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SCSL-2003-08-PT-047

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

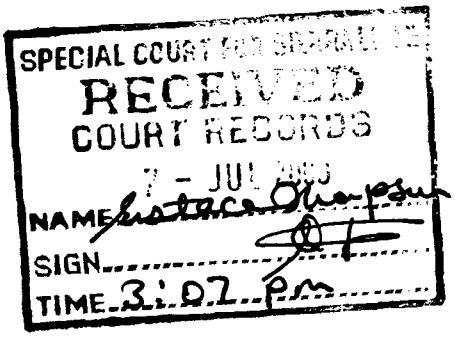
(858 -947)

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr Robin Vincent

Date filed: 7 July 2003



THE PROSECUTOR

Against

SAM HINGA NORMAN

CASE NO. SCSL – 2003 – 08 – PT

PROSECUTION RESPONSE TO THE THIRD DEFENCE "PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: JUDICIAL INDEPENDENCE"

Office of the Prosecutor:
Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Luc Côté, Chief of Prosecutions
Mr Walter Marcus-Jones, Sr. Appellate Counsel
Mr Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:
Mr. James Blyden Jenkins-Johnson
Mr Sulaiman Banja Tejan-Sie II

SPECIAL COURT FOR SIERRA LEONE
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INTRODUCTION

1. The Prosecution files this response to the Defence preliminary motion entitled "Preliminary Motion Based on Lack of Jurisdiction: Judicial Independence" (the "**Third Preliminary Motion**"), filed on behalf of Sam Hinga Norman (the "**Accused**") on 26 June 2003.[1]

2. The Third Preliminary Motion objects to the jurisdiction of the Special Court for Sierra Leone on the grounds that it lacks sufficient guarantees of judicial independence as its funding arrangements create a legitimate fear of political interference by economic manipulation. The Third Preliminary Motion requests the Chamber to declare that it lacks jurisdiction over any accused and that the Chamber should direct the immediate release of the Accused from detention. Alternatively, the Third Preliminary Motion requests the Chamber to stay proceedings against the Accused until sufficient guarantees of institutional financial independence are put in place and that the Court direct the immediate release of the Accused from detention.

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[1] Registry Page ("RP") 415-426.

3. For the reasons given below, the Prosecution submits that the Third Preliminary Motion should be dismissed in its entirety.

ARGUMENT

I. The Court is Bound by its Statute

4. The Special Court was established by the Special Court Agreement (the "**Agreement**"), which was concluded by the United Nations ("**UN**") and the Government of Sierra Leone through their representatives in possession of full powers to conclude the treaty. It was the Agreement that brought about the existence of the Special Court, and not the Special Court Agreement 2000 (Ratification) Act. This Agreement constitutes a treaty under international law[2] by whose terms the Special Court for Sierra Leone is bound along with the Statute of the Special Court for Sierra Leone (the "**Statute**") that is the Annex of that Agreement.

5. The Prosecution submits that the Agreement and Statute prescribe sound and standard mechanisms which ensure judicial independence and impartiality from two directions: the independence of the judges sitting in the Appellate and Trial Chambers (the "**Chambers**") and a clear separation of functions of the Management Committee from proceedings before the Court.

6. The Prosecution submits that both the Statute and the Agreement ensure that the Chambers is insulated from bias, or any apprehension thereof. Under Article 13(1) of the Statute, "judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source." The Agreement also requires that the Chambers be composed of "independent judges."[3]

7. The Prosecution submits that, according to the Agreement, the Management Committee's function is advisory in nature, and it enjoys no treaty-based authority to intervene in judicial affairs. The Agreement states that the Management Committee will "assist the

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[2] See the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "**Report of the Secretary-General**"), para. 9, indicating that the Special Court is "treaty-based".

[3] Agreement, Article 2(2).

Secretary-General in obtaining adequate funding, and provide advice and policy direction **on all non-judicial aspects of the operation of the Court.**"[4] In so doing, the Agreement prescribes functions of the Management Committee that are clearly insulated from substantive proceedings of the Court.[5]

II. Financial Structure of the Special Court for Sierra Leone Meets International Standards for Judicial Independence

8. The Defence argues that the financial structure of the Special Court compromises the financial independence of its Judiciary from the possibility of financial pressure. The argument by the Defence, however, is misplaced. The tension between reliance on voluntary contributions and judicial independence alleged by the Defence does not implicate the real concern that international standards try to address. Because a fundamental tension exists whenever an international court is funded by political actors such as nation states, international standards for independence set sufficient rather than absolute protections, and these standards focus on concerns about impartiality that are to be raised on an individual basis.[6]

9. The Prosecution submits that the dangers to judicial independence posed by the Management Committee as alleged by the Defence would only arise if multiple states colluded to undermine the independence of an international tribunal. As submitted earlier, the Management Committee is an advisory panel that is barred from any judicial decision-making. Furthermore, the Management Committee consists of members from seven countries and a representative of the Office of Legal Affairs which represents the entire Secretariat of the United Nations. In fact, the Special Court has received contributions

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[4] Agreement, Article 7 (emphasis added).

[5] The limits on the Management Committee's influence are reinforced in the "Terms of Reference for the Management Committee of the Special Court" set out in the Annex Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, Appendix III (S/2002/46). These clearly establish that the role of the Committee is to "assist" and advise the Court on "all non-judicial aspects of its operations." It is meant to encourage funding and support from all States. (See Article III, para. 3(a)-(f)).

[6] On the related matter of a court's creation, the International Criminal Tribunal for Rwanda stated that, "This Trial Chamber is of the view that criminal courts worldwide are the creation of legislatures which are eminently political bodies. This was an observation also made by the Trial Chamber in *Prosecutor v. Tadic*. To support this view, the Trial Chamber in that case relied on the Effects of Awards of Compensation made by the United Nations Administrative Tribunal, which specifically held that a political organ of the United Nations ... could and had created 'an independent and truly judicial body.'" *Prosecutor v. Joseph Kanyabashi*. Trial Chamber 2, "Decision on the Defence Motion on Jurisdiction", ICTR-96-15-1, 18 June 1997 at para. 39.

from thirty (30) countries.[7] Finally, no single country, regardless of its level of contribution to the Special Court, has more votes in the Management Committee than others. A reasonable observer, properly informed, would not reasonably apprehend bias based on insufficient structural independence.

10. The voluntary funding structure of the Special Court does not *per se* raise concerns under any applicable international standard. Rather, the various international standards on judicial independence are primarily concerned with shielding individual judges from a pecuniary interest in a given outcome. For example, salaries should be adequate to prevent the temptation for corruption and judges should excuse themselves from *specific cases* in which they have a pecuniary or other interest.

11. The Prosecution submits that the Rules of Procedure and Evidence (the "**Rules**") and the Statute of the Special Court (the "**Statute**") establish provisions governing the tenure and remuneration of judges ensure judicial independence and impartiality. Special Court judges are appointed for three-year terms which, as the Defence notes, equates to the intended duration of the Court's active existence. The Prosecution also notes that the remuneration schedule for the judges of the Special Court has been set. Though employment contracts of the Special Court are renewed on an annual basis, the Prosecution submits that any changes in judicial salaries would require a most extraordinary and public act by both the Registrar and the Management Committee, therefore protecting judicial independence.

12. The Statute mandates a selection process for judges to ensure "their high moral character, impartiality and integrity" and that they have "the qualifications required in their respective countries for appointment to the highest judicial offices."[8] Five of the eight judges of the Chambers were selected by the Secretary General of the United Nations, while three judges were selected by the Government of Sierra Leone. Due account was

[7] The following states have contributed to the Special Court: Australia, Belgium, Canada, Chile, Cyprus, Czech Republic, Denmark, Finland, Germany, Ireland, Italy, Japan, Liechtenstein, Lesotho, Luxemburg, Mali, Malaysia, Mauritius, Mexico, Netherlands, Nigeria, Norway, Philippines, Singapore, South Africa, Sweden, United Kingdom, United States, China (in-kind), and Switzerland (in-kind).

[8] Statute, Article 13(1).

taken "of the experience of the judges in international law, including international humanitarian law and human rights, criminal law and juvenile justice."[9]

13. The Agreement also buttresses the independence of judicial decisions by providing diplomatic immunities to the Judges of the Special Court. The judges "shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations."[10]

A. This Court's Existing Standard Meets All International Standard of Judicial Independence

14. The UN General Assembly adopted by resolution the Basic Principles on the Independence of the Judiciary (the "**Basic Principles**") drafted by the International Commission of Jurists.[11] According to the Basic Principles, the independence of the judiciary depends on "the role of the judges in relation to the system of justice and to the importance of their selection, training, and conduct." While these principles were drafted for State judiciary systems, they provide a standard by which the independence of an international court should also be measured.

15. The Special Court for Sierra Leone meets the standard for judicial independence set out by the UN in the relevant Basic Principles. The structure provides proper freedoms and immunities to Judges[12] and a method of selection with safeguards against judicial appointments for improper motives.[13] The Basic Principles also call for the term of office of a judge to be secured by law, guarantees of adequate remuneration, and judicial tenure

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[9] Statute, Article 13(2).

[10] According to Article 12(1) of the Special Court Agreement, the judges will enjoy:

(a) Personal inviolability, including immunity from arrest or detention;
(b) Immunity from criminal, civil and administration jurisdiction in conformity with the Vienna Convention;
(c) Inviolability for all papers and documents;
(d) Exemption, as appropriate, from immigration restrictions and other alien registration;
(e) The same immunities and facilities in respect of their personal baggage are accorded to diplomatic agents by the Vienna Convention;
(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

[11] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August to 6 September 1985, adopted under U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), adopted by UN/GA Resolution 40/32 and 40/146 (29 November 1985), "Seventh United Nations Congress on the prevention of Crime and the Treatment of Offenders". The International Commission of Jurists is dedicated to the "primacy, coherence and implementation of international law and principles that advance human rights." The Commission was founded in Berlin in 1952 and its membership is composed of sixty eminent jurists who are representatives of the different legal systems of the world.

[12] Basic Principles on the 9, 16. Special Court Agreement Article 12(1).

[13] Basic Principle 10

protections "until a mandatory retirement age or the expiry of their term of office."[14] According to the Basic Principles, judicial independence does not require job security beyond a specified term. The three-year term of the judges on the Special Court is adequately secured by law and their remuneration for that term is adequate. The Special Court provides financial and employment security for judges sufficient to allow them to make decisions in an independent and impartial manner.

16. The Prosecution submits that the voluntary funding mechanism of the Special Court does not weaken these protections to a point that violates international standards of judicial conduct. Principle 1 provides that "it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." Principle 7 affirms that it is "the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions." The members of the Management Committee are bound by these same duties, as outlined by the Agreement and Terms of Reference. As the Principles indicate, this obligation of non-intervention is one that must be presumed until evidence of a breach.

17. The Defendant invokes Principle 2 to suggest that the reliance on voluntary funding creates an indirect influence, but neglects to present the other principles that define the minimum protections for judges' freedoms of expression and association. Rigid qualification requirements, selection and training; conditions of service and tenure; and protections from removal should be in place in any judicial system to ensure that Principle 2 is met.

18. The International Bar Association (the "**IBA**") adopted a statement outlining minimum standards of judicial independence in 1982, and these principles predate and reiterate the international standards adopted by the General Assembly.[15] Under the subdivision on "securing impartiality and independence", the IBA focuses on the perceived bias of individual judges.[16] To the extent they address structural independence, the IBA states, "The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive," and notes that "[t]he ministers of the government shall not exercise any form of

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[14] Basic Principles 11 and 12.
[15] International Bar Association "Minimum Standards of Judicial Independence (1982).
[16] This section included only three principles: immunity of judges from legal action (Standard 43), recusal in cases where there is a reasonable suspicion of bias (Standard 44) and avoidance of conduct that might give rise to the appearance of bias (Standard 45). On the IBA's emphasis of impartiality over structural independence, see also Articles 35 and 37-40.

pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole."[17] With respect to financial independence, the IBA standards offer guidelines similar to those applied to the Special Court's Management Committee.[18]

B. This Court's Existing Safeguards meet The International Minimum Standard Enunciated in International Case Law

19. The Accused cites the Appellate judgment in the International Criminal Tribunal for the Former Yugoslavia ("ICTY") case of *Furundzija* to stand for the proposition that judicial independence requires that there should be nothing whatsoever in the circumstances surrounding a judgment that might give rise to the appearance of bias. This proposition is only a partial representation of the holding, and it thus misrepresents that decision. In *Furundzija*, the Appeals Chamber reviewed domestic and regional jurisprudence to arrive at a "reasonable person" standard for determining when there is an appearance of bias.[19] The Appellate Chamber held that where "a Judge is a party to the case, or has a financial or proprietary interests in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties," there is an unacceptable appearance of bias, and the Judge's disqualification from the case is "automatic." If none of these circumstances exists, the court held the adoption of the "reasonable person" standard to find that there would still be an unacceptable appearance of bias if circumstances were such as would "lead a reasonable observer, properly informed, to reasonably apprehend bias."

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[17] Ibid, Standards 2 and 16. Note that these standards are less prescriptive than the principles relating to judicial impartiality. The Special Court also provides, as called for by the IBA, judicial tenure (Standard 22), non-dilution of the Judiciary (Standards 24, 25), and merit-based selection of judges (Standard 26).

[18] Standard 5 commands that "[t]he Executive shall not have control over judicial functions," and Standard 10 notes that "it is the duty of the State to provide adequate financial resources to allow for the due administration of justice."

[19] For example, the European Court of Human Rights has found that in considering whether there is an appearance of bias, "what is decisive is whether this fear [of bias] can be held objectively justified." (*Hauschildt v. Denmark, Judgment of 24 May 1989*, Eur. Ct. H. R., Series A, No. 154 (***"Hauschildt"***), para. 46). Similarly, many common and civil law jurisdictions, including Canada (*R. v. Valente* (No. 2) (1983), 2 C.C.C. (3d) 417, at 439-40), Australia (*Webb v. The Queen* (1994), 181 CLR 41, 30 June 1994), South Africa (*President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgement on Recusal Application,* 1999 (7) BCLR 725 (CC), 3 June 1999), and Germany (German Code of Civil Procedure Art. 24) use the "reasonable person" standard as the arbiter of the appearance of judicial bias (*Prosecutor v. Furundzija*, IT – 95 – 17 – 1 – A, Appeals Chamber, 21 July 2000, para. 183-88).

20. The Appeals Chamber did not find bias in that case even though Judge Mumba had worked extensively on issues pertinent to the case.[20] The court found "meritless"[21] the contention of the Accused regarding apprehension of bias, stating, "It must be assumed that the Judges of the International Tribunal can disabuse their minds of any irrelevant personal beliefs or predispositions."[22] This view is consistent with the frequently repeated view of the European Court of Human Rights, that the personal impartiality of a Judge must be presumed until there is proof to the contrary.[23]

21. The Trial Chamber of the ICTR in *Kanyabashi* held that international judges are bound by oaths to act independently and should be assumed to do so. On a jurisdictional challenge, they found that "criminal courts worldwide are the creations of legislatures which are imminently political bodies."[24] The Court noted that judicial processes will be governed by independent rules of procedure and evidence, and that "the judges of the tribunal exercise their *judicial* duties independently and freely and are under oath to act honorably, faithfully, impartially and conscientiously as stipulated in Rule 14 of the Rules. Judges do not account to the Security Council for their judicial functions."[25]

C. This Court's Existing Safeguards Meet the International Standards Applied in Other International Tribunals

22. In addition to the explicit provisions of the Statute and Agreement that govern the Special Court, the Prosecution submits that the structural protections of judicial independence for the Special Court are similar to safeguards within the International Criminal Court (ICC), ICTY

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[20] Judge Mumba had worked for the United Nations Commission on the Status of Women, an organization which was concerned with allegations of mass and systematic rape during the war in the former Yugsolavia. Furthermore, Judge Mumba participated in preparations for the UN Fourth World Conference on Women held in Beijing, China in 1995, and contributed to the drafting of a document, "Platform for Action," whose goals included the reaffirmation of rape as a war crime. A meeting to discuss this and other goals was attended by three authors of one of the amicus curiae briefs and one of the Prosecutors in the *Furundzija* case.

[21] *Furundzija* para. 213

[22] *Id.* at para 197.

[23] See *Le Compte, Van Leuven and de Meyere, Judgment of 27 May 1981*, Eur. Ct. H. R., Series A, No. 43, para. 58 ("*Le Compte*"); *Piersack v Belgium* 1983 5 EHRR 169. Judgment of 1 October 1982 Series A No. 53, para 30 *De Cubber v Belgium* 1985 7 EHRR 236, para. 25.

