detention had been lawful in order to prevent the imminent commission or continuation of a criminal offence. As the applicants had been found in front of Waldeck prison in a van in which objects calling for the liberation of prisoners had been discovered, it had to be assumed that they had been about to commit or aid and abet a criminal offence.

15. The District Court further found that the applicants' continued detention was indispensable and proportionate. At the hearing, both applicants had given the impression that they had intended to proceed with committing an offence. As they had not made any statements or submissions on the merits, they had been unable to justify their conduct.

2. The proceedings before the Regional Court

16. On 4 June 2007 the Rostock Regional Court, in two separate decisions, dismissed appeals lodged by the first and second applicants (*sofortige Beschwerde*).

17. The Regional Court confirmed the District Court's finding that the applicants' arrest had been lawful under section 55(1) paragraph 2 (a) of the PSOA. As the applicants had been found in the vicinity of Waldeck prison in possession of banners with an imperative wording ("free"), they had intended to incite others to free prisoners and that constituted an offence. Moreover, having regard to the material in the case file, the first applicant had obstructed police officers in the exercise of their duties. The second applicant, for his part, had been charged with dangerous interference with rail traffic in 2002 in connection with the transport of "castor[1]" containers. The Regional Court further agreed with the District Court's reasoning to the effect that the continuation of the applicants' detention was indispensable and proportionate.

3. The proceedings before the Court of Appeal

18. On 7 June 2007 the Rostock Court of Appeal dismissed further appeals (*sofortige weitere Beschwerde*) subsequently brought by the applicants. In their appeals, the applicants, represented by counsel, had submitted that the slogans on the banners had been addressed to the police and the authorities, urging them to end the numerous arrests and detentions of demonstrators. They had not been meant to call upon others to attack prisons and to free prisoners by force, an interpretation which had to be considered as far-fetched, given that there had not been any violent liberation of detainees from German prisons in recent decades.

19. The Court of Appeal upheld the lower courts' finding that the requirements of section 55(1) paragraph 2(a) of the PSOA had been met. The applicants' arrest and continued detention was indispensible in order to avert a danger to public security and order. The banner "free all now", together with the banner "freedom for all prisoners", could be understood as an incitement to liberate prisoners, an offence under Article 120 of the Criminal Code (see paragraph 41 below). The police had been entitled to assume that the applicants had intended to drive to Rostock and display the banners at the partly violent demonstrations there. As a result, a crowd which had been ready to use violence might have been incited to liberate people who had been arrested and detained.

20. In respect of the second applicant, the requirements of section 55(1) paragraph 2(c) of the PSOA (see paragraph 37 below) had also been met. The second applicant had been arrested in 2002 in comparable circumstances on suspicion of dangerous interference with rail traffic in connection with the transport of castor containers. It was irrelevant whether he had subsequently been convicted.

21. The applicants had not contested the courts' conclusions; they had not made any statements or submissions on the merits. The police had been obliged to take into consideration the general security situation in Rostock on 2 and 3 June 2007. On those days, very violent clashes between demonstrators and the police had taken place in the city centre. Moreover, the applicants had proved to be prone to violence themselves by attacking police officers.

22. The Court of Appeal further considered that the applicants' right to freedom of expression under the Basic Law did not warrant a different conclusion. It accepted that the slogans on the banners could be understood in different ways. However, in the tense situation in and around Rostock the police had been authorised to prevent ambiguous declarations which could have lead to a risk to public security and order.

23. Furthermore, the duration of the applicants' detention was proportionate. According to a report by the Rostock police of 6 June 2007, between 6,000 and 10,000 anti-globalisation activists, some of whom were very violent, were moving towards Heiligendamm and were calling for an "attack on the embankment". It could not be excluded that the applicants would have participated in those demonstrations with the banners and would thus have incited other demonstrators to liberate prisoners.

4. The proceedings before the Federal Constitutional Court

24. On 6 June 2007 both applicants lodged a constitutional complaint with the Federal Constitutional Court and applied for an interim injunction ordering their immediate release.

25. The applicants complained that their detention had violated, in particular, their right to liberty and their right to freedom of expression. The second applicant further submitted that his detention had been in breach of his right to freedom of assembly. Both applicants argued that it had been far-fetched to interpret the slogans on the banners as inciting other demonstrators to attack prisons and to liberate prisoners. The banners had been addressed to the police, who had already arrested many anti globalisation activists, to the participants at the G8 summit and to the public in general, and had not advocated acts of violence. The applicants further stressed that they did not have any previous convictions. The second applicant submitted, in particular, that the criminal proceedings against him for dangerous interference with rail traffic had been discontinued.

26. These complaints were initially registered under file nos. 2 BvR 1195/07 and 2 BvR 1196/07 respectively. On 8 June 2007 the judge rapporteur at the Federal Constitutional Court informed the applicants' representatives by telephone that the Federal Constitutional Court would not take a decision on the applicants' request for interim measures.

27. On 9 June 2007 at 12.00 a.m. the applicants were released from prison.

28. The applicants' constitutional complaints of 6 June 2007 were then considered as having become devoid of purpose following their release.

29. On 6 July 2007 the applicants asked the Constitutional Court to find that their detention had been unconstitutional, despite the fact that they had been released in the meantime. Thereupon, their constitutional complaints were registered anew (file nos. 2 BvR 1521/07 and 2 BvR 1520/07 respectively).

30. On 6 August 2007 the Federal Constitutional Court, in two separate decisions, declined to consider the first and second applicants' constitutional complaints, without giving reasons (file nos. 2 BvR 1521/07 and 2 BvR 1520/07 respectively).

31. The decision was served on the first applicant's counsel on 14 August 2007 and on the second applicant's counsel on 13 August 2007.

C. Subsequent developments

32. The criminal proceedings instituted against the first applicant for having obstructed public officers in the exercise of their duties (*Widerstand gegen Vollstreckungsbeamte*) in the course of the identity check on 3 June 2007 were discontinued, in exchange for the

first applicant paying 200 euros (EUR). The criminal proceedings against the second applicant for the same offence were discontinued on grounds of insignificance.

33. The applicants submitted that one of the police officers involved in their arrest had later been convicted of causing bodily harm while exercising public office in relation to a different matter. They submitted that the proceedings were still pending before the appellate court. The Government did not comment on that point.

34. No criminal proceedings were brought against the applicants for having incited others to free prisoners.

35. On 20 December 2007 the Rostock Court of Appeal dismissed the applicants' complaints of a violation of their right to be heard.