[24] See *Prosecutor v. Joseph Kanyabashi.* Trial Chamber 2, "Decision on the Defence Motion on Jurisdiction", ICTR-96-15-1, para. 39. The jurisdictional challenge in that case was based on its establishment, but the structural protections found sufficient in that case are applicable to concerns about funding.

[25] See *Prosecutor v. Joseph Kanyabashi.* Trial Chamber 2, "Decision on the Defence Motion on Jurisdiction", ICTR-96-15-1, para. 41. The decision also notes that the independence and impartiality are ensured by (1) the calibre and integrity of the selection of judges, as ensured by Article 12(1) of the ICTR Statute, which is almost identical to Article 13(1) of the Special Court Statute and (2) a tribunal that ensures all the guarantees of fairness and justice (para. 42-44).

and International Criminal Court for Rwanda (ICTR). In each international court or tribunal, statutes shield Judges sufficiently from the influence of political forces, including the will of donor States. These protections include lengthy tenure, rigid qualifications and selection processes, privileges and immunities for judges, and a budgetary process that gives no individual country significant power to effect judicial decisions. Dependence upon voluntary funding contributions does not inhibit the Judges of the Special Court from exercising jurisdiction according to the solemn oaths taken upon their appointment.

23. The Statutes of the Special Court, ICTY and ICTR provide comparable protections for ensuring judicial independence and impartiality through the qualifications and selection of judges. All three bodies require that judges be of "high moral character, impartiality and integrity." Unlike their counterparts at the ICTR and ICTY (who serve four-year terms, subject to re-election), Judges of the Special Court have guaranteed tenure until the likely expiry of their term of office. The appointment processes at the Special Court and those at ICTR and ICTY are similarly independent. The Special Court appointments are less subject to the influence of individual states than the ICTR and ICTY elections in that, for those tribunals, the Security Council has the greatest role in the selection process, whereas at the Special Court, the Secretary General is the key actor.[26] In exercising his power to appoint judges to the Special Court, the Secretary General is obligated not to "seek or receive instructions from any government or from any other authority external to the organization."[27]

24. The funding source of the Special Court is similar to that of the International Criminal Court. The ICC is financially dependent upon State Parties and their continued support in that the funds of the Court are provided for in a budget decided by the Assembly of State Parties and raised, *inter alia*, from voluntary state contributions.[28]

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[26] At the ICTY and ICTR, States Members of the UN nominate candidates, the Security Council establishes a short list and the General Assembly elects the judges (Statute of the ICTY, Article 13bis and Statute of the ICTR, Article 12bis). Note that 190 countries can nominate for the ICTR and ICTY, with the Security Council narrowing the list of nominees to about 30 candidates for elections, from which 14 are chosen. In contrast, the Special Court Judges are appointed directly to the Special Court's Chambers by the Government of Sierra Leone and the Secretary General (Statute of the Special Court, Article 12).

[27] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 *entered into force* Oct. 24, 1945, Article 100 ("**UN Charter**")

[28] Rome Statute of the International Criminal Court, A/CONF.183/9, 1 July 2002, Article 115.

25. The source of funding for the Special Court is different from that of the ICTR and ICTY, but this structural difference does not undermine judicial independence due to the safeguards built into the Special Court's structure. The accused is concerned that the Special Court's reliance on voluntary contributions and the ability of donor states to approve the budget annually will influence judicial decision-making. This concern is misguided. The Article 17 funding and expenses of the ICTR and ICTY are also subject to review by States Members.[29] Thus, the relationship of the General Assembly to judicial salaries at the ICTY and ICTR is analogous to the Management Committee's power over judicial salaries at the Special Court. Furthermore, the Judges of the Special Court have an explicit statutory obligation to "be independent in the performance of their functions, and [] not accept or seek instructions from any Government or any other source."[30] This additional safeguard serves as the most powerful guarantor of judicial independence by locking the Special Court into Basic Principle 2.[31]

CONCLUSION

The Prosecution submits that the structure of the Special Court ensures ample protection of judicial independence and impartiality and that the mere possibility of lack of judicial independence is insufficient to invalidate the jurisdiction of the Court. The Prosecution submits that the Chamber should therefore dismiss the Third Preliminary Motion in its entirety.

Freetown, 23 June 2003.

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

Luc Côté
Chief of Prosecutions

Walter Marcus-Jones
Senior Appellate Counsel

Abdul Tejan-Cole
Appellate Counsel

[29] Article 17 of the UN Charter provides that "(1) the General Assembly shall consider and approve the budget of the UN and (2) expenses of the UN shall be borne by the Members as apportioned by the General Assembly."
[30] Statute of the Special Court of Sierra Leone, Article 13(1).
[31] Basic Principles on the Independence of The Judiciary, Basic Principal 2: The Judiciary "shall decide matters before them impartially ... without any restrictions, improper influences, inducements, pressures ... from any quarter for any reason."

PROSECUTION INDEX OF AUTHORITIES

1. "Terms of Reference for the Management Committee of the Special Court" set out in the Annex Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, Appendix III (S/2002/46)

2. *Prosecutor v. Joseph Kanyabashi.* Trial Chamber 2, "Decision on the Defence Motion on Jurisdiction", ICTR-96-15-1, 18 June 1997

3. Basic Principles on the Independence of the Judiciary , Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985)

4. UN/GA Resolution 40/32 and 40/146 (29 November 1985), "Seventh United Nations Congress on the prevention of Crime and the Treatment of Offenders"

5. International Bar Association, "Minimum Standards of Judicial Independence (1982).

6. *Hauschildt v. Denmark, Judgment of 24 May 1989*, Eur. Ct. H. R., Series A, No. 154, para 46[1]

7. *Prosecutor v. Furundzija*, IT – 95 – 17 – 1 – A, Appeals Chamber, 21 July 2000, para. 183 – 188 and 213

8. *Le Compte, Van Leuven and de Meyere, Judgment of 27 May 1981*, Eur. Ct. H. R., Series A, No. 43

9. *Piersack v Belgium* 1983 5 EHRR 169. Judgment of 1 October 1982 Series A No. 53, para 30[2]

10. *De Cubber v Belgium* 1985 7 EHRR 236, para 25[3]

11. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 *entered into force* Oct. 24, 1945, Articles 17, 100

12. Rome Statute of the International Criminal Court, A/CONF.183/9, 1 July 2002, Article 115

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[1] For full text see URL: http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/85.txt
[2] For full text see URL: http://hudoc.echr.coe.int.HUDOC1doc/HEJUD/sift/142.txt
[3] For full text see URL: http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/50.txt

PROSECUTION INDEX OF AUTHORITIES

ANNEX 1.

"Terms of Reference for the Management Committee of the Special Court" set out in the Annex Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, Appendix III (S/2002/46)

Appendix III

Terms of reference for the Management Committee for the Special Court for Sierra Leone

I. Mandate of the Management Committee

1. Pursuant to the letter of the President of the Security Council (paragraph 2 of S/2000/1234 of 22 December 2000), a Management Committee for the Special Court will be established.

II. Composition of the Management Committee

2. The Management Committee will be an informal arrangement open to important contributors to the Special Court willing to assume the functions referred to in section III of these terms of reference. The Government of Sierra Leone and the Secretary-General will also participate in the Management Committee.

III. Functions of the Management Committee

3. The Management Committee for the Special Court will, inter alia:

(a) Assist in the establishment of the Special Court, including in the identification of nominees for the positions of Registrar, Prosecutor and judges, for appointment by the Secretary-General;

(b) Consider reports of the Special Court and provide advice and policy direction on all non-judicial aspects of its operations, including questions of efficiency;

(c) Oversee the Special Court's annual budget and other financially related reports, and advise the Secretary-General on these matters;

(d) Assist the Secretary-General in ensuring that adequate funds are available for the operation of the Special Court;

(e) Encourage all States to cooperate with the Special Court;

(f) Report, on a regular basis, to the Group of Interested States for the Special Court.

IV. Secretariat services

4. The Secretary-General will provide the Management Committee with secretariat services, if required.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 2

Prosecutor v. Joseph Kanyabashi. Trial Chamber 2, "Decision on the Defence Motion on Jurisdiction", ICTR-96-15-1, 18 June 1997

ICTR-96-15A-T (730-719.) 3-7-97 873 730

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
Trial Chamber 2

Before: Judge William H. Sekule, Presiding Judge
Judge Tafazzal H. Khan
Judge Navanethem Pillay

OR: ENG

Registrar: Mr. Frederik Harhoff

Decision of: 18 June 1997

THE PROSECUTOR
versus
JOSEPH KANYABASHI

Case No. ICTR-96-15-T

DECISION ON THE DEFENCE MOTION ON JURISDICTION

Office of the Prosecutor:

Mr. Yacob Haile-Mariam

Counsel for the Defence

Mr. Evans Monari
Mr. Michel Marchand

THE TRIBUNAL,

SITTING AS Trial Chamber 2 of the International Criminal Tribunal for Rwanda ("the Tribunal"), composed of Judge William H. Sekule as Presiding Judge, Judge Tafazzal H. Khan and Judge Navanethem Pillay;

CONSIDERING the indictment submitted by the Prosecutor against Joseph Kanyabashi pursuant to Rule 47 of the Rules of Procedure and Evidence ("the Rules") and confirmed by Judge Yakov A. Ostrovsky on 15 July 1996 on the basis that there existed sufficient evidence to provide reasonable grounds for believing that he has committed genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II thereto;

TAKING NOTE of the transfer of the accused from Belgium to the Tribunal's Detention Facilities on 8 November 1996 and his initial appearance on 29 November 1996 before this Chamber;

BEING NOW SEIZED OF the preliminary motion filed by the Defence Counsel on 17 April 1997 pursuant to Rule 73(A)(i) of the Rules, challenging the jurisdiction of the Tribunal;

HAVING ALSO RECEIVED the Prosecutor's response, filed on 22 May 1997, to the Defence Counsel's motion;

HAVING HEARD the parties at the hearing of the Defence Counsel's motion and the Prosecutor's response, held on 26 May 1997;

CONSIDERING the provisions of the UN Charter, the Statute of the Tribunal and the Rules, in particular Rules 72 and 73;

TAKING INTO CONSIDERATION the decision of 10 August 1995 of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in Case No. IT-94-1-T, The Prosecutor versus Duško Tadić; and the decision of 2 October 1995 rendered by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in Case No. IT-94-1-AR72, on appeal of the said decision of the Trial Chamber.

AFTER HAVING DELIBERATED:

1. The Defence Counsel submitted his preliminary motion pursuant to Rule 73(A)(i) of the Rules 139 days after the initial appearance of the accused. By so doing, he manifestly exceeded the time-limit prescribed in Rule 73(B) of the Rules, which stipulates that preliminary motions by the accused shall be brought within sixty (60) days after the initial appearance, and in any case before the hearing on the merits. Rule 73(C) of the Rules further lays down that failure to apply within this time-limit shall constitute a waiver of the right, unless the Trial Chamber grants relief to hear the preliminary motion upon good cause being shown by the Defence Counsel.

2. The Trial Chamber, therefore, must first examine whether there are reasonable grounds for proceeding with the examination of this preliminary motion.

A. On the Consequence of the Defence Counsel's Failure to Submit his Preliminary Motion Within Sixty Days After the Initial Appearance Of the Accused.

3. Rule 72(B) of the Rules allows the Prosecution as well as the Defence to file preliminary motions and further establishes that the Trial Chamber shall dispose thereof *in limine litis*. The purpose of this requirement, evidently, is to ensure that all basic questions and fundamental objections raised by the parties against the competence, the proceedings and the functions of the Tribunal are properly addressed and dealt with before the beginning of the trial on its merits.

4. Rule 73(A) identifies some of the preliminary motions which must, for reasons of expediency, be raised and disposed of before the beginning of the trial on the merits, such as objections against the jurisdiction of the Tribunal or against defects in the indictment. Rule 73(B), accordingly, specifies that such motions must be filed within sixty (60) days after the initial appearance in order to ensure their consideration well in advance of the trial. Rule 73(C) goes on to establish that failure to meet the time-limit shall constitute a waiver of the right to submit such preliminary motions. If, however, the Defence shows good cause, the Trial Chamber might grant relief from this waiver. These Rules are clear and leave no room for misunderstanding.

5. The Trial Chamber notes, however, that the Defence motion was filed out of time, and was surprised that neither the Defence nor the Prosecutor made any reference to this fact when the preliminary motion was heard by the Trial Chamber. Defence Counsel did not file any request for a waiver and did not provide the Trial Chamber with any explanation for his failure to respect the prescribed time-limit. The Prosecutor, on her part, did not object to hearing this motion

6. Notwithstanding the fact that some of the questions raised by the Defence Counsel have already been addressed in the decision rendered on 2 October 1995 by the Appeals Chamber for the Former Yugoslavia, the Trial Chamber finds that, in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence and in the interests of justice, that the Defence Counsel's motion deserves a hearing and full consideration. The Trial Chamber, therefore, grants relief from the waiver *suo motu* and will thus proceed with the examination of the Defence Counsel's preliminary motion.

B. On the Substance of the Preliminary Motion

7. In his preliminary motion, the Defence Counsel raised a number of challenges concerning the jurisdiction of the Tribunal. These challenges can be adequately condensed into the following five principal objections:

(i) That the sovereignty of States, in particular that of the Republic of Rwanda, was violated by the fact that the Tribunal was not established by a treaty through the General Assembly;

(ii) that the Security Council lacked competence to establish an ad-hoc Tribunal under Chapter VII of the UN Charter;

(ii) that the Security Council lacked competence to establish an ad-hoc Tribunal under Chap ter VII of the UN Charter;

(iii) that the primacy of the Tribunal's jurisdiction over national courts was unjustified and violated the principle of *jus de non evocando*;

(iv) that the Tribunal cannot have jurisdiction over individuals directly under international law; and

(v) that the Tribunal is not and cannot be impartial and independent;

8. The Prosecutor responded that the basic arguments in the Defence Counsel's motion were addressed by the Trial Chamber and, in particular, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Tadić-case. The Trial Chamber notes that, in terms of Article 12(2) of the Statute, the two Tribunals share the same Judges of their Appeals Chambers and have adopted largely similar Rules of Procedure and Evidence for the purpose of providing uniformity in the jurisprudence of the two Tribunals. The Trial Chamber, respects the persuasive authority of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia and has taken careful note of the decision rendered by the Appeals Chamber in the Tadic case.

B.1. On the Defence Counsel's Objection that the Sovereignty of States, in Particular that of the Republic of Rwanda, Was Violated by the Fact that the Tribunal Was Not Established by a Treaty Through the General Assembly.

9. The Defence Counsel submitted in his written and oral submissions that the Tribunal should and in fact could only have been established by an international treaty upon recommendation of the General Assembly, which would have permitted the member States of the United Nations to express their approval or disapproval of the establishment of an ad-hoc Tribunal. The Defence Counsel argued that by leaving the establishment of the Tribunal to the Security Council through a Resolution under Chapter VII of the UN Charter, the United Nations not only encroached upon the sovereignty of the Republic of Rwanda, and other Member States, but also frustrated the endeavours of its General Assembly to establish a permanent criminal court. The Tribunal, in the Defence Counsel's view, was therefore not lawfully established.

10. The Prosecutor, in response to this first objection raised by Defence Counsel, rejected the notion that the Tribunal was unlawfully established and contended that, since there was a need for an effective and expeditious implementation of the decision to establish the Tribunal, the treaty approach would have been ineffective because of the considerable time required for the establishment of an instrument and for its entry into force.

11. The Trial Chamber finds that two issues need to be addressed. One is whether the accused as an individual has *locus standi* to raise a plea of infringement of the sovereignty of States, in particular that of the Republic of Rwanda, and the other is whether the sovereignty of the Republic of Rwanda and other Member States were in fact violated in the present case.

12. As regards the first of these questions, the Appeals Chamber held in the Tadić-case that

> "To bar an accused from raising such a plea is tantamount to deciding that , in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. "

The Trial Chamber agrees with this conclusion and accepts that the accused in the present case can raise the plea of State sovereignty. In any event, it is the individual and not the State who has been subjected to the jurisdiction of the Tribunal.

13. As regards the second question whether the sovereignty of the Republic of Rwanda has been violated by the Security Council's decision to establish the Tribunal, the Trial Chamber notes that membership of the United Nations entail certain limitations upon the sovereignty of the member States. This is true in particular by virtue of the fact that all member States, pursuant to Article 25 of the UN Charter, have agreed to accept and carry out the decisions of the Security Council in accordance with the Charter. For instance, the use of force against a State sanctioned by the Security Council in accordance with Article 41 of the UN Charter is one clear example of limitations upon sovereignty of the State in question which can be imposed by the United Nations.