36. On 1 May 2008 the Federal Constitutional Court declined to consider the first applicant's fresh constitutional complaint (file no. 2 BvR 538/08) and on 3 May 2008 that court declined to consider the second applicant's fresh constitutional complaint (file no. 2 BvR 164/08). In their complaints, the applicants had relied, in particular, on their rights to liberty, to freedom of expression and to freedom of assembly.

II. RELEVANT DOMESTIC LAW

A. The Mecklenburg Western-Pomerania Public Security and Order Act ("the PSOA")

37. Section 55(1) of the PSOA, in so far as relevant, provides:

> "A person may only be detained if:
>
> 1. ... ;
>
> 2. this is indispensable in order to prevent the imminent commission or continuation of a criminal offence; the assumption that a person will commit or aid and abet such an offence may be based, in particular, on the fact that,
>
> (a) he / she has announced or incited the commission of the offence or carries banners or other items containing such incitement;
>
> ...
>
> (c) he / she has been apprehended in the past on comparable grounds as a person involved in the commission of offences, and if facts warrant the conclusion that a repetition of this conduct is to be expected ..."

38. Section 56(5) of the PSOA provides that if the police take a person into custody, they must immediately obtain a judicial decision on the lawfulness and continuation of the detention. The judicial decision must set a maximum duration of detention, which may not exceed ten days in cases governed by section 55(1) paragraph 2. The District Court in the district in which the person concerned was arrested has jurisdiction to take the decision.

39. Under section 52 of the PSOA, the authorities may order a person to leave a place or prohibit a person from going to a specific place in order to avert a real danger (*Platzverweisung*). If the facts warrant the conclusion that the person will commit an offence in a specific area, that person may be prohibited from entering that area for up to ten weeks.

40. Under section 61(1) of the PSOA, an item may only be seized in order to avert an imminent danger to public security or order (paragraph 1) or if the facts warrant the conclusion that it might be used in order to commit a criminal or regulatory offence (paragraph 4).

B. The Criminal Code

41. Section 120(1) of the Criminal Code provides that whoever frees a prisoner or incites or helps him to escape shall be punished with imprisonment of up to three years or a fine. Subsection 3 of section 120 provides that an attempt shall be punishable.

C. The Code of Criminal Procedure

42. Sections 112 et seq. of the Code of Criminal Procedure concern pre trial detention. Pursuant to Section 112(1) of the Code, a defendant may be remanded in custody if there is a strong suspicion that he has committed a criminal offence and if there are grounds for arresting him. It may not be ordered if it is disproportionate to the importance of the case and to the penalty or measure of correction and prevention expected to be imposed.

THE LAW

I. JOINDER OF THE APPLICATIONS

43. Given that the present two applications concern two sets of proceedings in which the same subject matter – namely, the applicants' detention for preventive purposes during the 2007 G8 summit in Heiligendamm – was at issue, the Court decides that the applications shall be joined (Rule 42 § 1 of the Rules of Court).

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

44. The applicants complained that their detention for preventive purposes during the G8 summit had violated Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ..."

45. The Government contested that argument.

A. Admissibility

46. The Government took the view that the applicants had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They had not brought an action for compensation for their allegedly illegal detention under Article 5 § 5 of the Convention before the German courts prior to lodging their applications with the Court. The Government conceded that the applicants had utilised all existing remedies concerning their detention. Their primary aim – to obtain their release from prison – had, however, become devoid of purpose after their release on 9 June 2007. Afterwards, they could only have obtained compensation from the State.

47. The applicants contested that view. They had complained that their detention had breached their fundamental rights, both in the proceedings before the Rostock courts concerning the lawfulness of their detention and before the Federal Constitutional Court. Proceedings for damages in the civil courts would not have had a sufficiently wide scope and would not have been an effective remedy that could have been used to obtain a speedy decision on the lawfulness of their detention and to obtain their release if the detention was not lawful. Moreover, bringing a compensation claim after the detention had been considered lawful by the Rostock courts in the proceedings at issue would not have had any prospects of success. There was not a single case in which the civil courts, in compensation proceedings, had not followed a previous ruling of the courts deciding on the lawfulness of a person's detention. In these circumstances, the applicants had not been obliged to use another remedy in addition to the proceedings contesting the lawfulness of their detention that they had brought.

48. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to first use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996 IV; and *Aksoy v. Turkey*, 18 December 1996, § 52, *Reports* 1996-VI).

49. Under the Convention organs' well-established case-law, where lawfulness of detention is concerned, an action for damages against the State is not a remedy which has to be exhausted, because the right to have the lawfulness of detention examined by a court and the right to obtain compensation for any deprivation of liberty incompatible with Article 5 are two separate rights (see, *inter alia*, *Włoch v. Poland*, no. 27785/95, § 90, ECHR 2000 XI; *Belchev v. Bulgaria* (dec.), no. 39270/98, 6 February 2003; and *Khadisov and*

Tsechoyev v. Russia, no. 21519/02, § 151, 5 February 2009, with further references). Paragraph 1 of Article 5 of the Convention covers the former right and paragraph 5 of Article 5 the latter (*Khadisov and Tsechoyev*, cited above, § 151).

50. The Court notes that the applicants complained before the Court that their detention for preventive purposes during a G8 summit had violated Article 5 § 1 and that they had previously contested the lawfulness of the detention order before all competent domestic courts. Having regard to its case-law, they thereby exhausted domestic remedies for the purposes of their complaint under Article 5 § 1. The Government's objection of non exhaustion must therefore be dismissed.

51. The Court further notes that this complaint is not manifestly ill founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

52. The applicants argued that their detention from 3 to 9 June 2007 had violated Article 5 § 1 of the Convention. It had not been justified under any of the sub-paragraphs of that provision.

53. The applicants submitted, in particular, that their detention had not been justified under sub-paragraph (c) of Article 5 § 1, as that provision did not authorise a purely preventive deprivation of liberty. They had not been detained in connection with criminal proceedings, as required by that provision as interpreted in the Court's case-law (they referred, *inter alia*, to *Ječius v. Lithuania*, no. 34578/97, § 50, ECHR 2000 IX). This was proven by the fact that their detention had not been based on section 112 of the Code of Criminal Procedure, which concerned remand in custody (see paragraph 42 above). On the contrary, the courts had based their detention on sections 55 and 56 of the Mecklenburg Western-Pomerania Public Security and Order Act ("the PSOA"), which governed detention for preventive purposes without any link to criminal proceedings.

54. Moreover, the applicants argued that the aim of their detention had not been to bring them promptly before a judge and to try them for potential, future offences, as required by Article 5 § 3, read in conjunction with Article 5 § 1 (c). Nor could their detention have been reasonably considered necessary to prevent their committing an offence under the second alternative of Article 5 § 1 (c). Their potential offences had not been sufficiently outlined with a reasonable degree of specificity as regards, in particular, the place and time of their commission and their victims, as required by the Court's case-law (they cited, *inter alia*, *M. v. Germany*, no. 19359/04, § 102, 17 December 2009).

55. The applicants further submitted that their detention had not been justified under sub-paragraph (b) of Article 5 § 1 either. There had not been any court order that the applicants had failed to comply with. There had also not been any obligation incumbent on them which they had not fulfilled. Even if they had displayed the banners seized in the van, they would not have committed an offence.

56. In the applicants' submission, their detention had also not met the requirements of sub-paragraph (a) of Article 5 § 1 for lack of a "conviction".

57. Furthermore, in the applicants' view, their detention had not been "lawful" as required by Article 5 § 1. Section 55(1) of the PSOA, on which their detention had been based, had not been sufficiently precise so as to make it foreseeable to them that they faced detention for their conduct. Furthermore, that provision had not been applied correctly. There had been nothing to indicate that the applicants had been about to commit a specific offence at a given time and place. Even assuming, contrary to the fact that the applicants had themselves been hit by the police officers, that the first applicant had hit the arm and kicked the shin of a police officer, this had not warranted the conclusion that both applicants had been about to commit another completely different offence, a liberation of prisoners by force. In any event, even if the applicants had displayed the banners, this would not have been illegal. Their inscriptions had not advocated violence or harm to anyone. The applicants stressed in that connection that their lawyers had explained the different meaning attributable to the slogans on the banners, both at the hearing before the Regional Court and in their written statement of further appeal.

58. Moreover, the applicants' detention had also not been indispensable to prevent the imminent liberation of prisoners by force or an incitement of others to do so. There had been nothing to indicate that the applicants, who had not had any tools on them that could have been used to free prisoners, had been about to attack Waldeck prison, which was a high-security institution. There had not been any crowd of people present in the car park who could have been incited to liberate detainees in that prison by force. The assumption that the applicants might have displayed the banners at an unspecified demonstration, possibly attended by individuals prepared to use violence, could not be considered sufficient to have assumed the imminent commission of an offence, as required by section 55(1) paragraph 2 of the PSOA. The applicants further submitted that, contrary to the Government's submissions, none of the domestic courts had suggested that the applicants had intended to liberate prisoners by force themselves. The courts had only stated that there was reason to believe that the applicants had intended to incite others to do so.

59. The applicants' detention had also been arbitrary, in that it had not been necessary to achieve the aim pursued. The police could simply have ordered the applicants not to enter the area in which the G8 demonstrations had taken place under section 52 of the PSOA (see paragraph 39 above). Alternatively, they could also have seized the banners under section 61 of the PSOA (see paragraph 40 above). The applicants would then have been aware that the police considered the slogans illegal. In view of the chilling effect of such a police measure, it ought not to be assumed that the applicants would have reproduced

and used similar banners, as was claimed by the Government. As there had not been further violent demonstrations during the whole week of the G8 summit, the applicants' detention for six days had been disproportionate. They further noted in that connection that the seven Belorussian individuals also present in the van when the applicants had been arrested and to whom the banners could also have belonged had not been arrested and detained.

(b) The Government

60. The Government took the view that the applicants' detention had complied with Article 5 § 1 of the Convention. It had been justified under the second alternative of sub-paragraph (c) of Article 5 § 1 as detention reasonably considered necessary to prevent the applicants from committing an offence.

61. The Government contested the applicants' assertion that detention for preventive purposes was only authorised under Article 5 § 1 (c) of the Convention in connection with criminal proceedings. The applicants' detention had not been effected in connection with criminal proceedings and their preparatory acts undertaken to free prisoners by force or to incite others to do so had not been punishable. Under the wording of Article 5 § 1 (c), second alternative, detention for preventive purposes was justified if it was necessary to prevent a person from committing a concrete and specific offence, which, if carried out, would entail criminal proceedings. It was not necessary for the person concerned to have already committed an offence; the second alternative of Article 5 § 1 (c) would otherwise be superfluous in addition to the first alternative of that provision. Article 5 § 3 of the Convention had to be interpreted in the context of Article 5 § 1 (c) as requiring a prompt examination of the lawfulness of the detention of the person concerned: a criminal trial was not necessary, as the person was not charged with a criminal offence.

62. The Government further argued that in Germany such detention for preventive purposes was necessary, as acts preparing criminal offences were, as a rule, not yet punishable, contrary to the criminal law applicable in other Contracting Parties to the Convention. This served to encourage potential offenders to give up their plans to commit an offence. Without the possibility to detain persons for preventive purposes, the State would therefore be unable to comply with its positive obligation to protect its citizens from impending criminal offences – for instance, in the context of the transport of castor containers or football hooligans setting up an arranged brawl.

63. Referring to the case of *Guzzardi v. Italy* (6 November 1980, § 102, Series A no. 39), the Government submitted that the applicants' detention had been justified under the second alternative of sub-paragraph (c) of Article 5 § 1. There had been specific facts warranting the conclusion that it had been necessary to prevent them from committing an offence in the imminent future. The applicants had been found by the police standing next to a van in a car park in front of Waldeck prison in the company of seven other people one day after violent riots in Rostock city centre. The first applicant had violently resisted the police's identity check. The police had found folded-up banners bearing the inscriptions "freedom for all prisoners" and "free all now" in the van. In these circumstances, it had been reasonable for the police to assume that the applicants had been about to join the

ongoing demonstrations in Rostock and to display the banners to demonstrators, some of whom had been violent. This would have amounted to an incitement of others to free prisoners, punishable under Article 120 of the Criminal Code.

64. The Government submitted that the wording of the banner bearing the inscription "free all now" could have reasonably been interpreted as a call upon other demonstrators to violently free prisoners, rather than as a call upon the State authorities to order their release. The first applicant had violently resisted the identity check and proceedings had previously been brought against the second applicant for dangerous interference with rail traffic arising in the context of the transport of castor containers. Therefore, it had to be assumed that the applicants had wanted to disturb the summit by violent means and had wanted to incite other violent demonstrators present in Rostock to free prisoners held in the holding pens for prisoners which had been set up in the city centre or individuals arrested during a demonstration by force. The applicants had not explained in the proceedings before the domestic courts that the inscriptions on their banners had had a different meaning.