14. The Trial Chamber notes, furthermore, that the establishment of the ICTR was called for by the Government of Rwanda itself, which maintained that an international criminal tribunal could assist in prosecuting those responsible for acts of genocide and crimes against humanity and in this way promote the restoration of peace and reconciliation in Rwanda. The Ambassador of Rwanda, during the discussion and adoption of Resolution 955 in the Security Council on 8 November 1994 declared that:

> "The tribunal will help national reconciliation and the construction of a new society based on social justice and respect for the fundamental rights of the human person, all of which will be possible only if those responsible for the Rwandese tragedy are brought to justice."

15. Against this background, the Trial Chamber is of the view that the Security Council's establishment of the Tribunal through a Resolution under Chapter VII of the UN Charter and with the participation of the Government of Rwanda, rather than by a treaty adopted by the Member States under the auspices of the General Assembly, did not violate the sovereignty of the Republic of Rwanda and that of the Member States of the United Nations..

16. The Defence Counsel further argued that the establishment of the Tribunal through a resolution of the Security Council effectively undermined the General Assembly's initiative to set up a permanent international Criminal Court. The Trial Chamber, however, mindful of the fact that such a tribunal may well be created by an international treaty, finds that this question has no bearing on the jurisdiction of this Tribunal and must therefore, be rejected.

B.2. On the Defence Counsel's Objections that the Security Council Lacked Competence to Establish an *ad-hoc* Tribunal under Chapter VII of the UN Charter

17. The second main issue addressed by the Defence relates to the interpretation and delimitation of Chapter VII of the UN Charter and more specifically to the contents and boundaries of the authority of the Security Council.

18. In his written and oral submissions, the Defence Counsel argued that the establishment of the Tribunal by the Security Council was ill-founded for five basic reasons:

(i) that the conflict in Rwanda did not pose any threat to international peace and security;

(ii) that there was no international conflict to warrant any action by the Security Council;

(iii) that the Security Council thus could not act within Chapter VII of the UN Charter;

(iv) that the establishment of an ad-hoc tribunal was never a measure contemplated by Article 41 of the UN Charter; and finally

(v) that the Security Council has no authority to deal with the protection of Human Rights.

The Trial Chamber will now examine each of these contentions in turn.

19. ***"The conflict in Rwanda did not pose any threat to international peace and security"***.

On several occasions, e.g. in Congo, Somalia and Liberia, the Security Council has established that incidents such as sudden migration of refugees across the borders to neighbouring countries and extension or diffusion of an internal armed conflict into foreign territory may constitute a threat to international peace and security. This, might happen, in particular where the areas immediately affected have exhausted their resources. The reports submitted by the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (see Doc. S/1994/1157) and also by the Commission of Experts appointed by the Secretary General (see Doc. S/1994/1125) concluded that the conflict in Rwanda as well as the stream of refugees had created a highly volatile situation in some of the neighbouring regions. As a matter of fact, this conclusion was subsequently shared by the Security Council and formed the basis for the adoption of Security Council's resolution 955 (1994) of 8 November 1994.

20. Although bound by the provisions in Chapter VII of the UN Charter and in particular Article 39 of the Charter, the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber.

21. While it is true that the conflict in Rwanda was internal in the sense that it emerged from inherent tensions between the two major groups forming the population within the territory of Rwanda and otherwise did not involve the direct participation of armed forces belonging to any other State, the Trial Chamber cannot accept the Defence Counsel's notion that the conflict did not pose any threat to international peace and security. The question of, whether or not the conflict posed a threat to international peace and security is a matter to be decided exclusively by the Security Council. The Trial Chamber nevertheless takes judicial notice of the fact that the conflict in Rwanda created a massive wave of refugees, many of whom were armed, into the neighbouring countries which by itself entailed a considerable risk of serious destabilisation of the local areas in the host countries where the refugees had settled. The demographical composition of the population in certain neighbouring regions outside the territory of Rwanda, furthermore, showed features which suggest that the conflict in Rwanda might eventually spread to some or all of these neighbouring regions.

22. The Trial Chamber concludes that there is no merit in the Defence Counsel's argument that the conflict in Rwanda did not pose any threat to international peace and security and holds that this was a matter to be decided exclusively by the Security Council.

23. ***"There was no international conflict to warrant any action by the Security Council."***

The Defence Counsel further contends that there was no international conflict to warrant any action by the Security Council. This argument has been partly addressed in the preceding paragraphs in the sense that *if* the Security Council had decided that the conflict in Rwanda did in fact pose a threat to international peace and security, this conflict would thereby fall within the ambit of the Security Council's powers to restore and maintain international peace and security pursuant to the provisions in Chapter VII of the UN Charter.

24. The Security Council's authority to take such action, furthermore, exists independently of whether or not the conflict was deemed to be international in character. The decisive pre-requisite for the Security Council's prerogative under Article 39 and 41 of the UN Charter is not whether there *exists* an *international* conflict, but whether the conflict at hand entails a threat to international peace and security. Internal conflicts, too, may well have international implications which can justify Security Council action. The Trial Chamber holds that there is no basis for the Defence Counsel's submission that the Security Council's competence to act rested on a pre-existing international conflict.

25. ***"The Security Council could not act within Chapter VII of the UN Charter."***

During his oral submission, the Defence Counsel further added that the Security Council was not competent to act in the case of the conflict in Rwanda because international peace and security had already been re-established by the time the Security Council decided to create the Tribunal.

26. The Trial Chamber observes, once again, that this argument entails a finding of fact based on evidence and that, in any case, the question of whether or not the Security Council was justified in taking actions under Chapter VII when it did, is a matter to be determined by the Security Council itself. The Trial Chamber notes, in particular, that cessation of the atrocities of the conflict does not necessarily imply that international peace and security had been restored, because peace and security cannot be said to be re-established adequately without justice being done. In the Trial Chamber's view, the achievement of international peace and security required that swift international action be taken by the Security Council to bring to justice those responsible for the atrocities in the conflict.

27. ***"The establishment of an ad-hoc tribunal was never a measure contemplated by Article 41 of the UN Charter."***

The thrust of this argument lies in the contention that the establishment of an ad-hoc Tribunal to prosecute perpetrators of genocide and violations of international humanitarian law is not a measure contemplated by the provisions of Chapter VII of the UN Charter. While it is true that establishment of judicial bodies is not directly mentioned in Article 41 of the UN Charter as a measure to be considered in the restoration and maintenance of peace, it clearly falls within the ambit of measures to satisfy this goal. The list of actions contained in Article 41 is clearly not exhaustive but indicates some examples of the measures which the Security Council might eventually decide to impose on States in order to remedy a conflict or an imminent threat to international peace and security. This is also the view of the Appeals Chamber in the Tardic-case.

28. ***"The Security Council has no authority to deal with the protection of Human Rights"***
Finally, the Defence Counsel holds that the international protection of Human Rights is embedded in particular international instruments such as the global International Covenants on Civil and Political Rights & Social, Economic and Cultural Rights and in the regional conventions on Human Rights for Europe and Africa, all of which have established particular international institutions entrusted with the task of protecting the body of international Human Rights. The Defence Counsel claims, therefore, that the protection of Human Rights is not a matter for the Security Council.

29. The Trial Chamber cannot accept the Defence Counsel's argument that the existence of specialized institutions for the protection of Human Rights precludes the Security Council from taking action against violation of this body of law. Rather to the contrary, the protection of international Human Rights is the responsibility of all United Nations organs, the Security Council included, without any limitation, in conformity with the UN Charter.

B.3. On the Defence Counsel's Objections Against the Primacy of the Tribunal's Jurisdiction Over National Courts and Against Violation of the Principle of *Jus de non Evocando.*

30. Although the Defence Counsel did not explicitly challenge the primacy of the Tribunal's jurisdiction over national courts, this objection is implied in the Defence Counsel's contention that establishment of the Tribunal violated the principle of *jus de non evocando*.

31. This principle, originally derived from constitutional law in civil law jurisdictions, establishes that persons accused of certain crimes should retain their right to be tried before the regular domestic criminal Courts rather than by politically founded ad-hoc criminal tribunals which, in times of emergency, may fail to provide impartial justice. As stated by the Appeals Chamber in the Tadić-case: "As a matter of fact and of law the principle advocated by the Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial." In the Trial Chamber's opinion, however, the Tribunal is far from being an institution designed for the purpose of removing, for political reasons, certain criminal offenders from fair and impartial justice and have them prosecuted for political crimes before prejudiced arbitrators.

32. It is true that the Tribunal has primacy over domestic criminal Courts and may at any stage request national Courts to defer to the competence of the Tribunal pursuant to article 8 of the Statute of the Tribunal, according to which the Tribunal may request that national Courts defer to the competence of the Tribunal at any stage of their proceedings. The Tribunal's primacy over national Courts is also reflected in the principle of *non bis in idem* as laid down in Article 9 of the Statute and in Article 28 of the Statute which establishes that States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber. The primacy thereby entrenched for the Tribunal, however, is exclusively derived from the fact that the Tribunal is established under Chapter VII of the UN Charter, which in turn enables the Tribunal to issue directly binding international legal orders and requests to States, irrespective of their consent. Failure of States to comply with such legally binding orders and requests may, under certain conditions, be reported by the President of the Tribunal to the Security Council for further action.

The Trial Chamber concludes, therefore, that the principle of *jus de non evocando* has not been violated.

B.4. On the Defence Counsel's Objections Against the Tribunal's Jurisdiction over Individuals Directly under International Law.

33. The Defence Counsel further contends that bestowing the Tribunal with jurisdiction over individuals is inconsistent with the UN Charter, for the reason that the Security Council has no authority over individuals, and that only States can pose threats to international peace and security.

34. The Prosecution responded to this contention by citing the Nüremberg Trials which, in the Prosecution's view, established that individuals who have committed crimes under international law can be held criminally responsible directly under international law. The Prosecutor further contended that attribution of individual criminal responsibility is a fundamental expression of the need for enforcement action by the Security Council. It is indeed difficult to separate the individual from the State, as the duties and rights of States are only duties and rights of the individuals who compose them, and as international criminal law, like other branches of law, deals with the regulation of human conduct. It is to individuals, not the abstract, that international law applies, and it is against individuals that it should provide sanctions. In the words of the Deputy Prosecutor in the trial against *Frank Hans* in 1946:

> "It seems intolerable to every sensitized human being that the men who put their good will at disposition of the State entity in order to make use of the power and material resources of this entity to slaughter, as they have done, millions of human beings in the execution of a policy long since determined, should be assured of immunity. The principle of State sovereignty which might protect these men is only a mask; this mask removed, the man's responsibility reappears."

35. The Trial Chamber recalls that the question of direct individual criminal responsibility under international law is and has been a controversial issue within and between various legal systems for several decades and that the Nüremberg trials in particular have been interpreted differently in respect of the position of the individual as a subject under international law. By establishing the two International Criminal Tribunals for the Former Yugoslavia and Rwanda, however, the Security Council explicitly extended international legal obligations and criminal responsibilities directly to individuals for violations of international humanitarian law. In doing so, the Security Council provided an important innovation of international law, but there is nothing in the Defence Counsel's motion to suggest that this extension of the applicability of international law against individuals was not justified or called for by the circumstances, notably the seriousness, the magnitude and the gravity of the crimes committed during the conflict.

36. In his submissions, furthermore, the Defence Counsel referred to a number of other areas of conflicts and incidents in which the Security Council took no action to establish an international criminal tribunal, e.g. Congo, Somalia and Liberia, and the Defence Counsel seems to infer from the lack of such action in these cases that individual criminal responsibility should not be taken in the case of the conflict in Rwanda. The Trial Chamber, however, disagrees entirely with this perception. The fact that the Security Council, for previously prevailing geo-strategic and international political reasons, was unable in the past to take adequate measures to bring to justice the

perpetrators of crimes against international humanitarian law is not an acceptable argument against introducing measures to punish serious violations of international humanitarian law when this becomes an option under international law. The Trial Chamber, thus, cannot accept the Defence Counsel's objections against the Tribunal's jurisdiction over individuals.

B.5. On the Defence Counsel's Objections Based on the Allegation that the Tribunal is not Impartial and Independent.

37. The Defense Motion asserted that the Tribunal was set up by the Security Council, a political body and as such the Tribunal is just another appendage of an international organ of policing and coercion, devoid of independence.

38. The Prosecutor, in response, challenged the claim in the Defense Motion that the Tribunal cannot act both as a subsidiary organ of the Security Council and as an independent Judicial body. He stated that although the ICTY and the ICTR share certain aspects of personnel, materials and means of operation, the Tribunal for Rwanda is a separate Tribunal with its own Statute, its own sphere of jurisdiction and its own rules of operation and as such it has legal independence.

39. This Trial Chamber is of the view that criminal courts worldwide are the creation of legislatures which are eminently political bodies. This was an observation also made by the Trial Chamber in the Tadić-case. To support this view, the Trial Chamber in that case relied on *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (1954) I.C.J. 47, 53; Advisory Opinion of 13 July), which specifically held that a political organ of the United Nations, in that case the General Assembly, could and had created "an independent and truly judicial body." Likewise, the Security Council could create such a body using its wide discretion under Chapter VII.

40. This independence is, for example, demonstrated by the fact that the Tribunal is not bound by national rules of evidence as stated under rule 89 A of the Rules of Procedure and Evidence. The Tribunal is free to apply those Rules of Evidence which best favor a fair determination of the matter before it as stipulated in rule 89(B) of the Rules.

41. Further, the judges of the Tribunal exercise their *judicial* duties independently and freely and are under oath to act honorably, faithfully, impartially and conscientiously as stipulated in rule 14 of the Rules. Judges do not account to the Security Council for their judicial functions.

42. In this Trial Chamber's view, the personal independence of the judges of the Tribunal and the integrity of the Tribunal are underscored by Article 12 (1) of the Statute of the Tribunal which states that persons of high moral character, integrity, impartiality who possess adequate qualifications to become judges in their respective countries and having widespread experience in criminal law, international law including international humanitarian law and human rights law, shall be elected.

43. This Trial Chamber also subscribes to a view which was expressed by the Appeals Chamber in the Tadic case that when determining whether a tribunal has been 'established by law', consideration should be made to the setting up of an organ in keeping with the proper international standards providing all the guarantees of fairness and justice.

44. Under the Statute and the Rules of Procedure and Evidence, the Tribunal will ensure that the accused receives a fair trial.This principle of fair trial is further entrenched in Article 20 which embodies the major principles for the provision of a fair trial, *inter alia,* the principles of public hearing and subject to cross examination. The rights of the accused are also set out such as the right to counsel, presumption of innocence until the contrary is proved beyond a reasonable doubt, privilege against self-incrimination and the right to adequate time for the preparation of his/her case. These guarantees are further included in rules 62, 63 and 78 of the Rules.The rights of the accused enumerated above are based upon Article 14 of the International Covenant on Civil and Political Rights and are similar to those found in Article 6 of the European Convention on Human Rights.

45. Defence Counsel argued that the obligation imposed on the Tribunal to report to the Security Council derogates its independence as a judicial organ. The Prosecutor contended that this obligation was discretionary. In fact it is mandatory. In Article 34 of the Statute, the Tribunal is duty bound to do this annually. This requirement is not only a link between it and the Security Council but it is also a channel of communication to the International community, which has an interest in the issues being addressed and the right to be informed of the activities of the Tribunal. In the Chamber`s view, the Tribunal`s obligation to report progress to the Security Council is purely administrative and not a judicial act and therefore does not in any way impinge upon the impartiality and independence of it`s judicial decision.

46. The Defence Counsel further contended that African jurisprudence and Human Rights Covenants were overlooked in the setting up the Tribunal. This contention cannot be correct because the important instruments on human rights in Africa, including the Charter of the Organization of African Unity (O.A.U.) and the African Charter On Human Rights ("the African Charter") were indirectly included in the law applicable to the Tribunal. Articles 3 and 7 of the African Charter on Human and People's Rights, for example, contain rights which are similar to those guaranteed in the Statute.

47. The Defence Counsel argued that the impartiality of the of the Tribunal has not been demonstrated for the reason that there has been selective prosecution only of persons belonging to the Hutu ethnic group.

48. In his response, the Prosecutor dismissed these allegations and stated that indictments have been issued against leading perpetrators of the genocide and that subject to the availability of evidence, he intended to prosecute Hutu and Tutsi "extremists". The use of the word "extremists" is inaccurate and unfortunate, in view of Article 1 of the statute.

49. The Trial Chamber simply reiterates that, pursuant to Article 1 of the Statute, all persons who are suspected of having committed crimes falling within the jurisdiction of the Tribunal are liable to prosecution.

50. The Trial Chamber is not persuaded by the arguments advanced by the Defence Counsel that the Tribunal is not impartial and independent and accordingly rejects this contention.

FOR THESE REASONS,

DECIDES to dismiss the motion submitted by the Defence Counsel challenging the jurisdiction of the Tribunal.

Arusha, 18 June 1997.

William H. Sekule
Presiding Judge

T. H. Khan
Judge

Navanethem Pillay
Judge

Pronounced in Open Court on the 3rd of July 1997

Presiding Judge

(Seal of the Tribunal)

PROSECUTION INDEX OF AUTHORITIES

ANNEX 3.

Basic Principles on the Independence of the Judiciary , Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985)

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Basic Principles on the Independence of Judiciary

UN Document Series Symbol: ST/HR/
UN Issuing Body: Secretariat Centre for Human Rights

Adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Milan from 26 August to 6 September 1985 and e General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 Dece

Whereas in the Charter of the United Nations the peoples of the world affirm, inte determination to establish conditions under which justice can be maintained to ac international co-operation in promoting and encouraging respect for human rights fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the pri equality before the law, of the presumption of innocence and of the right to a fair hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and and Political Rights both guarantee the exercise of those rights, and in addition, t Covenant on Civil and Political Rights further guarantees the right to be tried with delay,

Whereas frequently there still exists a gap between the vision underlying those pr and the actual situation,

Whereas the organization and administration of justice in every country should be by those principles, and efforts should be undertaken to translate them fully into

Whereas rules concerning the exercise of judicial office should aim at enabling juc in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the T Offenders, by its resolution 16, called upon the Committee on Crime Prevention a to include among its priorities the elaboration of guidelines relating to the indepen judges and the selection, professional training and status of judges and prosecutc

Whereas it is, therefore, appropriate that consideration be first given to the role o relation to the system of justice and to the importance of their selection, training conduct,

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The following basic principles, formulated to assist Member States in their task of and promoting the independence of the judiciary should be taken into account an by Governments within the framework of their national legislation and practice an brought to the attention of judges, lawyers, members of the executive and the leg and the public in general. The principles have been formulated principally with pr judges in mind, but they apply equally, as appropriate, to lay judges, where they

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshri Constitution or the law of the country. It is the duty of all governmental and othe institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts accordance with the law, without any restrictions, improper influences, inducemer pressures, threats or interferences, direct or indirect, from any quarter or for any

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall exclusive authority to decide whether an issue submitted for its decision is within competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judic nor shall judicial decisions by the courts be subject to revision. This principle is wi prejudice to judicial review or to mitigation or commutation by competent authori sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using e legal procedures. Tribunals that do not use the duly established procedures of the process shall not be created to displace the jurisdiction belonging to the ordinary judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judi ensure that judicial proceedings are conducted fairly and that the rights of the pa respected.

7. It is the duty of each Member State to provide adequate resources to enable th to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the are like other citizens entitled to freedom of expression, belief, association and as provided, however, that in exercising such rights, judges shall always conduct the such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizati represent their interests, to promote their professional training and to protect the independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability w appropriate training or qualifications in law. Any method of judicial selection shall

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against judicial appointments for improper motives. In the selection of judges, the no discrimination against a person on the grounds of race, colour, sex, religion, p other opinion, national or social origin, property, birth or status, except that a req that a candidate for judicial office must be a national of the country concerned, sh considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remunera conditions of service, pensions and the age of retirement shall be adequately secu

12. Judges, whether appointed or elected, shall have guaranteed tenure until a m retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on obje factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is ar matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their delib and to confidential information acquired in the course of their duties other than in proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjo immunity from civil suits for monetary damages for improper acts or omissions in exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professiona shall be processed expeditiously and fairly under an appropriate procedure. The ju have the right to a fair hearing. The examination of the matter at its initial stage s kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacit behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in acc with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subjec independent review. This principle may not apply to the decisions of the highest c those of the legislature in impeachment or similar proceedings.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 4.

UN/GA Resolution 40/32 and 40/146 (29 November 1985), "Seventh United Nations Congress on the prevention of Crime and the Treatment of Offenders"

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United Nations **A/RES/40/32**

General Assembly

Distr. GENERAL

29 November 1985

ORIGINAL: ENGLISH

A/RES/40/32
29 November 1985
96th plenary meeting

Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders

The General Assembly,

Recalling its resolution 35/171 of 15 December 1980, in which it endorsed the Caracas Declaration, annexed to that resolution, and urged implementation of the conclusions relating to the new perspectives for international co-operation in crime prevention in the context of development adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling also its resolution 36/21 of 9 November 1981, in which the Seventh Congress was invited to consider current and emerging trends in crime prevention and criminal justice, with a view to defining new guiding principles for the future course of crime prevention and criminal justice in the context of development needs, the goals of the International Development Strategy for the Third United Nations Development Decade and the Declaration and the Programme of Action on the Establishment of a New International Economic Order, taking into account the political, economic, social and cultural circumstances and traditions of each country and the need for crime prevention and criminal justice systems to be consonant with the principles of social justice,

Recalling further its resolution 39/112 of 14 December 1984, in which the Secretary-General was requested to ensure that the substantive and organizational work of the Seventh Congress was fully adequate for its successful outcome,

Emphasizing the responsibility assumed by the United Nations in crime prevention under General Assembly resolution 415 (V) of 1 December 1950, which was affirmed in Economic and Social Council resolutions 731 F (XXVIII) of 30 July 1959 and 830 D (XXXII) of 2 August 1961, and in the promotion and strengthening of international co-operation in this field in accordance with Assembly resolutions 3021 (XXVII) of 18 December 1972, 32/59 and 32/60 of 8 December 1977, 35/171 of 15 December 1980 and 36/21 of 9 November 1981,

Bearing in mind the theme of the Congress, "Crime prevention for freedom,

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justice, peace and development", and the importance of preserving peace as a condition for development and international co-operation,

Welcoming the fact that the Congress, in accordance with General Assembly resolution 39/112, paid particular attention to the question of illicit drug trafficking,

Alarmed by the growth and seriousness of crime in many parts of the world, including conventional and non-conventional criminality, which have a negative impact on development and the quality of life,

Considering that crime, particularly in its new forms and dimensions, seriously impairs the development process of many countries, as well as their international relations,

Noting that the function of the criminal justice system is to contribute to the protection of the basic values and norms of society,

Aware of the importance of enhancing the efficiency and effectiveness of criminal justice systems,

Noting that to limit effectively the harm caused by modern economic and unconventional crime, policy measures should be based on an integrated approach, the main emphasis being placed on the reduction of opportunities to commit crime and on the strengthening of norms and attitudes against it,

Aware of the importance of crime prevention and criminal justice, which embraces policies, processes and institutions aimed at controlling criminality and ensuring equal and fair treatment for all those involved in the criminal justice process,

Mindful that the incorporation of crime prevention and criminal justice policies in the planning process can help to ensure a better life for people throughout the world, promote the equality of rights and social security, enhance the effectiveness of crime prevention, especially in such spheres as urbanization, industrialization, education, health, population growth and migration, housing and social welfare, and substantially reduce the social costs directly and indirectly related to crime and crime control by ensuring social justice, respect for human dignity, freedom, equality and security,

Convinced that due attention should be paid to crime prevention and criminal justice and the related processes, including the fate of victims of crime, the role of youth in contemporary society and the application of United Nations standards and norms,

Determined to improve regional, interregional and international co-operation and co-ordination to achieve further progress in this area, including effective and full implementation of the resolutions of the Seventh Congress,

Having considered the report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the report of the Secretary-General on the implementation of the recommendations of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and the report of the Secretary-General on the implementation of the conclusions of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, all submitted in pursuance of General Assembly resolution 39/112,

1. Expresses its satisfaction with the report of the Seventh United

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Nations Congress on the Prevention of Crime and the Treatment of Offenders and with the preparatory work carried out by the Committee on Crime Prevention and Control, as the preparatory body for the Congress, at its seventh and eighth sessions and by the regional and interregional preparatory meetings convened in co-operation with the regional commissions, interregional and regional crime prevention institutes and interested Governments;

2. Takes note of the report of the Secretary-General on the implementation of the recommendations of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and of his report on the conclusions of the Seventh Congress;

3. Approves the Milan Plan of Action adopted by consensus by the Seventh Congress, as a useful and effective means of strengthening international co-operation in the field of crime prevention and criminal justice;

4. Recommends the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order for national, regional and international action, as appropriate, taking into account the political, economic, social and cultural circumstances and traditions of each country on the basis of the principles of the sovereign equality of States and of non-interference in their internal affairs;

5. Endorses the other resolutions unanimously adopted by the Seventh Congress;

6. Invites Governments to be guided by the Milan Plan of Action in the formulation of appropriate legislation and policy directives and to make continuous efforts to implement the principles contained in the Caracas Declaration and other relevant resolutions and recommendations adopted by the Sixth Congress, in accordance with the economic, social, cultural and political circumstances of each country;

7. Invites also Member States to monitor systematically the steps being taken to ensure co-ordination of efforts in the planning and execution of effective and humane measures to reduce the social costs of crime and its negative effects on the development process, as well as to explore new avenues for international co-operation in this field;

8. Invites the Committee on Crime Prevention and Control, at its ninth session, to review the Milan Plan of Action, the resolutions and recommendations unanimously adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and their implications for the programmes of the United Nations system and to make specific recommendations on the implementation thereof in its report to the Economic and Social Council at its first regular session of 1986;

9. Requests the Economic and Social Council to examine, at its first regular session of 1986, the report of the Committee on Crime Prevention and Control and the recommendations of the Seventh Congress for further implementation of the Milan Plan of Action in order to provide, within the United Nations system, overall policy guidance on crime prevention and criminal justice, and to undertake periodically the review, monitoring and appraisal of the Milan Plan of Action;

10. Urges the United Nations system, including the regional and interregional institutes in the field of crime prevention and the treatment of offenders and the relevant non-governmental organizations having consultative status with the Economic and Social Council to become actively involved in the

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implementation of the recommendations of the Seventh Congress;

11. Urges also the Department of Technical Co-operation for Development of the Secretariat and the United Nations Development Programme to give their full support to projects of technical assistance, in particular to developing countries, in the field of crime prevention and criminal justice and to encourage technical co-operation among developing countries;

12. Requests the Secretary-General to make every effort to translate into action, as appropriate, the relevant recommendations and policies stemming from the Milan Plan of Action and the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order and to provide adequate follow-up of the other resolutions and recommendations unanimously adopted by the Seventh Congress;

13. Also requests the Secretary-General, in his report to the Committee on Crime Prevention and Control, to initiate a review, as a matter of urgency, of the functioning and programme of work of the United Nations in the field of crime prevention and criminal justice, including the United Nations regional and interregional institutes, paying special attention to improving the co-ordination of relevant activities within the United Nations in all related areas in order to establish priorities and ensure the continuing relevance and responsiveness of the United Nations to emerging needs, and to submit the final report to the Economic and Social Council at its first regular session of 1987;

14. Further requests the Secretary-General to circulate the report of the Seventh Congress to Member States and intergovernmental organizations in order to ensure that it is disseminated as widely as possible, and to strengthen information activities in this field;

15. Requests the Secretary-General to submit to the General Assembly, at its forty-first session, a report on the measures taken to implement the present resolution;

16. Decides to include in the provisional agenda of its forty-first session the item entitled "Crime prevention and criminal justice".

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ANNEX 5.

International Bar Association Minimum Standards of Judicial Independence (1982)

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IBA MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE

the global voice of the legal profession

(Adopted 1982)

A. JUDGES AND THE EXECUTIVE

1. a) Individual judges should enjoy personal independence and substantive independence.

   b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.

   c) Substantive independence means that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience.

2. The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive.

3. a) Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.

   b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

4. a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution, which is indepedent of the Executive.

   b) The power of removal of a judge should preferably be vested in a judicial tribunal.

   c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.

5. The Executive shall not have control over judicial functions.

6. Rules of procedure and practice shall be made by legislation or by the Judiciary in co-operation with the legal profession subject to parliamentary approval.

7. The State shall have a duty to provide for the executive of judgements of the Court. The Judiciary shall exercise supervision over the execution process.

8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

9. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

10. It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

11. a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

    b) In countries where the power of division of judicial work is vested in the Chief Justice, it is not considered inconsistent with judicial independence to accord to the Chief Justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.

c) Subject to (a) the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.

12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.

13. Court services should be adequately financed by the relevant government.

14. Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.

15. a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.

b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure.

16. The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole.

17. The power of pardon shall be exercised cautiously so as to avoid its use as interference.

18. a) The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court judgement.

b) The Executive shall not have the power to close down or suspend the operation of the court system at any level.

B. JUDGES AND THE LEGISLATURE

19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.

20. a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes im prove the terms of service.

b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.

21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

C. TERMS AND NATURE OF JUDICIAL APPOINTMENTS

22. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

23. a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.

b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

24. The number of the members of the highest court should be rigid and should not be subject to change except by legislation.

25. Part-time judges should be appointed only with proper safeguards.

26. Selection of judges shall be based on merit.

27. The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.

28. The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgements in disciplinary proceedings, whether held in camera or in public, may be published.

29. a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.

b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.

30. A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge.

31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.

32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

D. THE PRESS, THE JUDICIARY AND THE COURTS

33. It should be recognised that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.

34. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.

E. STANDARDS OF CONDUCT

35. Judges may not, during their term of office, serve in executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.

36. Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking.

37. Judges shall not hold positions in political parties.

38. A judge, other than a temporary judge, may not practice law during his term of office.

39. A judge should refrain from business activities, except his personal investments, or ownership of property.

40. A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.

41. Judges may be organised in associations designed for judges, for furthering their rights and interests as judges.

42. Judges may take collective action to protect their judicial independence and to uphold their position.

F. SECURING IMPARTIALITY AND INDEPENDENCE

43. A judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.

44. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

45. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

G. THE INTERNAL INDEPENDENCE OF THE JUDICIARY

46. In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters.

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ANNEX 6.

Hauschildt v. Denmark, Judgment of 24 May 1989, Eur. Ct. H. R., Series A, No. 154

In the Hauschildt case*,

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* Note by the registry: The case is numbered 11/1987/134/188.
The second figure indicates the year in which the case was referred to
the Court and the first figure its place on the list of cases referred
in that year; the last two figures indicate, respectively, the case's
order on the list of cases and of originating applications (to the
Commission) referred to the Court since its creation.

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court, and composed of the following judges:

Mr R. Ryssdal, President,
Mr J. Cremona,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr F. Matscher,
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 B. Gomard, ad hoc judge,

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

Having deliberated in private on 28 September 1988, 27 January, 22 February and 29 April 1989,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 October 1987, within the three-month period laid down by 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"). The case originated in an application (no. 10486/83) against Kingdom of Denmark lodged with the Commission on 27 October 1982 under Article 25 (art. 25) by a Danish citizen, Mr Mogens Hauschildt.

The Commission's request referred to Articles 44 and 48 (art. 44,

42. The Court concludes that the Government have not shown that there was available under Danish law at the relevant time an effective remedy to which the applicant could be expected to have resorted.

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

43. Mr Hauschildt alleged that he had not received a hearing by an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1) which, in so far as relevant, provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing by an ... impartial tribunal ...."

The applicant, while not objecting in principle to a system such as that existing in Denmark whereby a judge is entrusted with a supervisory role in the investigation process (see paragraphs 32-33 above), criticised it in so far as the very same judge is then expected to conduct the trial with a mind entirely free from prejudice. He did not claim that a judge in such a position would conduct himself with personal bias, but argued that the kind of decisions he would be called upon to make at the pre-trial stage would require him, under the law, to assess the strength of the evidence and the character of the accused, thereby inevitably colouring his appreciation of the evidence and issues at the subsequent trial. In the applicant's submission, a defendant was entitled to face trial with reasonable confidence in the impartiality of the court sitting in judgment on him. He contended that any reasonable observer would consider that a trial judge who had performed such a supervisory function could not but engender apprehension and unease on the part of the defendant. The same reasoning applied in principle to appeal-court judges responsible for decisions on detention pending appeal or other procedural matters.

As to the facts of his own case, Mr Hauschildt pointed out above all that the presiding judge of the City Court, Judge Larsen, had taken numerous decisions on detention on remand and other procedural matters, especially at the pre-trial stage. He referred in particular to the application of section 762(2) of the Act (see paragraphs 20 and 33 above). He expressed similar objections as regards the judges of the High Court on account of their dual role during the appeal proceedings (see paragraph 26 above) and also, in relation to some of them, because of their intervention at the first-instance stage (see paragraphs 16 and 25 above).

44. The Government and the majority of the Commission considered that the mere fact that a trial judge or an appeal-court judge had previously
ordered the accused's remand in custody or issued various procedural directions in his regard could not reasonably be taken to affect the judge's impartiality, and that no other ground had been established in the
present case to cast doubt on the impartiality of the City Court or the High Court.