65. The Government further argued that the applicants' detention had also been justified under sub-paragraph (b) of Article 5 § 1. It had been necessary to secure the fulfilment of an obligation prescribed by law. Having regard to the circumstances of the case, it was certain that the applicants would not have fulfilled their legal duty to comply with an order to report to a police station in their town of residence at regular intervals (*Meldeauflage*) or with an order not to enter a particular area (*Platzverweis*). The applicants had travelled several hundred kilometres in order to reach the venue of the G8 summit and had resisted the identity check. They had thus demonstrated that they would not follow orders made by the police. Having regard to the exceptional situation at hand, it had not been necessary to wait until the applicants had in fact breached such an order. Bearing in mind the great number of demonstrators present, it would not have been possible to prevent the applicants from committing offences upon their doing so. Therefore, compliance with their legal duties to respect such an order and the prevention of specific offences could only have been secured by their instantaneous detention.

66. In the Government's submission, following the decision of the District Court ordering the applicants' detention, their deprivation of liberty had also been justified under sub-paragraph (a) of Article 5 § 1. They argued that the term "conviction" in that provision, contrary to the Court's case-law (they referred, *inter alia*, to *M. v. Germany*, no. 19359/04, §§ 87, 95, 17 December 2009), did not only comprise criminal convictions, but also court decisions ordering detention for preventive purposes.

67. The Government further argued that the applicants' detention had been lawful and in accordance with a procedure prescribed by law. It had been based on section 55(1) paragraph 2 (a) of the PSOA. The detention of the second applicant, who had been arrested in 2002 on suspicion of dangerous interference with rail traffic, had been based, in addition, on section 55(1) paragraph 2 (c) of the PSOA.

68. In the Government's view, the applicants' detention had also been proportionate and not arbitrary. There had not been any less intrusive means available to prevent them from freeing prisoners by force or inciting others to do so during the whole duration of the G8 summit. In particular, as shown above (see paragraph 65), obliging them to report to a police station outside the G8 area at regular intervals would not have been sufficient to prevent them committing an offence. For the same reasons set out above, an order made against them not to enter a particular area – that of the G8 summit – had not been suitable to avert the offence. The same applied to the seizure of the banners, which the applicants could have reproduced.

2. The Court's assessment

(a) Recapitulation of the relevant principles

69. The Court reiterates that Article 5 § 1 sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, *inter alia*, *Guzzardi v. Italy*, 6 November 1980, § 96, Series A no. 39; *Witold Litwa v. Poland*, no. 26629/95, § 49, ECHR 2000 III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008 ...).

70. Under the second alternative of sub-paragraph (c) of Article 5 § 1, the detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence". That ground of detention does no more than afford the Contracting States a means of preventing a concrete and specific offence (see *Guzzardi*, cited above, § 102; *Ciulla v. Italy*, 22 February 1989, § 40, Series A no. 148; and *Shimovolos v. Russia*, no. 30194/09, § 54, 21 June 2011 (not yet final)) as regards, in particular, the place and time of its commission and its victim(s) (see *M. v. Germany*, no. 19359/04, §§ 89, 102, 17 December 2009). This can be seen both from the use of the singular ("an offence") and from the object of Article 5, namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see *Guzzardi*, ibid.; and *M. v. Germany*, cited above, § 89).

71. Under the Court's well-established case-law, detention to prevent a person from committing an offence must, in addition, be "effected for the purpose of bringing him before the competent legal authority", a requirement which qualifies every category of detention referred to in Article 5 § 1 (c) (see *Lawless v. Ireland (no. 3)*, 1 July 1961, pp. 51-53, § 14, Series A no. 3, and, *mutatis mutandis*, *Ječius v. Lithuania*, no. 34578/97, §§ 50-51, ECHR 2000 IX, and *Engel and Others v. the Netherlands*, 8 June 1976, § 69, Series A no. 22).

72. Sub-paragraph (c) thus permits deprivation of liberty only in connection with criminal proceedings (see *Ječius*, cited above, § 50). It governs pre-trial detention (see *Ciulla*, cited above, §§ 38-40). This is apparent from its wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph 3, which form a whole with it (see, *inter alia*, *Ciulla*, cited above, § 38; and *Epple v. Germany*, no. 77909/01, § 35, 24 March 2005). Paragraph 3 of Article 5 § 1 stipulates that everyone arrested or detained in

accordance with the provisions of paragraph 1 (c) of Article 5 shall be brought promptly before a judge – in any of the circumstances contemplated by the provisions of that paragraph – and shall be entitled to trial within a reasonable time (see also *Lawless*, cited above, pp. 51-53, § 14).

73. Furthermore, detention is authorised under the second limb of sub paragraph (b) of Article 5 § 1 to "secure the fulfilment of any obligation prescribed by law". It concerns cases where the law permits the detention of a person to compel him to fulfil a real and specific obligation already incumbent on him, and which he has until then failed to satisfy (*Engel and Others*, cited above, § 69; *Guzzardi*, cited above, § 101; *Ciulla*, cited above, § 36; and *Epple*, cited above, § 37). The arrest and detention must be for the purpose of securing the fulfilment of the obligation and not punitive in character (see *Gatt v. Malta*, no. 28221/08, § 46, ECHR 2010 ...). As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist (*Vasileva v. Denmark*, no. 52792/99, § 36, 25 September 2003; and *Epple*, cited above, § 37). It does not justify, for example, administrative internment meant to compel a citizen to discharge his general duty of obedience to the law (*Engel and Others*, cited above, § 69). Finally, a balance must be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty (*Vasileva*, cited above, § 37; and *Epple*, cited above, § 37).

74. For the purposes of sub-paragraph (a) of Article 5 § 1, the word "conviction", having regard to the French text ("*condamnation*"), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence (see *Guzzardi*, cited above, § 100), and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50; and *M. v. Germany*, cited above, § 87).

(b) Application of these principles to the present case

75. The Court is called upon to determine, first, whether the applicants' detention under section 55(1) paragraph 2 of the PSOA in order to prevent them from committing a criminal offence fell within one of the permissible grounds for deprivation of liberty listed in sub-paragraphs (a) to (f) of Article 5 § 1.