On the other hand, a minority of the Commission expressed the opinion

that, having regard to the circumstances of the case, Mr Hauschildt was entitled to entertain legitimate misgivings as to the presence of Judge Larsen on the bench of the City Court as presiding judge.

45. The Court's task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to or affected Mr Hauschildt gave rise to a violation of Article 6 para. 1 (art. 6-1).

46. The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective
test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the De Cubber judgment of 26 October 1984, Series A no. 86, pp. 13-14, para. 24).

47. As to the subjective test, the applicant has not alleged, either before the Commission or before the Court, that the judges concerned acted with personal bias. In any event, the personal impartiality of a judge must be presumed until there is proof to the contrary and in the present case there is no such proof.

There thus remains the application of the objective test.

48. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see, mutatis mutandis, the De Cubber judgment previously cited, Series A no. 86, p. 14, para. 26).

This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive (see the Piersack judgment of 1 October 1982, Series A no. 53, p. 16, para. 31). What is decisive is whether this fear can be held objectively justified.

49. In the instant case the fear of lack of impartiality was based on the fact that the City Court judge who presided over the trial and the High Court judges who eventually took part in deciding the case on appeal had already had to deal with the case at an earlier stage of the proceedings and had given various decisions with regard to the applicant at the pre-trial stage (see paragraphs 20-22 and 26 above).

This kind of situation may occasion misgivings on the part of the accused as to the impartiality of the judge, misgivings which are understandable, but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be so treated depends on the circumstances of each particular case.

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ANNEX 7.

Prosecutor v. Furundzija, IT – 95 – 17 – 1 – A, Appeals Chamber, 21 July 2000, para. 183 – 188 and 213

183. The interpretation by national legal systems of the requirement of impartiality and in particular the application of an appearance of bias test, generally corresponds to the interpretation under the European Convention.

184. Nevertheless, the rule in common law systems varies. In the United Kingdom, the court looks to see if there is a "real danger of bias rather than a real likelihood",[248] finding that it is "unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time."[249] However, other common law jurisdictions have rejected this test as being too strict, and cases such as *Webb, R.D.S.,* and the *South African Rugby Football Union* case use the reasonable person as the arbiter of bias, investing him with the requisite knowledge of the circumstances before an assessment as to impartiality can be made.

185. In the case of *Webb*, the High Court of Australia found that, in determining whether or not there are grounds to find that a particular Judge is partial, the court must consider whether the circumstances would give a fair-minded and informed observer a "reasonable apprehension of bias".[250] Similarly, the Supreme Court of Canada identified the applicable test for determining bias to be whether words or actions of the Judge give rise to a reasonable apprehension of bias to the informed and reasonable observer: "This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances".[251]

186. A recent case to confirm the above formula is the *South African Rugby Football Union Case,*[252] where the Supreme Court of South Africa stated that "[t]he question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel." [253]

187. In the United States a federal Judge is disqualified for lack of impartiality where "a reasonable man, cognisant of the relevant circumstances surrounding a Judge's failure to recuse himself, would harbour legitimate doubts about the Judge's impartiality."[254]

188. This is also the trend in civil law jurisdictions, where it is required that a Judge should not only be actually impartial, but that the Judge should also appear to be impartial.[255] For example, under the German Code of Criminal Procedure, although Articles 22 and 23 are the provisions setting down mandatory grounds for disqualification, Article 24 provides that a Judge may be challenged for "fear of bias" and that such "[c]hallenge for fear of bias is proper if there is reason to distrust the impartiality of a Judge". Thus, one can challenge a Judge's partiality based on an objective fear of bias as opposed to having to assert actual bias. Similarly in Sweden, a Judge may be disqualified if any circumstances arise which create a legitimate doubt as to the Judge's impartiality.[256]

3. A standard to be applied by the Appeals Chamber

189. Having consulted this jurisprudence, the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the

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impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

> i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[257]

190. In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[258]

191. The Appeals Chamber notes that Rule 15(A) of the Rules provides:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case. [259]

The Appeals Chamber is of the view that Rule 15(A) of the Rules falls to be interpreted in accordance with the preceding principles.

4. Application of the statutory requirement of impartiality to the instant case

(a) Actual Bias

192. As mentioned above,[260] the Appellant does not allege actual bias on the part of Judge Mumba. Accordingly, the Appeals Chamber sees no need to consider this aspect further in the instant case.

(b) Whether Judge Mumba was a party to the cause or had a disqualifying interest therein

193. With regard to the first branch of the second principle, the Appellant highlights the similarities in the circumstances of this case and that of *Pinochet*.[261] However, the *Pinochet* case is distinguishable from the instant case on at least two grounds.

194. First, whereas Lord Hoffmann was at the time of the hearing of that case a Director of Amnesty International Charity Limited, Judge Mumba's membership of the UNCSW was not contemporaneous with the period of her tenure as a Judge in the instant case.[262] Secondly, the close link between Lord Hoffmann and Amnesty International in the *Pinochet* case is absent here. As Lord Browne-Wilkinson said, "[o]nly in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to

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recuse himself or disclose the position to the parties."[263] While Judge Mumba may have been involved in the same organisation, there is no evidence that she was closely allied to and acting with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs in the present case. The link here is tenuous, and does not compare to that existing between Amnesty International and Lord Hoffmann in the *Pinochet* case. Nor may this link be established simply by asserting that Judge Mumba and the Prosecution lawyer and the three *amici* authors shared the goals of the UNCSW in general. There is, therefore, no basis for a finding in this case of partiality based on the appearance of bias test established in the *Pinochet* case.

(c) Whether the circumstances of Judge Mumba's membership of the UNCSW would lead a reasonable and informed observer to apprehend bias

195. The Appeals Chamber, in applying the second branch of the second principle, considers it useful to recall the well known maxim of Lord Hewart CJ that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[264] The Appellant, relying on the findings in the *Pinochet* case, alleges that there was an appearance of bias, because of Judge Mumba's prior membership of the UNCSW and her alleged associations with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs.[265]

196. In the view of the Appeals Chamber, there is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal,[266] and has also been recognised in municipal law. For example, the Supreme Court of South Africa in the *South African Rugby Football Union* case found:

> The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. [267]

197. The Appeals Chamber endorses this view, and considers that, in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that Judge Mumba was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality . As has been stated, "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be `firmly established.'"[268]

198. The Appellant suggests that, during her time with the UNCSW, Judge Mumba acted in a personal capacity and was "personally involved" in promoting the cause of the UNCSW and the Platform for Action. Consequently, she had a personal interest in the Appellant's case and, as this created an appearance of bias, she should have been disqualified.[269] The Prosecutor argues that Judge Mumba acted solely as a representative of her country and, as such, was not putting forward her personal views, but those of her country.[270]

199. The Appeals Chamber finds that the argument of the Appellant has no basis. First, it is the Appeals Chamber's view that Judge Mumba acted as a representative of her country and therefore served in an official capacity. This is borne out by the fact that Resolution 11(II) of the UN Economic and Social

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Council that established the UNCSW provides that this body shall consist of "one representative from each of the fifteen Members of the United Nations selected by the Council."[271] Representatives of the UNCSW are selected and nominated by governments.[272] Although the Appeals Chamber recognises that individuals acting as experts in many UN human rights bodies do serve in a personal capacity, [273] the founding Resolution of the UNCSW does not provide for its members to act in such capacity. Therefore, a member of the UNCSW is subject to the instructions and control of the government of his or her country. When such a person speaks, he or she speaks on behalf of his or her country. There may be circumstances which show that, in a given case, a representative personally identified with the views of his or her government, but there is no evidence to suggest that this was the case here. In any event, Judge Mumba's view presented before the UNCSW would be treated as the view of her government.

200. Secondly, even if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSW and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.

201. Indeed, even if Judge Mumba sought to implement the relevant objectives of the UNCSW, those goals merely reflected the objectives of the United Nations,[274] and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal. These resolutions condemned the systematic rape and detention of women in the former Yugoslavia and expressed a determination "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."[275] In establishing the Tribunal, the Security Council took account "with grave concern" of the "report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia" and relied on the reports provided by, *inter alia*, the Commission of Experts and the Special Rapporteur for the former Yugoslavia, in deciding that the perpetrators of these crimes should be brought to justice.[276] The general question of bringing to justice the perpetrators of these crimes was, therefore, one of the reasons that the Security Council established the Tribunal.

202. Consequently, the Appeals Chamber can see no reason why the fact that Judge Mumba may have shared these objectives should constitute a circumstance which would lead a reasonable and informed observer to reasonably apprehend bias. The Appeals Chamber agrees with the Prosecutor's submission that "ScConcern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of pre-judgement in any future trial for rape."[277] To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.

203. The Appeals Chamber recognises that Judges have personal convictions. "Absolute neutrality on the part of a judicial officer can hardly if ever be achieved."[278] In this context, the Appeals Chamber notes that the European Commission considered that "political sympathies, at least insofar as they are of different shades, do not in themselves imply a lack of impartiality towards the parties before the court".[279]

204. The Appeals Chamber considers that the allegations of bias against Judge Mumba based upon her prior membership of the UNCSW should be viewed in light of the provisions of Article 13(1) of the Statute, which provide that "[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."

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205. The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. Judge Mumba's membership of the UNCSW and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. Therefore, Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.[280]

206. The Appellant has alleged that "Judge Mumba's decision Sthe JudgementC in fact promoted specific interests and goals of the Commission."[281] He states that she advocated the position that rape was a war crime and encouraged the vigorous prosecution of persons charged with rape as a war crime.[282] He erroneously states that this was the first case in which either the International Tribunal or the ICTR was offered the opportunity to reaffirm that rape is a war crime,[283] and that through this case the Trial Chamber expanded the definition of rape.[284] The Appellant alleges that this expanded definition of rape which emerged in the Judgement reflected that which had been adopted by the Expert Group Meeting, at which the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer were present.[285] In his submissions, these circumstances could cause a reasonable person to reasonably apprehend bias.

207. On the other hand, the Prosecutor argues that, in terms of the definition of rape, there is no evidence that Judge Mumba acted under the influence of the Expert Group Meeting or that she was even aware of it or its report. The Prosecutor states that the three authors of one of the *amicus curiae* briefs did not advance a definition of rape in their submissions (the Appellant does not dispute this statement[286]), and that in any event, the Appellant took no issue with the submissions made by the Prosecutor on the elements of rape during trial.[287]

208. The Appeals Chamber notes that there was no dispute at trial as to whether rape can, or should, be categorised as a war crime. The Prosecutor addressed the definition of rape in both her pre-trial brief and during the trial,[288] and, as found by the Trial Chamber, these submissions went unchallenged by the Appellant.[289] In addition, the Appellant confirmed during the oral hearing on the appeal that there was no issue raised at trial as to whether rape could be categorised as a war crime;[290] in fact, at the same hearing, he made no oral submission on the question of recusal.[291] For these reasons, the Appeals Chamber finds that the circumstances could not lead a reasonable observer, properly informed, to reasonably apprehend bias.

209. Moreover, the Appeals Chamber notes that both the International Tribunal and the ICTR have had the opportunity, prior to the Judgement, to define the crime of rape.[292]

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213. Finally, the Appellant alleges that the association Judge Mumba had with the three authors of an *amicus curiae* brief created an apprehension of bias. He contends that, in filing the briefs before the Trial Chamber, the "amici actively assisted the prosecution in its effort to convict Mr. Furundziija by seeking to prevent the reopening of the trial after the Defence discovered that relevant documents had been withheld by the prosecution....the amici advanced legal arguments that assisted the prosecution in order to advance an agenda they shared with Judge Mumba."[301] The Appellant quotes sections of the briefs to illustrate the attitude which Judge Mumba shared; those sections, he says, reminded "the Tribunal that its ruling `profoundly affects (a) women's equal rights to access to justice and (b) the goal of bringing perpetrators of sexual violence in armed conflict before the two International Criminal Tribunals."[302]

214. The Judgement notes that the *amicus curiae* briefs "dealt at great length with issues pertaining to the re-opening of the...proceedings" and the suggested scope of the reopening.[303] They did not address the question of rape or the Appellant's personal responsibility for the rapes in question.[304] In any event, by the time the briefs were filed on 9 and 11 November 1998, the Trial Chamber had already decided to reopen the proceedings which commenced on 9 November 1998.[305]

215. The Appeals Chamber finds that there is no substance in the Appellant's allegations as contained in this ground of appeal. This ground therefore fails.

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301 Appellant's Amended Brief, p. 118.
302 *Ibid.*, p. 119.
303 Judgement, para. 107.
304 The Appellant concedes that the *amicus curiae* briefs did not address the issue of the definition of rape (Appellant's Amended Brief, footnote 29).
305 Judgement, para. 107.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 8.

Le Compte, Van Leuven and de Meyere, Judgment of 27 May 1981, Eur. Ct. H. R., Series A, No. 43

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EUROPEAN COURT OF HUMAN RIGHTS

In the case of Le Compte, Van Leuven and De Meyere,

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

Mr. G. WIARDA, President,

Mr. R. RYSSDAL,

Mr. H. MOSLER,

Mr. M. ZEKIA,

Mr. J. CREMONA,

Mr. THÓR VILHJÁLMSSON,

Mrs. D. BINDSCHEDLER-ROBERT,

Mr. D. EVRIGENIS,

Mr. G. LAGERGREN,

Mr. L. LIESCH,

Mr. F. GÖLCÜKLÜ,

Mr. F. MATSCHER,

Mr. J. PINHEIRO FARINHA,

Mr. E. GARCIA de ENTERRIA,

Mr. M. SØRENSEN,

Mr. L.-E. PETTITI,

Mr. B. WALSH,

Sir VINCENT EVANS,

Mr. R. MACDONALD,

Mr. A. VANWELKENHUYZEN, ad hoc judge,

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

Having deliberated in private from 26 to 28 November 1980 and then on

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29 and 30 January and 27 May 1981,

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

PROCEDURE

1. The case of Le Compte, Van Leuven and De Meyere was referred to the Court by the European Commission of Human Rights ("the Commission") and the Gouvernment of the Kingdom of Belgium ("the Government"). The case originated in two applications against that State lodged with the Commission in 1974 and 1975 by three Belgian nationals, Dr. Herman Le Compte, Dr. Frans Van Leuven and Dr. Marc De Meyere, under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The Commission ordered the joinder of the applications on 10 March 1977.

2. Both the Commission's request and the Government's application were lodged with the registry of the Court within the period of three months laid down by Articles 32 par. 1 and 47 (art. 32-1, art. 47) - the former on 14 March 1980 and the latter on 23 April 1980. The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the Kingdom of Belgium recognising the compulsory jurisdiction of the Court (Article 46) (art. 46); the application referred to Article 48 (art. 48). The purpose of the request and the application is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 6 and 11 (art. 6, art. 11).

3. Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality, was called upon to sit as an ex officio member of the Chamber of seven judges to be constituted (Article 43 of the Convention) (art. 43). However, by letter dated 21 March 1980, he declared that he withdrew pursuant to Rule 24 par. 2 of the Rules of Court. On 9 April, the Government appointed as ad hoc judge Mr. A. Vanwelkenhuyzen, Professor at the Free University of Brussels (Article 43 of the Convention and Rule 23 par. 1) (art. 43).

On 29 April, Mr. G. Balladore Pallieri, the President of the Court and an ex officio member of the Chamber (Rule 21 par. 3 (b)), drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. G. Wiarda, Mr. R. Ryssdal, Sir Gerald Fitzmaurice, Mrs. D. Bindschedler-Robert and Mr. L. Liesch (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43).

4. Mr. Balladore Pallieri assumed the office of President of the Chamber (Rule 21 par. 5). He ascertained, through the Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. On 23 May 1980, he decided that the Agent should have until 15 August 1980 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar.

The Government's memorial was received at the registry on 20 August 1980. On 22 October, the Secretary to the Commission informed the Registrar that the Delegates would reply thereto at the hearings; he also transmitted to the Registrar the observations of the applicants' lawyer on the Commission's report.

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5. On 1 October 1980, the Chamber decided under Rule 48 to relinquish juridiction forthwith in favour of the plenary Court.

6. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President of the Court directed on 7 October that the oral proceedings should open on 25 November.

7. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 25 November; Mr. Wiarda, then Vice-President of the Court, presided as Mr. Balladore Pallieri was unable to attend. The Court had held a preparatory meeting immediately before the hearings opened. Sir Vincent Evans, the judge elected on 29 Sepember 1980 to replace Sir Gerald Fizmaurice, sat in the latter's stead (Rule 2 par. 3 of the Rules of Court).