76. The Court observes that in the Government's submission, the applicants' detention was justified, in the first place, under sub paragraph (c) of Article 5 § 1. It further notes that the applicants, by being in the possession of folded-up banners bearing the inscriptions "freedom for all prisoners" and "free all now", had not yet committed a criminal offence and were subsequently never charged with having incited others to liberate prisoners by force. This is uncontested between the parties. Their detention therefore falls to be examined under the second alternative of Article 5 § 1 (c) as detention reasonably considered necessary to prevent them committing an offence.

77. In determining whether the offence that the authorities sought to prevent the applicants from committing can be considered as sufficiently concrete and specific, as required by the Court's case-law in respect of, in particular, the place and time of its commission and

its victim(s) (see paragraph 70 above), the Court observes that the domestic courts appear to have diverged on the specific offence the applicants were about to commit. The Rostock District and Regional Courts appear to have considered that the applicants, with the help of the impugned banners, had intended to incite others to free prisoners detained in Waldeck prison by force (see paragraphs 14 and 17 above). This was inferred from the applicants' presence in the car park in front of that prison – in which, however, apart from the seven passengers in the van, no other people were present (see paragraph 12 above). On the contrary, the Rostock Court of Appeal considered that the applicants had intended to drive to Rostock and display the banners at the partly violent demonstrations there and thus incite the crowd present in Rostock to liberate prisoners by force (see paragraph 19 above).

78. In addition, in determining whether the applicants' detention could be "reasonably considered necessary" in order to prevent them from inciting others to liberate prisoners by force, the Court cannot but note that the applicants were detained for some five and a half days for preventive purposes and thus for a considerable time. Moreover, as was also accepted by the Court of Appeal (see paragraph 22 above), the inscriptions on the banners could be understood in different ways. The applicants, represented by counsel in the proceedings, had explained that the slogans had been addressed to the police and the authorities, urging them to end the numerous detentions of demonstrators, and had not been meant to call upon others to free prisoners by force. It is also uncontested that the applicants had not themselves carried any instruments which could have served to liberate prisoners violently. In these circumstances, the Court is not convinced that their continuing detention could reasonably be considered necessary to prevent them from committing a sufficiently concrete and specific offence. The Court is further not convinced of the necessity of the applicants' detention because it would, in any event, have been sufficient to seize the banners in question in order to make them aware of potential negative consequences and prevent them from inciting others – negligently – to liberate prisoners.

79. The Court further refers to its long-established case-law under which, in order to be justified under Article 5 § 1 (c), the applicants' detention must have been effected for the purpose of bringing them before the competent legal authority in the course of their pre-trial detention and aimed at committing them to a criminal trial (see paragraphs 71-72 above). Having regard to its above finding that the applicants' detention could not reasonably be considered necessary in the circumstances of the present case, it does not, however, consider it necessary to respond to the parties' detailed arguments on that point, especially the Government's arguments advocating a revision of the Court's long-standing case-law.

80. Consequently, the applicants' detention was not justified under sub paragraph (c) of Article 5 § 1.

81. The Court further notes that, in the Government's submission, the applicants' detention was also justified under sub-paragraph (b) of Article 5 § 1 "in order to secure the fulfilment of any obligation prescribed by law". They argued that the applicants would

neither have respected an order to report to a police station in their respective towns of residence at regular intervals nor an order not to enter the area in which the G8-related demonstrations took place. It had therefore been justified to secure their compliance with such an order by their detention. In this respect, the Court cannot but note that the police in fact neither ordered the applicants to report to a police station in their town of residence nor prohibited them from entering the area in which G8-related demonstrations took place. The applicants therefore cannot be considered to have been under an "obligation prescribed by law", for the purposes of Article 5 § 1 (b), to report to a police station or to not enter the area of the G8-related demonstrations and which they failed to satisfy.

82. The Court observes that the Government further argued that the applicants had been detained in accordance with Article 5 § 1 (b) in order to secure the fulfilment of their obligation not to commit a specific offence – the incitement of others to liberate prisoners. In this respect, the Court refers to its case-law, cited above, under which the "obligation prescribed by law", for the purposes of the said provision, must be real and specific, already incumbent on the person concerned and which the person has until the time of detention failed to satisfy (see paragraph 73). It notes that the applicants were detained under section 55(1) paragraph 2 of the PSOA, which authorises detention if "this is indispensable in order to prevent the imminent commission ... of a criminal offence" (see paragraph 37 above), such as an offence under section 120 of the Criminal Code. The Court considers that the duty not to commit a criminal offence in the imminent future cannot be considered as sufficiently concrete and specific, as defined in the Court's case-law, so as to fall under Article 5 § 1 (b), at least as long as there are not any specific measures ordered which have not been complied with. It reiterates in that connection that a wide interpretation of sub-paragraph (b) of Article 5 § 1 would entail consequences incompatible with the notion of the rule of law, from which the whole Convention draws its inspiration (see *Engel and Others*, cited above, § 69). Moreover, the applicants cannot be considered to have previously failed in their duty not to commit such an offence. The applicants' detention was therefore not covered by sub-paragraph (b) of Article 5 § 1 either.

83. The Court further notes the Government's argument that following the District Court's order authorising the applicants' deprivation of liberty under section 55(1) paragraph 2 of the PSOA, their detention was also justified under sub-paragraph (a) of Article 5 § 1. They submitted that, under its wording, that provision had also covered court decisions ordering detention for preventive purposes. The Court, however, refers to its well established case-law stating that a "conviction", having regard to the French text ("*condamnation*"), has to be understood as a finding of guilt of an offence (see paragraph 74 above). It observes that in the proceedings at issue, the domestic courts did not find the applicants guilty of any criminal offence, but rather ordered their detention in order to prevent them from committing an offence in the future. Their detention thus did not fall under sub-paragraph (a) of Article 5 § 1.

84. The Court considers – and this is uncontested by the parties – that the applicants' detention for preventive purposes was not justified under any of the other sub-paragraphs of Article 5 § 1 either.