There appeared before the Court:

- for the Government

Mr. J. NISET, Legal Adviser at the Ministry of Justice, Agent,

Mr. J. M. NELISSEN GRADE, Counsel,

MR. J. PUTZEYS

MR. S. GEHLEN, lawyers for the Ordre des médecins (Medical Association),

Mr. F. VERHAEGEN, adviser at the Ministry of Public Health,

Mr. F. VINCKENBOSCH, sécretaire d'administration at the Ministry of Public Health, Advisers;

- for the Commission

Mr. G. SPERDUTI,

MR. M. MELCHIOR, Delegates,

MR. J. BULTINCK, the applicant's lawyer before the Commission, assisting the Delegates (Rule 29 par. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mr. Nelissen Grade for the Government and by Mr. Sperduti, Mr. Melchior and Mr. Bultinck for the Commission, as well as their replies to questions put by the Court. It requested those appearing to produce various documents; these were supplied by the Commission on 25 November 1980 and 26 January 1981.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCE OF THE CASE

A. Dr. Le Compte

8. Dr. Herman Le Compte, a Belgian national born in 1929 and resident at Knokke-Heist, is a medical practitioner.

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I. The suspension ordered in 1970

9. On 28 October 1970, the West Flanders Provincial Council of the Ordre des médecins (Medical Association), which sits in Bruges, ordered that Dr. Le Compte's right to practise medicine be suspended for six weeks. The ground was that he had given to a Belgian newspaper an interview considered by the Council to amount to publicity incompatible with the dignity and reputation of the profession. The applicant lodged an objection (opposition) against this decision, which had been given in absentia, but it was confirmed by the Provincial Council on 23 December 1970, the applicant again having failed to appear.

Dr. Le Compte thereupon referred the matter firstly to the Appeals Council of the Ordre des médecins, which, on 10 May 1971, held his appeal to be inadmissible, and secondly to the Court of Cassation, on 7 April 1972, the latter declared his appeal on a point of law inadmissible, on the ground that it had been filed without the assistance of a lawyer entitled to practise before that Court.

The order suspending Dr. Le Compte's right to practise became effective on 20 May 1972 but he did not comply with it. For this reason, on 20 February 1973, the Furnes criminal court (tribunal correctionnel) sentenced him, pursuant to Article 31 of Royal Decree no. 79 of 10 November 1967 on the Ordre des médecins, to imprisonment and a fine.

This decision was confirmed on 12 September 1973 by the Ghent Court of Appeal; a appeal by Dr. Le Compte on a point of law was dismissed by the Court of Cassation on 25 June 1974.

2. The suspension ordered in 1971

10. Concurrently with the foregoing proceedings, which are not in issue in the present case (see paragraph 36 below), further proceedings were in progress. In fact, on 30 June 1971 the Provincial Council of the Ordre des médecins had, by a decision rendered in absentia, ordered another suspension, for three months, of the applicant's right to practise: the Council stated that he had publicised in the press the above-mentioned decisions of the disciplinary organs of the Ordre and his criticisms of those organs, such conduct constituting contempt of the Ordre.

11. Dr. Le Compte had appealed to the Appeals Council of the Ordre which had confirmed this decision although without upholding the allegation of contempt. He had then referred the matter to the Court of Cassation, where he relied on the same grounds.

He contended in the first place that compulsory membership of the Ordre des médecins, without which no one may practise medicine and subjection to the jurisdiction of its disciplinary organs were contrary to the principle of freedom of association, which is guaranteed by Article 20 of the Belgian Constitution and Article 11 (art. 11) of the Convention.

The Court rejected this plea in the following terms:

"... compulsory entry on the register of an ordre which, like the Ordre des médecins, is a public-law institution having the function of ensuring the oberservance of the medical profession's rules of professional conduct and the maintenance of the reputation,

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standards of discretion, probity and dignity of its members cannot be regarded as incompatible with freedom of association, as guaranteed by Article 20 of the Constitution; ... the appellant does not allege that the rule which he is challenging goes beyond the bounds of the restrictions authorised by Article 11 par. 2 (art. 11-2) of the Convention, for example for the protection of health."

The applicant also alleged a violation of Articles 92 and 94 of the Constitution: the first provides that the courts of law shall have exclusive jurisdiction to determine disputes over civil rights and the second prohibits the establishment of extraordinary tribunals for the purpose of resolving such disputes. He pointed out that the decision complained of had nonetheless been taken by a disciplinary organ, set up by Royal Decree no. 79, and that it had given a ruling on a civil right, namely the right to practise medicine.

The Court of Cassation replied that "disciplinary proceedings and the imposition of disciplinary sanctions are, in principle, unrelated to the disputes over which exclusive jurisdiction is reserved to the courts of law by Article 92 of the Constitution". The Court added that, since the Councils of the Ordre des médecins did not have jurisdiction to determine such disputes, "they are not extraordinary tribunals whose estblishment is prohibited by Article 94". Finally, the Court observed that section 1 par. 8 (a) of the Act of 31 March 1967 (see paragraph 20 below) empowered the Crown "to reform and adapt the legislation governing the practice of the various branches of medicine" and that "the legislature was referring, inter alia, to the Act of 25 July 1938 establishing the Ordre des médecins, which Act conferred disciplinary powers on the Councils of the Ordre".

Lastly, Dr. Le Compte alleged that there had been a violation of Article 6 par. 1 (art. 6-1) of the Convention. He argued that the decision complained of had been given without any public inquiry and by a tribunal composed of medical practitioners, which could not be regarded as impartial since the kind of conduct of which he was accused might harm his colleagues.

The Court of Cassation confined itself to pointing out that Article 6 par. 1 (art. 6-1) did not apply to disciplinary proceedings.

Accordingly, by judgment of 3 May 1974, the appeal was dismissed.

12. Dr. Le Compte did not comply with the order suspending his right to practise medicine, which became final following the Court of Cassation's judgment. On that account he was sentenced by the Bruges criminal court on 16 September and 15 October 1974 to terms of imprisonment and fines. He lodged an appeal against the first decision and an objection against the second, which had been rendered in absentia.

13. Since that time, a number of further proceedings have been instituted, both disciplinary, for the publicity given by the applicant to his dispute with the Ordre, and criminal, for his refusal to comply with the measures imposed by its Councils.

One of the disciplinary proceedings resulted in Dr. Le Compte's being struck off the register of the Odre with efect from 26 December 1975. In this connection he lodged a further application (no. 7496/76) with the Commission on 6 May 1976; that application, which the Commission declared admissible on 4 December 1979, is not

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relevant for the examination of the present case.

The criminal proceedings, at first instance, led to prison sentences and to fines.

B. Dr. Van Leuven and Dr. De Meyere

14. Dr. Frans Van Leuven and Dr. Marc De Meyere are medical practitioners, born in 1931 and 1940, respectively. Both of them reside at Merelbeke and are Belgian nationals.

15. On 20 January 1973, thirteen medical practitioners practising in and around Merelbeke filed a complaint to the effect that these two applicants had committed breaches of the rules of professional conduct; it was alleged, in particular, that they had systematically limited their fees to the amounts reimbursed by the Social Security, even when on emergency duty, and had distributed without charge to private houses a fortnightly magazine called Gezond in which general practitioners were held up to ridicule. On 14 March 1973, the applicants were heard by the Bureau of the Provincial Council of the Ordre. They admitted that they had limited the fees charged to their own clients but not the fees charged when they were on emergency duty. In addition, they pointed out that they were not the publishers of Gezond and they denied that they had lampooned their colleagues in its pages.

16. On 19 March 1973, another medical practitioner lodged a further complaint against the applicants; he alleged that, two days after their appearance before the Bureau of the Provincial Council, they had put up in the waiting rooms of the Merelbeke medical centre a notice informing the public of the first complaint and the reasons therefor. On 23 May 1973, the Bureau of the Provincial Council heard the applicants in connection with the second complaint. They declared that they were entitled to provide the public with information about the situation, especially as it was already a matter of common knowledge.

17. The East Flanders Provincial Council of the Ordre des médecins, which sits in Ghent, summoned Dr. Van Leuven and Dr. De Meyere to answer several allegations.

On 24 October 1973, it directed that their right to practise medicine be suspended for a period of one month for having charged fees limited to the amounts reimbursed by the Social Security, for having contributed to the magazine Gezond and for having made therein public utterances judged offensive to their colleagues. In addition, Dr. Van Leuven was reprimanded for his behaviour when appearing before the Bureau of the Provincial Council on 14 March 1973. These various decisions were based on Articles 6 par. 2 and 16 of Royal Decree no. 79.

The Provincial Council considered, on the other hand, that the posting in the waiting rooms of the medical centre of a notice judged contrary to the rules of professional conduct did not warrant a disciplinary sanction, bearing in mind that the notice had been removed following a request from the Bureau.

18. The applicants appealed to the Appeals Council.

On 24 June 1974, the latter declared the appeal admissible and upheld the Provincial Council's decision insofar as it had found established the allegations relating to the charging of fees limited

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to the amounts reimbursed by the Social Security and the contribution to the magazine Gezond. For the rest, the Appeals Council set aside the decision challenged and, after taking into account the complaint regarding the notice in the waiting rooms and joining it with the two other complaints, directed that the right of Dr. Van Leuven and Dr. De Meyere to practise medicine be suspended for a period of fifteen days.

19. On 25 April 1975, the Court of Cassation ruled against the applicants, who had appealed on a point of law.

The Court rejected the ground of appeal based on breach of Article 11 (art. 11) of the Convention; it considered that the functions of the Ordre des médecins "are by no means unrelated to the protection of health and that compulsory entry ... on the register of an Ordre of this kind does not exceed the restrictions on freedom of association which are necessary for the protection of health".

The Court in addition declared inadmissible, for want of legal interest, the ground of appeal to the effect that the limitation of fees to the amounts reimbursed by the Social Security was in conformity with both the law and the rules of professional conduct for medical practitioners; the Court found that the suspension had in fact also been imposed as a sanction for other disciplinary offences.

II. THE ORDRE DES MEDECINS

20. The ordre des médecins, which was established by an Act of 25 July 1938, was re-organised by Royal Decree no. 79 of 10 November 1967. This Decree was made under the Act of 31 March 1967 "investing the King with certain powers with a view to ensuring economic revival, acceleration of regional reconversion and a stable, balanced budget". The Act enabled the Crown, acting by Decrees in Council, to take "all appropriate steps ... to further the quality and ensure satisfactory provision of health care through reform and adaptation of the legislation governing the practice of the various branches of medicine" (section 1 par. 8 (a)); it specified that such Decrees could "repeal supplement, amend or replace existing legal provisions" (section 3).

21. Article 2 of Royal Decree no. 79 provides that "the Ordre des médecins shall include all physicians, surgeons and obstetricians who are permanently resident in Belgium and entered on the register of the Ordre for the Province where they have their permanent residence" and that "in order to practise medicine in Belgium, every medical practitioner" - whether Belgian or foreign - "must be entered on the register of the Ordre".

Military doctors, however, are only obliged to be entered on the register if they practise outside their military duties.

22. Alongside the Ordre des médecins, there exist in Belgium private associations formed to protect the professional interests of medical practitioners. The most important of these associations are consulted and invited to take part in collective negotiations when the Government are considering the adoption of decisions affecting those interests, to propose candidates for nomination as members of certain organs and to appoint their representatives on others, and to take various measures themselves.

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A. Organs

23. The Ordre des médecins "shall enjoy civil personality in public law" (Article 1, third paragraph, of Royal Decree no. 79). It comprises three kinds of organs, namely Provincial Councils, Appeals Councils and the National Council.

1. Provincial Councils

24. The Provincial Councils (of which there are ten) consist of a number, which is always even and is fixed by the Crown, of members and substitute members who are medical practitioners of Belgian nationality elected for six years by doctors entered on the register of the Ordre. There are also an assessor and a substitute assessor who are judges of first instance courts appointed for six years by the Crown; the assessor has a consultative status (Articles 5 and 8 par. 1 of Royal Decree no. 79).

The Council's functions are defined by Article 6 of Royal Decree no. 79 in the following terms:

"1° to keep the register of the Ordre. They may refuse or defer entry on the register if the person applying has been guilty either of an act of such seriousness as would cause the name of a member of the Ordre to be struck off the register or of serious misconduct damaging the reputation or dignity of the profession.

If the medical commission ... has decided and notified the Ordre that a medical practitioner no longer fulfils the conditions required for practising medicine or that it is neccessary, for reasons of physical or mental disability, to place a restriction on the practise by him of medicine, the relevant Provincial Council shall, in the first case, remove the practitioner's name from the register and, in the second case, make the maintenance of his name thereon subject to observance of the restriction ordered.

A practitioner's name may also be removed from the register at his own request.

Reasons must be given for any decision refusing or deferring entry on the register, removing a practitioner's name therefrom or making its maintenance thereon subject to restrictive conditions;

2° to ensure observance of the rules of professional conduct for medical practitoners and the upholding of the reputation, standards of discretion, probity and dignity of the members of the Ordre. They shall to this end be responsible for disciplining misconduct committed by their registered members in or in connection with the practice of the profession and serious misconduct committed outside the realm of professional activity, whenever such misconduct is liable to damage the reputation or dignity of the profession;

3° to give, of their own motion or on request, the members of the Ordre advice on matters of professional conduct ...; such advice shall be submitted to the National Council for approval ...;

4° to notify the relevant authorities of any acts involving illegal practice of medicine of which the Councils have knowledge;

5° to act, at the joint request of those concerned, as final arbitrator in disputes regarding the fees claimed by a medical

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practitioner from his client ...;

6° to reply to all requests for advice emanating from courts of law in connection with disputes as to fees;

7° to settle the annual subscription ... including the amount fixed by the National Council for each registered member."

25. The Provincial councils are distinct from the medical commissions which have been set up, outside the Ordre, in each Province and are composed in addition to medical and pharmaceutical practitioners of members of the paramedical professions and of officials of the Ministry of Public Health (Article 36 of Royal Decree no. 78). These commissions have two functions. The first is general and consists of "proposing to the authorities any measures designed to make a contribution to public health" and of "ensuring that practitioners ... (and) members of the paramedical professions collaborate effectively in the implementation of the measures laid down by the authorities for the purpose of preventing or combatting diseases subject to quarantine or communicable diseases". The second, specific function comprises various responsibilities: "checking and ... approving practitioners' diplomas"; "withdrawing approval or making its continuance in force subject to the acceptance by the person concerned of (certain) restrictions"; "ensuring that the practice of medicine (is conducted) in accordance with the laws and regulations"; "detecting and ... reporting to the prosecuting authority cases of illegal practice"; assessing the demand for emergency services and supervising their operation; "informing interested parties, whether acting in public or private capacity, of decisions taken" as regards a practitioner's exercise of his profession; "advising the organs of the Ordres concerned of allegations of professional misconduct against practitioners"; "supervising public sales where medicines are involved" (Article 37).

2. The Appeals Councils

26. The two Appeals Councils - one of which uses the French and the other the Dutch language - have their seat "in the Greater Brussels area". They are each composed of ten medical practitioners of Belgian nationality (five members and five substitute members) elected for six years by the Provincial Councils from among persons other than their own members, and ten Court of Appeal judges (five members and five substitute members) appointed by the Crown for the same length of time. From among these judges, the Crown designates the Chairman, who has a casting vote, and the member who is to act as rapporteur (Article 12 par. 1 and 2 of Royal Decree no. 79).

The Appeals Councils hear appeals from decisions given by the Provincial Councils on matters of registration or discipline. They deal, as the body of first and final instance, with claims concerning the regularity of elections to the Provincial Councils, the Appeals Councils and the National Council. They also decide cases on which the Provincial Councils have not given a ruling within the prescribed time-limit. Finally, they settle any dispute between Provincial Councils regarding a practitioner's place of permanent residence (Article 13).

3. The National Council

27. The National Council comprises twenty persons (ten members and ten

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substitute members) of Belgian nationality who are respectively elected by each of the Provincial Councils from among medical practitioners entered on its register, and twelve persons (six members and six substitute members) appointed by the Crown from among medical practitioners nominated in lists of three candidates by the medical faculties in the country. The National Council is presided over by a judge of the Court of Cassation chosen by the Crown and consists of two sections - one French-speaking, the other Dutch-speaking - each of which elects from among its number a Vice-President (Article 14).

The National Council formulates "those general principles and those rules concerning the morality, reputation, standards of discretion, probity and devotion to duty essential for practice of the profession which constitute the code of professional conduct for medical practitioners"; these principles and rules may be made compulsory by Royal Decrees in Council (a draft code failed to receive Royal approval). It keeps up to date a list of those disciplinary decisions given by the Provincial and Appeals Councils which are no longer open to appeal. It gives reasoned opinions "on general matters, on problems of principle and on the rules of professional conduct". It settles the amount of the subscription medical practitioners are asked to pay to the Ordre. More generally, it takes "all steps necessary for the achievement of the aims of the Ordre" (Article 15).