85. The Court further takes note of the Government's argument that without the possibility of detaining individuals for preventive purposes, the State would be unable to comply with its positive obligation to protect its citizens from impending criminal offences. In the case at hand, however, even taking into account the general situation before and during the G8 summit, it has not been sufficiently demonstrated that a liberation of prisoners had been imminent. Therefore, the commission of that offence could not justify an interference with the right to liberty, especially as less intrusive measures could have been taken (see paragraph 78 above). The Court reiterates that, in any event, the Convention obliges State authorities to take reasonable steps within the scope of their powers to prevent criminal offences of which they had or ought to have had knowledge. However, it does not permit a State to protect individuals from criminal acts of a person by measures which are in breach of that person's Convention rights, in particular the right to liberty as guaranteed by Article 5 § 1 (see *Jendrowiak v. Germany*, no. 30060/04, §§ 37-38, 14 April 2011 with further references) and as at issue in the applicants' case.

86. There has accordingly been a violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

87. Relying on Article 5 § 5 of the Convention, the first applicant further submitted that a claim for compensation in respect of damage caused by his unlawful detention had had no prospects of success.

88. The Court has examined the first applicant's complaint as submitted by him. However, having regard to all the material in its possession, the Court finds that, even assuming the exhaustion of domestic remedies in all respects, the complaint does not disclose any appearance of a violation of Article 5 § 5.

89. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 10 AND ARTICLE 11 OF THE CONVENTION

90. The applicants further argued that their detention had disproportionately interfered with their right to freedom of expression guaranteed by Article 10 of the Convention and their right to freedom of assembly under Article 11 of the Convention, as it had made it impossible for them to participate and express their views in demonstrations during the G8 summit.

91. Article 10 and Article 11 of the Convention, in so far as relevant, provide:

Article 10

"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. ...

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."

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, ...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. ..."

92. The Government contested that argument.

A. Admissibility

93. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Referring also to its findings above (see paragraphs 48-50), it further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

94. The applicants argued that their detention had violated both their freedom of expression under Article 10 of the Convention and their freedom of peaceful assembly under Article 11 of the Convention. The interference with those rights by their detention had not been justified. It had not been "prescribed by law" and had not pursued a legitimate aim for the reasons they set out in relation to Article 5 § 1 (see paragraph 57 above). In particular, it had been uncertain if, when and where the applicants would display the banners "freedom for prisoners" and "free all now". Doing so would, furthermore, not have been an offence under the Criminal Code. The slogans could not have been understood as an incitement to a very uncommon crime but had had a different, more obvious meaning. With more than 1,000 demonstrators having been detained in connection with the G8 summit but only 100 detentions having been approved by the courts, there had been more than enough reason to criticise the deprivations of liberty that had taken place in connection with the summit.

95. The applicants further submitted that their detention had been disproportionate and thus not "necessary" in terms of paragraph 2 of Articles 10 and 11. The public interest in preventing the uncertain commission of an offence at an indefinite place and time had not outweighed their interest in showing their disagreement with many unlawful deprivations of liberty in the course of the G8 summit and in taking part in protests against that summit. The slogans "freedom for prisoners" and "free all now" had been well-known, conventional leftist slogans in respect of such detentions and could not have been interpreted as a call for violent liberation of prisoners. Depriving them of their liberty in the given circumstances had discouraged an open discussion of matters of public interest.

(b) The Government

96. The Government considered that neither Article 10 nor Article 11 of the Convention had been breached. The interference with the applicants' freedom of expression and freedom of assembly by their detention had been justified. It had been based on section 55(1) paragraph 2 (a) of the PSOA, a provision which had been sufficiently precise to be foreseeable in terms of its application to the applicants. It had pursued legitimate aims, as the applicants' detention had been in the interest of public safety and for the prevention of crime.

97. The Government further argued that the interference had been "necessary in a democratic society" for the purposes of Article 10 § 2 and Article 11 § 2. They stressed that there had not been a less restrictive measure than the applicants' detention available in order to achieve the said legitimate aims. In particular, it had not been sufficient to seize the banners in question, as the applicants could easily have drawn up new, comparable banners at any time and could have used them immediately during the demonstrations in Rostock. It had also been proportionate to detain the applicants. There had been riots in Rostock city centre the day before. The applicants, who had shown themselves to be prepared to use violence, had been on their way to Rostock to participate in the demonstrations. There had been reason to fear that the applicants' banners would have incited other violent demonstrators to liberate prisoners detained in the prisoner holding pens in Rostock by force. In these circumstances, the public interest in maintaining public order and in the prevention of crime had outweighed the applicants' interest in participating in the demonstrations.

2. The Court's assessment

(a) Applicable Convention Article

98. The Court reiterates that the protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention (see *Ezelin v. France*, 26 April 1991, § 37, Series A no. 202; *Djavit An v. Turkey*, no. 20652/92, § 39, ECHR 2003 III; *Women On Waves and Others v. Portugal*, no. 31276/05, § 28, ECHR 2009 ... (extracts); *Barraco v. France*, no. 31684/05, § 27, ECHR 2009 ...; and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 52, 12 September 2011).

99. The Court notes that in cases in which applicants complained that they had been prevented from participating in and expressing their views during assemblies, including demonstrations, or that they had been sanctioned for such conduct, it has taken several elements into account in determining the relationship between the right to freedom of expression and the right to freedom of assembly. Depending on the circumstances of the case, Article 11 has often been regarded as the *lex specialis*, taking precedence for assemblies over Article 10 (see, for instance, *Ezelin*, cited above, § 35, concerning a disciplinary sanction imposed on the applicant, a lawyer, after having participated in a demonstration to protest against two court decisions; *Osmani and Others v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 50841/99, ECHR 2001 X, concerning the conviction of the applicant, an elected official, for having stirred up national hatred in a speech he delivered at an assembly he had organised; *Djavit An*, cited above, § 39, concerning the refusal of the Turkish and Turkish-Cypriot authorities to allow the applicant to cross the "green line" into southern Cyprus in order to participate in inter-community meetings; *Galstyan v. Armenia*, no. 26986/03, § 95, 15 November 2007, concerning a sanction of three days' detention for having participated in a demonstration; and *Barraco*, cited above, § 26, concerning the applicant's conviction for having participated in a traffic-slowing operation organised as part of a day of protest by a trade union).

100. In other cases, the Court, having regard to the specific circumstances of the case and the way in which the applicants formulated their complaints, has considered that the main focus of the respective applicants' complaints lay on the right to freedom of expression and thus examined the case under Article 10 alone (see, for instance, *Karademirci and Others v. Turkey*, nos. 37096/97 and 37101/97, § 26, ECHR 2005 I, concerning a criminal sanction for having read out a statement during an assembly in front of a school, and *Yılmaz and Kılıç v. Turkey*, no. 68514/01, § 33, 17 July 2008, concerning the applicants' criminal conviction for having participated in demonstrations in support of Abdullah Öcalan).

101. The Court notes that in the present case, the parties submitted arguments in relation to Articles 10 and 11 together in the proceedings before the Court. It finds that the applicants essentially complained of the fact that, owing to their detention throughout the duration of the G8 summit, they were unable to express their views *together with the other demonstrators* present to protest against the summit. They also protested against the prohibition to express their views concerning the detention of demonstrators as expressed on the banners. The main focus of their complaints lies, however, on their right to freedom of assembly as they were prevented from taking part in the demonstrations and expressing their views. It will therefore examine this part of the application under Article 11 alone. It notes, however, that the issue of freedom of expression cannot in the present case be entirely separated from that of freedom of assembly. Notwithstanding its autonomous role and particular sphere of application, Article 11 must therefore also be considered in the light of Article 10 (see, *mutatis mutandis*, *Ezelin*, cited above, § 37).

(b) Whether there was an interference with the right to freedom of peaceful assembly

102. The Court considers that, by their detention, ordered by the domestic courts for the entire duration of the G8 summit, the applicants were prevented from taking part in demonstrations against that summit.

103. The Court reiterates that Article 11 of the Convention only protects the right to "peaceful assembly". That notion does not cover a demonstration where the organisers and participants have violent intentions (see *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 77, ECHR 2001 IX; and *Galstyan*, cited above, § 101). However, the possibility of extremists with violent intentions who are not members of the organising group joining a demonstration cannot as such take away that right. Even if there is a real risk of a public demonstration resulting in disorder as a result of developments outside the control of those organising it, such a demonstration does not as such fall outside the scope of Article 11 § 1, but any restriction placed on such an assembly must be in conformity with the terms of paragraph 2 of that provision (see *Christians against Racism and Fascism v. the United Kingdom*, no. 8440/78, Commission decision of 16 July 1980, Decisions and Reports (DR) 21, pp. 148-149; and, *mutatis mutandis*, *Ezelin*, cited above, § 41).

104. The Court notes that at the time of their arrest, the applicants intended to take part in future demonstrations against the G8 summit. There is nothing to indicate that the organisers of the demonstrations in which the applicants intended to participate had violent intentions. As shown above (paragraphs 8 and 103), the fact that the police also expected extremists with violent intentions to join the otherwise peaceful demonstrations does not result in those demonstrations losing the protection of Article 11 § 1.

105. As for the applicants' own aims in joining the demonstrations, the Court is not satisfied that it has been shown that the applicants had violent intentions in seeking to participate in G8-related demonstrations. In this connection, it notes, first, that the domestic courts did not consider that the applicants, by carrying banners bearing the inscriptions "freedom for all prisoners" and "free all now", intended to liberate prisoners by force themselves. It also observes that no weapons were found on the applicants. It further takes note of the Court of Appeal's finding that a crowd which was ready to use violence might be incited by the banners to liberate prisoners by force, but further notes that that court conceded that the slogans on the banners at issue in the present case could be understood in different ways (see paragraphs 19, 21 and 22 above). It also takes into account the declaration made by the applicants, represented by counsel, in the proceedings before the domestic courts. They had explained that the slogans on the banners had been addressed to the police and the authorities, urging them to end the numerous detentions of demonstrators, and had not been meant to call upon others to attack prisons and to free prisoners by force (see paragraphs 18 and 25 above). In the Court's view, the applicants gave a plausible interpretation of the inscriptions on their banners, which themselves clearly did not openly advocate violence. Having regard also to the domestic court's finding of the slogans' ambivalent content allowing for different interpretations, the Court considers that it has not been proven that the applicants deliberately intended to incite others to violence. Neither could, in the Court's view, such

a conclusion be drawn from the fact that one of the applicants was considered to have resisted the police's identity check by force and was thus considered to have used force himself - in different circumstances and in a different manner than by displaying banners to others at a demonstration. It further notes in this connection that neither of the applicants was shown to have previous convictions for violent conduct during demonstrations or in comparable situations.

106. The applicants' detention thus interfered with their right to freedom of peaceful assembly under Article 11 § 1. This is uncontested between the parties.

(c) Whether the interference was justified

107. Such an interference gives rise to a breach of Article 11 unless it can be shown that it was "prescribed by law", pursued one or more legitimate aims as defined in paragraph 2 of that Article, and was "necessary in a democratic society".

(i) "Prescribed by law" and legitimate aim

108. In determining whether the interference was "prescribed by law", the Court reiterates that a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Ezelin*, cited above, § 45). It observes that it is contested between the parties whether the applicants' detention was prescribed by a law– section 55(1) paragraph 2 of the PSOA – which was sufficiently precise to be foreseeable in its application in the circumstances of the applicants' case. The Court considers that it can leave that question open and examine the case on the assumption that the interference was "prescribed by law" for the reasons which follow.

109. The Court is satisfied that the aim of the authorities in ordering the applicants' detention was to prevent them from committing a crime, namely inciting others to liberate prisoners by force. This aim as such is legitimate under Article 11 § 2.

(ii) "Necessary in a democratic society"

110. In determining whether the interference was "necessary in a democratic society", the Court reiterates that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively (see *Djavit An*, cited above, § 56; and *Barraco*, cited above, § 41).

111. The expression "necessary in a democratic society" implies that the interference corresponds to a "pressing social need" and, in particular, that it is proportionate to the legitimate aim pursued. The nature and severity of the sanction imposed are factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued (see *Osmani and Others*, cited above, with further references).

112. The Court must further determine whether the reasons adduced by the national authorities to justify the interference are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 47, *Reports* 1998 I; and *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 87).

113. The Contracting States have a certain margin of appreciation in assessing whether an interference is "necessary in a democratic society", but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 87; and *Barraco*, cited above, § 42). There is little scope under Article 10 of the Convention – in the light of which Article 11 has to be construed (see paragraphs 98 and 101 above) – for restrictions on political speech or on debate on questions of public interest (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 88, with further references). However, where there has been incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 90; and, *mutatis mutandis*, *Galstyan*, cited above, § 115, and *Osmani and Others*, cited above).