B. Procedure in disciplinary matters

28. In the procedure relating to disciplinary and registration matters, which is primarily governed by the Royal Decree of 6 February 1970 "regulating the organisation and working of the Councils of the Ordre des médecins", the contending parties are always heard. There may be three stages: a ruling at first instance by the Provincial Council, a ruling at final instance by the Appeals Council and a review by the Court of Cassation of the legality of the decisions and the observance of formal requirements.

1. Before the organs of the Ordre

29. The procedure begins before the Provincial Council which "acts either on its own initiative, or at the request of the National Council, the Minister responsible for public health, the procureur du Roi or the medical commission, or on complaint by a medical practitioner or a third party" (Article 20 par. 1, first sub-paragraph, of Royal Decree no. 79). The procedure continues before the Appeals Council if it has been seised either by the practitioner concerned, or by the Provincial Council's assessor, or by the President of the National Council acting jointly with one of the Vice-Presidents; an appeal has suspensive effect (Article 21).

30. Investigation of the matter necessarily involves the participation of a member of the judiciary: before the Provincial Council, for the purposes of the initial investigation, this will be the assessor; before the Appeals Council, for the purposes, if need be, of a supplementary investigation, it will be the Council member acting as rapporteur (see paragraphs 24 and 26 above). Furthermore, the Provincial Council member who acted as rapporteur may always be heard by the Appeals Council (Articles 7 par. 1, 12 par. 2 and 20 of Royal Decree no. 79).

31. Before the Provincial and Appeals Councils, the proceedings are conducted in private (Article 24 par. 1, sub-paragraph 3, of Royal

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Decree no. 79 and Article 19 of the Royal Decree of 6 February 1970). The medical practitioner concerned has the right to be informed as soon as possible of the opening of an inquiry against him (Article 24 of the Royal Decree of 6 February 1970); the procedure further provides for time-limits and formalities allowing him to have adequate time and facilities for the preparation of his defence (Articles 25 and 31); in addition, it contains guarantees concerning the use of languages (Articles 36 to 39).

The practitioner is also entitled to challenge the members of the organ hearing his case; he appears in person and may be assisted by one or more counsel who, like himself, may inspect the case-file (Articles 26, 31 and 40 to 43).

32. The Provincial and Appeals Councils are bound to deliver their ruling within a reasonable time, to preserve the secrecy of their deliberations and to give reasons for their decision. The person concerned must be promptly informed of the decision and of any appeal which may have been entered. Decisions are taken by simple majority. However, a two-thirds majority is required for striking a practitioner off the register of the Ordre or for his suspension for more than a year. The same rule applies to Appeals Council decisions ordering a sanction where the Provincial Council has imposed none or increasing the severity of the sanction imposed by the Provincial Council (Article 25 in fine of Royal Decree no. 79, Articles 4, 12, 26, 32 and 33 of the Royal Decree of 6 February 1970). The sanctions which may be imposed by the Provincial Councils - and also, if appropriate, the Appeals Councils - are "warning, censure, reprimand, suspension of the right to practise medicine for a period not exceeding two years and striking off the register of the Ordre" (Article 16 of Royal Decree no. 79).

2. Before the Court of Cassation

33. Under Article 23 of Royal Decree no. 79, "final decisions of the Provincial Councils or the Appeals Councils may be referred to the Court of Cassation either by the Minister responsible for public health, or by the President of the National Council acting jointly with one of the Vice-Presidents, or by the practitioner concerned, on the ground of contravention of the law" - the latter term being understood in a wide sense - "or of non-observance of a formal requirement which is either a matter of substance or laid down on pain of nullity". The Court will have before it the complete case-file (decisions at first instance and on appeal, memorials and final submissions of the parties, including a detailed statement of the facts); however, it cannot verify the findings of fact made by the Councils of the Ordre, unless it is alleged that there has been a breach of the rules of evidence. The Court does not have jurisdiction to rectify factual errors on the part of the Appeals Councils or to examine whether the sanction is proportionate to the fault.

An appeal to the Court of Cassation on a point of law has suspensive effect.

3. Notification of the decision

34. Decisions in a disciplinary matter which have become final are notified to the Minister of Public Health; the most important ones (striking off the register of the Ordre or suspension of the right to practise) are also notified to the medical commission and to the

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procureur général attached to the Court of Appeal (Article 27 of Royal Decree no. 79 and Article 35 of the Royal Decree of 6 February 1970).

PROCEEDINGS BEFORE THE COMMISSION

35. Dr. Le Compte applied to the Commission on 28 October 1974, Dr. Van Leuven and Dr. De Meyere on 21 October 1975.

All three applicants claimed that the obligation to join the Ordre des médecins and to be under the jurisdiction of its disciplinary organs contravened Article 11 (art. 11) of the Convention, taken alone or in conjunction with Article 17 (art. 17+11). They further alleged that during the course of the disciplinary proceedings they had not had the benefit of the guarantees laid down by Article 6 (art. 6) and that the sanctions imposed on them were calculated to prevent them from disseminating information and ideas, thereby violating Article 10 (art. 10).

36. On 6 October 1976 and 10 March 1977 respectively, the Commission declared the applications admissible save on two points: it rejected for non-exhaustion of domestic remedies (Article 27 par. 3) (art. 27-3) the complaints made by all three applicants under Article 10 (art. 10) and the complaints made by Dr. Le Compte in connection with the decision given by the West Flanders Provincial Council on 28 October 1970 (see paragraph 9 above).

On 10 March 1977, the Commission ordered the joinder of the applications in pursuance of Rule 29 of its Rules of Procedure.

In its report of 14 December 1979 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion:

- unanimously, that there had been no breach of Article 11 par. 1 (art. 11-1) of the Convention since the Ordre des médecins did not constitute an association;

- by eight votes to three, that Article 6 par. 1 (art. 6-1) was applicable to the proceedings which led to the disciplinary measures imposed on the applicants;

- that Article 6 par. 1 (art. 6-1) had been violated in that the applicants did not receive a "public hearing" (eight votes to three) before an "impartial tribunal" (seven votes to four).

The report contains three separate opinions, two of which are dissenting.

FINAL SUBMISSIONS MADE TO THE COURT

37. In their memorial, the Government submitted:

"[May it please the Court] to hold that the facts of the present case do not disclose any breach by the Belgian State of its obligations under the European Convention on Human Rights."

AS TO THE LAW

I. THE COMPLAINT MADE INITIALLY CONCERNING ARTICLE 10 (art. 10)

38. Initially, Dr. Le Compte, Dr. Van Leuven and Dr. De Meyere

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relied on Article 10 (art. 10) as well as on Articles 6 par. 1, 11 and 17 (art. 6-1, art. 11, art. 17): they maintained that the disciplinary sanctions imposed on them by the Provincial and Appeals Councils were designed to prevent them from disseminating information and ideas. In so doing, they were attacking the actual content of the decisions affecting them and not the procedure leading thereto or the obligation to join the Ordre des médecins. Accordingly, this was not merely a further legal submission or argument adduced in support of their claims under Articles 6 par. 1, 11 and 17 (art. 6-1, art. 11, art. 17), but a separate complaint. Having been rejected by the Commission for non-exhaustion of domestic remedies (see paragraph 36 above), this complaint goes beyond the ambit of the case referred to the Court (see, inter alia, the Schiesser judgment of 4 December 1979, Series A no. 34, p. 17, par. 41).

II. THE ALLEGED VIOLATION OF ARTICLE 6 par. 1 (art. 6-1)

39. The applicants claimed that they were victims of violations of Article 6 par. 1 (art. 6-1), which reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

40. Having regard to the submissions of those appearing before the Court, the first question for decision is whether this paragraph is applicable; the majority of the Commission affirmed that it was, but this was disputed by the Government.

A. The applicability of Article 6 par. 1 (art. 6-1)

41. Article 6 par. 1 (art. 6-1) applies only to the determination of "civil rights and obligations or of any criminal charge" (in the French text: "contestations sur [des] droits et obligations de caractère civil" and "bien-fondé de toute accusation en matière pénale"). As the Court has found on several occasions, certain cases (in the French text: "causes") are not comprised within either of these categories and thus fall outside the Article's scope (see, for example, the Lawless judgment of 1 July 1961, Series A no. 3, p. 51, par. 12; the Neumeister jugment of 27 June 1968, Series A no. 8, p. 43, par. 23; the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 40, par. 108).

42. Thus, as the Government rightly emphasised with reference to the Engel judgment of 8 June 1976, disciplinary proceedings as such cannot be characterised as "criminal"; nevertheless, this may not hold good for certain specific cases (Series A no. 22, pp. 33-36, par. 80-85).

Again, disciplinary proceedings do not normally lead to a contestation (dispute) over "civil rights and obligations" (ibid., p. 37, par. 87 in fine). However, this does not mean that the position may not be different in certain circumstances. The Court has

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not so far had to resolve this issue expressly; in the König case, which was cited by the Commission and the Government, the applicant was complaining solely of the duration of proceedings which he had instituted before administrative courts after an administrative body had withdrawn his authorisation to run his clinic and then his authorisation to practise medicine (judgment of 28 June 1978, Series A no. 27, p. 8, par. 18, and p. 28, par. 85; see also above-mentioned Engel judgment, pp. 36-37, par. 87, first sub-paragraph).

43. In the present case, it is necessary to determine whether Article 6 par. 1 (art. 6-1) applied to the whole or part of the proceedings that took place before the Provincial and Appeals Councils, which are disciplinary organs, and subsequently before the Court of Cassation, a judicial body.

At least after the admissibility decisions of 6 October 1976 and 10 March 1977, the Government, the Commission and the applicants scarcely discussed this issue other than in the context of the words "contestations" (disputes) over "civil rights and obligations". The Court considers that it too should take this as its starting-point.

1. The existence of "contestations" (disputes) over "civil rights and obligations"

44. In certain respects, the meaning of the words "contestations" (disputes) over "civil rights and obligations" has been clarified in the Ringeisen judgment of 16 July 1971 and the König judgment of 28 June 1978.

According to the first of these judgments, the phrase in question covers "all proceedings the result of which is decisive for private rights and obligations", even if the proceedings concern a dispute between an individual and a public authority acting in its sovereign capacity; the character "of the legislation which governs how the matter is to be determined" and of the "authority" which is invested with jurisdiction in the matter are of little consequence (Series A no. 13, p. 39, par. 94).

The very notion of "civil rights and obligations" lay at the heart of the König case. The rights at issue included the right "to continue his professional activities" as a medical practitioner "for which he had obtained the necessary authorisations". In the light of the circumstances of that case, the Court classified this right as private, and hence as civil for the purposes of Article 6 par. 1 (art. 6-1) (loc. cit., pp. 29-32, par. 88-91 and 93-95).

The ramifications of this line of authority are again considerably extended as a result of the Golder judgment of 21 February 1975. The Court concluded that "Article 6 par. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal" (Series A no. 18, p. 18, par. 36). One consequence of this is that Article 6 par. 1 (art. 6-1) is not applicable solely to proceedings which are already in progress: it may also be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 par. 1 (art. 6-1).

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45. In the present case, a preliminary point needs to be resolved: can it be said that there was a veritable "contestation" (dispute), in the sence of "two conflicting claims or applications" (oral submissions of counsel for the Government)?

Conformity with the spirit of the Convention requires that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning; besides, it has no counterpart in the English text of Article 6 par. 1 (art. 6-1) ("In the determination of his civil rights and obligations"; cf. Article 49 (art. 49): "dispute").

Even if the use of the French word "contestation" implies the existence of a disagreement, the evidence clearly shows that there was one in this case. The Ordre des médecins alleged that the applicants had committed professional misconduct rendering them liable to sanctions and they denied those allegations. After the competent Provincial Council had found them guilty of that misconduct and ordered their suspension from practice - decisions that were taken in absentia in the case of Dr. Le Compte (West Flanders) and after hearing submissions on issues of fact and of law from Dr. Van Leuven and Dr. De Meyere in their cases (East Flanders) -, the applicants appealed to the Appeals Council. They all appeared before that Council where, with the assistance of lawyers, they pleaded amongst other things Articles 6 par. 1 and 11 (art. 6-1, art. 11). In most respects their appeals proved unsuccessful, whereupon they turned to the Court of Cassation relying once more, inter alia, on the Convention (see paragraphs 10-11 and 15-19 above).

46. In addition, it must be shown that the "contestation" (dispute) related to "civil rights and obligations", in other words that the "result of the proceedings" was "decisive" for such a right (see the above-mentioned Ringeisen judgment).

According to the applicants, what was at issue was their right to continue to exercise their profession; they maintained that this had been recognised to be a "civil" right in the König judgment of 28 June 1978 (loc. cit., pp. 31-32, paragraphs 91 and 93).

According to the Government, the decisions of the Provincial and Appeals Councils had but an "indirect effect" in the matter. It was argued that these organs, unlike the German administrative courts in the König case, did not review the lawfulness of an earlier measure withdrawing the right to practise but had instead to satisfy themselves that breaches of the rules of professional conduct, of a kind justifying disciplinary sanctions, had actually occurred. A "contestation" (dispute) over the right to continue to exercise the medical profession was said to have arisen, if at all, "at a later stage", that is when Dr. Le Compte, Dr. Van Leuven and Dr. De Meyere contested before the Court of Cassation the lawfulness of the measures imposed on them. The Government further submitted that this right was not "civil" and invited the Court not to follow the decision which it took in this respect in the König judgment.

47. As regards the question whether the dispute related to the above-mentioned right, the Court considers that a tenuous connection or remote consequences do not suffice for Article 6 par. 1 (art. 6-1), in either of its official versions ("contestation sur", "determination of"): civil rights and obligations must be the object - or one of the objects - of the "contestation"

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(dispute); the result of the proceedings must be directly decisive for such a right.

Whilst the Court agrees with the Government on this point, it does not agree that in the present case there was not this kind of direct relationship between the proceedings in question and the right to continue to exercise the medical profession. The suspensions ordered by the Provincial Council on 30 June 1971 (Dr. Le Compte) and on 24 October 1973 (Dr. Van Leuven and Dr. De Meyere) were to deprive them temporarily of their rights to practise. That right was directly in issue before the Appeals Council and the Court of Cassation, which bodies had to examine the applicants' complaints against the decisions affecting them.

48. Furthermore, it is by means of private relationships with their clients or patients that medical practitioners in private practice, such as the applicants, avail themselves of the right to continue to practise; in Belgian law, these relationships are usually contractual or quasi-contractual and, in any event, are directly established between individuals on a personal basis and without any intervention of an essential or determining nature by a public authority. Accordingly, it is a private right that is at issue, notwithstanding the specific character of the medical profession - a profession which is exercised in the general interest - and the special duties incumbent on its members.

The Court thus concludes that Article 6 par. 1 (art. 6-1) is applicable; as in the König case (see the above-mentioned judgment, p. 32, par. 95), it does not have to determine whether the concept of "civil rights" extends beyond those rights which have a private nature.

49. Two members of the Commission, Mr. Frowein and Mr. Polak, emphasised in their dissenting opinion that the present proceedings did not concern a withdrawal of the authorisation to practise, as did the König case, but a suspension for a relatively short period - three months for Dr. Le Compte and fifteen days for Dr. Van Leuven and Dr. de Meyere. These members maintained that a suspension of this kind did not impair a civil right but was to be regarded as no more than a limitation inherent therein.

The Court is not convinced by this argument, which the Government adopted as a further alternative plea in paragraph 19 of their memorial. Unlike certain other disciplinary sanctions that might have been imposed on the applicants (warning, censure and reprimand - see paragraph 32 above), the suspension of which they complained undoubtedly constituted a direct and material interference with the right to continue to exercise the medical profession. The fact that the suspension was temporary did not prevent its impairing that right (see, mutatis mutandis, the above-mentioned Golder judgment, p. 13, par. 26); in the "contestations" (disputes) contemplated by Article 6 par. 1 (art. 6-1) the actual existence of a "civil" right may, of course, be at stake but so may the scope of such a right or the manner in which the beneficiary may avail himself thereof.

50. Since the dispute over the decisions taken against the applicants has to be regarded as a dispute relating to "civil rights and obligations", it follows that they were entitled to have their case (in French: "cause") heard by "a tribunal" satisfying the conditions laid down in Article 6 par. 1 (art. 6-1) (see the

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above-mentioned Golder judgment, p. 18, par. 36).

51. In fact, their case was dealt with by three bodies - the Provincial Council, the Appeals Council and the Court of Cassation. The question therefore arises whether those bodies met the requirements of Article 6 par. 1 (art. 6-1).