114. In the present case, the Court notes that the applicants were detained for almost six days in order to prevent them from inciting others to liberate prisoners by force during demonstrations against the G8 summit. It found above (see paragraphs 75-86) that the applicants' detention for preventive purposes did not fall within any of the permissible grounds for deprivation of liberty under Article 5 § 1 and was thus in breach of that provision. The Court further observes that the summit was expected to attract a considerable number of demonstrators (some 25,000), a large majority of whom were peaceful, but who also included a considerable number of demonstrators prepared to use violence. A number of mass demonstrations were scheduled to take place over several days, some of which had descended into riots in Rostock city centre prior to the applicants' arrest. The Court accepts that guaranteeing the security of the participants at the summit and maintaining public order in general in this situation was a considerable challenge for the domestic authorities, where decisions often had to be taken speedily.

115. However, as set out above (see paragraph 105), the Court cannot consider it established that the applicants had intended, by displaying the banners bearing the impugned inscriptions at the demonstrations, to deliberately stir up other demonstrators prepared to use violence to liberate prisoners taken during the G8 summit by force. It appears, on the contrary, an acceptable assessment of the relevant facts by the authorities, having regard to their margin of appreciation, that the slogans could be considered ambiguous and that the applicants could thus have negligently incited others to violence by displaying them during certain demonstrations (see, for a case concerning the use of

symbols with multiple meanings, *Vajnai v. Hungary*, no. 33629/06, §§ 51 et seq., 8 July 2008).

116. The Court further finds that the applicants, by taking part in the demonstrations against the G8 summit, intended to participate in a debate on matters of public interest, namely the effects of globalisation on peoples' lives. Moreover, by the slogans on their banners, they intended to criticize the police's management in securing the summit, in particular the high number of detentions of demonstrators. Given that a considerable number of demonstrators (more than 1,000 of the 25,000 demonstrators expected) were temporarily detained during the course of the summit, the Court considers that the slogans contributed to a debate on a question of public interest. It is further clear that depriving the applicants of their liberty for several days for having intended to display the impugned banners had a chilling effect on the expression of such an opinion and restricted the public debate on that issue.

117. In sum, the applicants' intended protests during the G8 summit must be considered to have been aimed at participating in a debate of public interest, to which there is little scope for restriction (see paragraph 113 above). Moreover, the applicants were not shown to have had the intention of inciting others to violence. In these circumstances, the Court considers that a considerable sanction, namely detention for almost six days, was not a proportionate measure in order to prevent the applicants from possibly negligently inciting others to liberate demonstrators detained during the G8 summit by force. In such a situation, a fair balance between the aims of securing public safety and prevention of crime and the applicants' interest in freedom of assembly could not be struck by immediately taking the applicants into detention for several days.

118. In particular, the Court is not convinced that there were not any effective, less intrusive measures available to attain the said aims in a proportionate manner. Notably, it considers that in the given situation, in which it has not been shown that the applicants were aware that the police considered the slogans on their banners illegal, it would have been sufficient to seize the banners in question. This could reasonably be expected to have had a chilling effect on the applicants, preventing them from drawing up new, comparable banners immediately. Even if freedom of expression would then have been restricted to a certain extent, taking part in the demonstrations would not have been made impossible from the very outset.

119. In view of the foregoing, the Court concludes that the interference with the applicants' right to freedom of assembly has not been "necessary in a democratic society". There has accordingly been a violation of Article 11 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

120. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

121. The applicants claimed 10,000 euros (EUR) each in respect of non pecuniary damage suffered as a result of their detention in breach of the Convention. They referred to the awards of just satisfaction the Court made in the cases of *Brega v. Moldova* (no. 52100/08, § 52, 20 April 2010) and *Vasileva v. Denmark* (no. 52792/99, § 47, 25 September 2003) to support their view that the sum claimed was reasonable. They asked all payments to be made into their lawyer's fiduciary bank account.

122. The Government considered the amounts claimed excessive. They submitted that if the Court were to find a violation of the Convention, this would constitute sufficient just satisfaction. They argued that the facts of the cases cited by the applicants in support of their view were not comparable to those at issue in the present applications.

123. The Court considers that their detention for some six days in breach of Articles 5 § 1 and 11 of the Convention must have caused the applicants distress which would not be adequately compensated by the finding of a violation alone. Making an assessment on an equitable basis, it therefore awards each of the applicants EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable, under this head. Having regard to the power of attorney presented by the applicants' lawyer, which authorises her to accept any payments to be made by the other party to the proceedings, it orders the sums payable to the applicants to be paid into their lawyer's fiduciary bank account.

B. Costs and expenses

124. The first applicant also claimed EUR 2,340.85 for costs and expenses incurred before the domestic courts (EUR 68 in court costs and EUR 2,272.85 in lawyers' fees, including VAT payable thereon) and EUR 1,892.50 (including VAT) for those incurred before the Court. The second applicant claimed EUR 2,370.65 for costs and expenses incurred before the domestic courts (EUR 68 in court costs and EUR 2,302.65 in lawyers' fees, including VAT payable thereon) and EUR 2,082.50 (including VAT) for those incurred before this Court. They submitted documentary evidence to support their claims.

125. The Government, arguing in general that no compensation was payable to the applicants under Article 41 of the Convention, did not comment on these claims.

126. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court is satisfied that the proceedings before the domestic courts and before this Court were aimed at preventing and then redressing the violations of Articles 5 § 1 and 11 of the Convention

found. It further finds that the costs and expenses claimed by the applicants were necessarily incurred and reasonable as to quantum.

127. The Court therefore awards the first applicant EUR 4,233.35 (including VAT), covering costs and expenses under all heads, plus any tax that may be chargeable to him. It further awards the second applicant EUR 4,453.15 (including VAT), covering costs and expenses under all heads, plus any tax that may be chargeable to him. It orders also these sums payable to them to be paid into their lawyer's fiduciary bank account.

C. Default interest

128. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the first applicant's complaint under Article 5 § 5 of the Convention inadmissible and the remainder of the applications admissible;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds* that there has been a violation of Article 11 of the Convention;

5. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, into the applicants' lawyer's fiduciary bank account

(i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, to each of the applicants in respect of non-pecuniary damage;

(ii) EUR 4,233.35 (four thousand two hundred thirty-three euros, thirty-five cents), including VAT, to the first applicant, plus any tax that may be chargeable to him, in respect of costs and expenses;

(ii) EUR 4,453.15 (four thousand four hundred fifty-three euros, fifteen cents), including VAT, to the second applicant, plus any tax that may be chargeable to him, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 1 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Dean Spielmann
Registrar President

1 Cask for the storage and transport of radioactive material.