(a) The Court does not consider it indispensable to pursue this point as regards the Provincial Council. Whilst Article 6 par. 1 (art. 6-1) embodies the "right to a court" (see paragraph 44 above), it nevertheless does not oblige the Contracting States to submit "contestations" (disputes) over "civil rights and obligations" to a procedure conducted at each of its stages before "tribunals" meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system. To this extent, the Court accepts that the arguments of the Government and of Mr. Sperduti in his separate opinion are correct.

(b) Once the Provincial Council had imposed on Dr. Le Compte, Dr. Van Leuven and Dr. De Meyere a temporary ban on the exercise of their profession, they appealed to the Appeals Council which thus had to determine the dispute over the right in question.

According to the Government, the Appeals Council nevertheless did not have to meet the conditions contained in Article 6 par. 1 (art. 6-1) since an appeal on a point of law against its decision lay to the Court of Cassation and that Court's procedure certainly did satisfy those conditions.

The Court does not agree. For civil cases, just as for criminal charges (see the Deweer judgment of 27 February 1980, Series A no. 35, pp. 24-25, par. 48), Article 6 par. 1 (art. 6-1) draws no distiction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to "civil rights and obligations". Hence, the "right to a court" (see the above-mentioned Golder judgment, p. 18, par. 36) and the right to a judicial determination of the dispute (see the above-mentioned König judgment, p. 34, par. 98 in fine) cover questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the fault (see paragraph 33 above). It follows that Article 6 par. 1 (art. 6-1) was not satisfied unless its requirements were met by the Appeals Council itself.

2. The existence of "criminal charges"

52. When deciding on the admissibility of the applications, the Commission stated that the organs of the Ordre had not been required to determine criminal charges; the same point is made at paragraph 67 of the Commission's report.

53. The Court considers it superfluous to determine this issue, which was scarcely touched on by those appearing before it: as in the König case (see the above-mentioned judgment, pp. 32-33, p par. 96), those of the Article 6 (art. 6) rules which the applicants

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alleged were violated apply to both civil and criminal matters.

B. Compliance with Article 6 par. 1 (art. 6-1)

54. Having regard to the conclusion at paragraph 51 above, it has to be established whether in the exercise of their jurisdiction both the Appeals Council and the Court of Cassation met the conditions laid down by Article 6 par. 1 (art. 6-1), the former because it alone fully examined measures affecting a civil right and the latter because it conducted a final review of the lawfulness of those measures. It is therefore necessary to examine whether each of them in fact constituted a "tribunal" which was "established by law", "independent" and "impartial", and afforded the applicants a "public hearing".

55. Whilst the Court of Cassation, notwithstanding the limits on its jurisdiction (see paragraphs 33 and 51 above), obviously has the characteristics of a tribunal, it has to be ascertained whether the same may be said of the Appeals Council. The fact that it exercises judicial functions (see paragraph 26 above) does not suffice. According to the Court's case-law (the above-mentioned Neumeister judgment, p. 44; the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 41, par. 78; the above-mentioned Ringeisen judgment, p. 39, par. 95), use of the term "tribunal" is warranted only for an organ which satisfies a series of further requirements - independence of the executive and of the parties to the case, duration of its members' term of office, guarantees afforded by its procedure - several of which appear in the text of Article 6 par. 1 (art. 6-1) itself. In the Court's opinion, subject to the points mentioned below, those requirements were satisfied in the present cases.

56. Since it was set up under the Constitution (Article 95), the Court of Cassation is patently established by law. As for the Appeals Council, the Court notes, as did the Commission and the Government, that, like each of the organs of the Ordre des médecins, it was established by an Act of 25 July 1938 and re-organised by Royal Decree no. 79 of 10 November 1967, made under an Act of 31 March 1967 investing the King with certain powers (see paragraph 20 above).

57. There can be no doubt as to the independence of the Court of Cassation (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 19, par. 35). The Court, in company with the Commission and the Government, is of the opinion that this also applies to the Appeals Council. It is composed of exactly the same number of medical practitioners and members of the judiciary and one of the latter, designated by the Crown, always acts as Chairman and has a casting vote. Besides, the duration of a Council member's term of office (six years) provides a further guarantee in this respect (see paragraph 26 above).

58. The Court of Cassation raises no problem on the issue of impartiality (see the above-mentioned Delcourt judgment, p. 19, par. 35).

The Appeals Council, so the Commission stated in its opinion, did not, in the particular circumstances, constitute an impartial tribunal: whilst the legal members were to be deemed neutral, the medical members had, on the other hand, to be considered as unfavourable to the applicants since they had interests very close to those of one of the parties to the proceedings.

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The Court does not agree with this argument concerning the Council's composition. The presence - already adverted to - of judges making up half the membership, including the Chairman with a casting vote (see paragraph 26 above), provides a definite assurance of impartiality and the method of election of the medical members cannot suffice to bear out a charge of bias (cf., mutatis mutandis, the above-mentioned Ringeisen judgment, p. 40, par. 97).

Again, the personal impartiality of each member must be presumed until there is proof to the contrary; in fact, as the Government pointed out, none of the applicants exercised his right of challenge (see paragraph 31 above).

59. Under the Royal Decree of 6 February 1970, all publicity before the Appeals Council is excluded in a general and absolute manner, both for the hearings and for the pronouncement of the decision (see paragraphs 31 and 34 above).

Article 6 par. 1 (art. 6-1) of the Convention does admittedly provide for exceptions to the rule requiring publicity - at least in respect of the trial of the action -, but it makes them subject to certain conditions. However, there is no evidence to suggest that any of these conditions was satisfied in the present case. The very nature both of the misconduct alleged against the applicants and of their own complaints against the Ordre was not concerned with the medical treatment of their patients. Consequently, neither matters of professional secrecy nor protection of the private life of these doctors themselves or of patients were involved; the Court does not concur with the Government's argument to the contrary. Furthermore, there is nothing to indicate that other grounds, amongst those listed in the second sentence of Article 6 par. 1 (art. 6-1), could have justified sitting in camera; the Government, moreover, did not rely on any such ground.

Dr. Le Compte, Dr. Van Leuven and Dr. de Meyere were thus entitled to have the proceedings conducted in public. Admittedly, neither the letter nor the spirit of Article 6 par. 1 (art. 6-1) would have prevented

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PROSECUTION INDEX OF AUTHORITIES

ANNEX 9

Piersack v Belgium 1983 5 EHRR 169. Judgment of 1 October 1982 Series A No. 53

In the Piersack case,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. Wiarda, President,
Mr. W. Ganshof van der Meersch,
Mr. G. Lagergren,
Mr. L. Liesch,
Mr. F. Gölcüklü,
Mr. J. Pinheiro Farinha,
Mr. R. Bernhardt,

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

Having deliberated in private on 25 and 26 March and on 21 September 1982,

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

PROCEDURE

1. The Piersack case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application (no. 8692/79) against the Kingdom of Belgium lodged with the Commission on 15 March 1979 under Article 25 (art. 25) of the Convention by a Belgian national, Mr. Christian Piersack.

2. The Commission's request was lodged with the registry of the Court on 14 October 1981, within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Kingdom of Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request is to obtain a decision as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 6 § 1 (art. 6-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 22 October 1981, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. Thór Vilhjálmsson, Mrs. D. Bindschedler-Robert, Mr. L. Liesch, Mr. J. Pinheiro Farinha and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). On 25 November, the President exempted Mrs. Bindschedler-Robert from sitting; thereafter she was replaced by Mr. F. Gölcüklü, the first substitute judge (Rules 22 § 1 and 24 § 4).

4. Mr. Wiarda, who had assumed the office of President of the Chamber

30. Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.

(a) As regards the first approach, the Court notes that the applicant is pleased to pay tribute to Mr. Van de Walle's personal impartiality; it does not itself have any cause for doubt on this score and indeed personal impartiality is to be presumed until there is proof to the contrary (see the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 25, § 58).

However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, § 31). As the Belgian Court of Cassation observed in its judgment of 21 February 1979 (see paragraph 17 above), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.

(b) It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. So radical a solution, based on an inflexible and formalistic conception of the unity and indivisibility of the public prosecutor's department, would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several Contracting States where transfers from one of those offices to the other are a frequent occurrence. Above all, the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality; the Court concurs with the Government on this point.

(c) The Belgian Court of Cassation, which took Article 6 § 1 (art. 6-1) into consideration of its own motion, adopted in this case a criterion based on the functions exercised, namely whether the judge had previously intervened "in the case in or on the occasion of the exercise of ... functions as a judicial officer in the public prosecutor's department". It dismissed Mr. Piersack's appeal on points of law because the documents before it did not, in its view, show that there had been any such intervention on the part of Mr. Van de Walle in the capacity of senior deputy to the Brussels procureur du Roi, even in some form other than the adoption of a personal standpoint or the taking of a specific step in the process of prosecution or investigation (see paragraph 17 above).

(d) Even when clarified in the manner just mentioned, a criterion of this kind does not fully meet the requirements of Article 6 § 1 (art. 6-1). In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of

questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.

31. This was what occurred in the present case. In November 1978, Mr. Van de Walle presided over the Brabant Assize Court before which the Indictments Chamber of the Brussels Court of Appeal had remitted the applicant for trial. In that capacity, he enjoyed during the hearings and the deliberations extensive powers to which, moreover, he was led to have recourse, for example the discretionary power conferred by Article 268 of the Judicial Code and the power of deciding, with the other judges, on the guilt of the accused should the jury arrive at a verdict of guilty by no more than a simple majority (see paragraphs 13-14 and 20-21 above).

Yet previously and until November 1977, Mr. Van de Walle had been the head of section B of the Brussels public prosecutor's department, which was responsible for the prosecution instituted against Mr. Piersack. As the hierarchical superior of the deputies in charge of the file, Mrs. del Carril and then Mr. De Nauw, he had been entitled to revise any written submissions by them to the courts, to discuss with them the approach to be adopted in the case and to give them advice on points of law (see paragraph 19 above). Besides, the information obtained by the Commission and the Court (see paragraphs 9-11 above) tends to confirm that Mr. Van de Walle did in fact play a certain part in the proceedings.

Whether or not Mr. Piersack was, as the Government believe, unaware of all these facts at the relevant time is of little moment. Neither is it necessary to endeavour to gauge the precise extent of the role played by Mr. Van de Walle, by undertaking further enquiries in order to ascertain, for example, whether or not he received the covering note of 4 February 1977 himself and whether or not he discussed this particular case with Mrs. del Carril and Mr. De Nauw. It is sufficient to find that the impartiality of the "tribunal" which had to determine the merits (in the French text: "bien-fondé") of the charge was capable of appearing open to doubt.

32. In this respect, the Court therefore concludes that there was a violation of Article 6 § 1 (art. 6-1).

3. "Tribunal established by law"

33. Initially, the applicant also claimed that the Brabant Assize Court was not a "tribunal established by law", arguing that Mr. Van de Walle's presence on the bench contravened, inter alia, Article 127 of the Judicial Code.

In order to resolve this issue, it would have to be determined whether the phrase "established by law" covers not only the legal basis for the very existence of the "tribunal" - as to which there can be no dispute on this occasion (Article 98 of the Belgian Constitution) - but also the composition of the bench in each case; if so, whether the European Court can review the manner in which national courts - such

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ANNEX 10

De Cubber v Belgium 1985 7 EHRR 236

In the De Cubber case (*),

(*) The case is numbered 8/1983/64/99. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court (**), as a Chamber composed of the following judges:

(**) The revised Rules of Court, which entered into force on 1 January 1983, are applicable to the present case.

Mr. G. Wiarda, President,
Mr. W. Ganshof van der Meersch,
Mrs. D. Bindschedler-Robert,
Mr. F. Gölcüklü,
Mr. F. Matscher,
Sir Vincent Evans,
Mr. R. Bernhardt,

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

Having deliberated in private on 25 May and 2 October 1984,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 October 1983, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 9186/80) against the Kingdom of Belgium lodged with the Commission on 10 October 1980 under Article 25 (art. 25) by a Belgian citizen, Mr. Albert De Cubber.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request 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 6 para. 1 (art. 6-1).

2. In response to the inquiry made in accordance with

its part, rejected the Government's criticism that it had made a subjective analysis (see paragraphs 63, 68-69 and 72-73 of the report; verbatim record of the hearings held on 23 May 1984).

However this may be, the personal impartiality of a judge is to be presumed until there is proof to the contrary (see the same judgment, loc. cit.), and in the present case no such proof is to be found in the evidence adduced before the Court. In particular, there is nothing to indicate that in previous cases Mr. Pilate had displayed any hostility or ill-will towards Mr. De Cubber (see paragraph 9 above) or that he had "finally arranged", for reasons extraneous to the normal rules governing the allocation of cases, to have assigned to him each of the three preliminary investigations opened in respect of the applicant in 1977 (see paragraphs 8, 10 and 16 above; paragraph 46 of the Commission's report).

26. However, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim quoted in, for example, the Delcourt judgment of 17 January 1970 (Series A no. 11, p. 17, para. 31), "justice must not only be done: it must also be seen to be done". As the Belgian Court of Cassation has observed (21 February 1979, Pasicrisie 1979, I, p. 750), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see the above-mentioned judgment of 1 October 1982, pp. 14-15, para. 30).

27. Application of these principles led the European Court, in its Piersack judgment, to find a violation of Article 6 para. 1 (art. 6-1): it considered that where an assize court had been presided over by a judge who had previously acted as head of the very section of the Brussels public prosecutor's department which had been responsible for dealing with the accused's case, the impartiality of the court "was capable of appearing open to doubt" (ibid., pp. 15-16, para. 31). Despite some similarities between the two cases, the Court is faced in the present proceedings with a different legal situation, namely the successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case.

28. The Government put forward a series of arguments to show that this combination of functions, which was unquestionably compatible with the Judicial Code as construed in the light of its drafting history (see paragraph 20, first sub-paragraph, above), was also reconcilable with the Convention. They pointed out that in Belgium an investigating judge is fully independent in the performance of his duties; that unlike the judicial officers in the public prosecutor's department, whose submissions are not binding on him, he does not have the status of a party to criminal proceedings and is not "an instrument of the prosecution"; that "the object of his activity" is not, despite Mr. De Cubber's allegations, "to establish the guilt of the person he believes to be guilty" (see paragraph 44 of the Commission's report), but to "assemble in an impartial manner evidence in favour of as well as against the accused", whilst maintaining "a

admissible as regards this complaint and inadmissible as regards the remainder. In its report of 5 July 1983 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a violation of Article 6 para. 1 (art. 6-1) on the point in question. The full text of the Commission's opinion is reproduced as an annex to the present judgment.

AS TO THE LAW

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

23. Under Article 6 para. 1 (art. 6-1),

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an ... impartial tribunal ... ."

One of the three judges of the Oudenaarde criminal court who, on 29 June 1979, had given judgment on the charges against the applicant had previously acted as investigating judge in the two cases in question: in one case he had done so from the outset and in the other he had replaced a colleague, at first on a temporary and then on a permanent basis (see paragraphs 8, 10 and 12 above). On the strength of this, Mr. De Cubber contended that he had not received a hearing by an "impartial tribunal"; his argument was, in substance, upheld by the Commission.

The Government disagreed. They submitted:

- as their principal plea, that Mr. Pilate's inclusion amongst the members of the trial court had not adversely affected the impartiality of that court and had therefore not violated Article 6 para. 1 (art. 6-1);

- in the alternative, that only the Ghent Court of Appeal, whose impartiality had not been disputed, had to satisfy the requirements of that Article (art. 6-1);

- in the further alternative, that a finding of violation would entail serious consequences for courts, such as the Oudenaarde criminal court, with "limited staff".

A. The Government's principal plea

24. In its Piersack judgment of 1 October 1982, the Court specified that impartiality can "be tested in various ways": a distinction should be drawn "between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect" (Series A no. 53, p. 14, para. 30).

25. As to the subjective approach, the applicant alleged before the Commission that Mr. Pilate had for years shown himself somewhat relentless in regard to his (the applicant's) affairs (see paragraphs 45-47 of the Commission's report), but his lawyer did not maintain this line of argument before the Court; the Commission, for

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ANNEX 11.

Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 *entered into force* Oct. 24, 1945, Articles 17, 100

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Charter of the United Nations
Chapter IV

The General Assembly

Article 9

Composition

1. The General Assembly shall consist of all the Members of the United Nations.

2. Each member shall have not more than five representatives in the General Assembly.

Functions and Powers

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

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4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16

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The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

Voting

Article 18

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, Composition including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

Procedure

Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the

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Charter of the United Nations
Chapter XV

The Secretariat

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the

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ANNEX 12.

Rome Statute of the International Criminal Court, A/CONF.183/9, 1 July 2002, Article 115

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Rome Statute of the International Criminal Court*

* Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114

Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115

Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116

Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117

Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.