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SCSL-2004-14-PT
(227 — 258)

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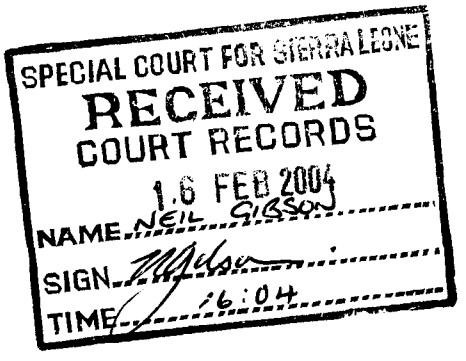
THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe
Registrar: Mr. Robin Vincent
Date: 16 February 2004



THE PROSECUTOR

Against

MOININA FOFANA (et. al.)

CASE NO. SCSL-2003-14-PT

REPLY TO THE PROSECUTION RESPONSE TO THE APPLICATION FOR BAIL PURSUANT TO RULE 65

Office of the Prosecutor:
Mr. James C. Johnson
Mr. Luc Côté
Mr. Charles A. Caruso

Defence Office:
Mr. Sylvain Roy
Mr. Ibrahim Yillah
Ms. Phoebe Knowles

Defence Counsel:
Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie
Dr. Liesbeth Zegveld
Prof. Dr. P. André Nollkaemper

1. The Defence for Mr. Moinina Fofana hereby files its Reply to the "Prosecution Response to Defence Application for Bail Pursuant to Rule 65", filed on 9 February 2004 (the "Response").

2. The Defence will not repeat arguments made in the "Application for Bail Pursuant to Rule 65" (the "Application"). It will, however, take this opportunity to clarify some issues raised by the Prosecution.

Law

3. In the Application the Defence submitted, among other things, that pre-trial detention should remain an exception and not become the rule. In its Response, the Prosecution seems to deny that this well-established human rights principle applies in cases before the Special Court[1].

4. The principle that pre-trial custody should remain the exception is based on the presumption of innocence and on the rule of respect for individual liberty. For this reason it is well enshrined in all major international human rights instruments, such as the International Covenant on Civil and Political Rights;[2] the European Convention for the Protection of Human Rights and Fundamental Freedoms;[3] the American Convention on Human Rights;[4] and the African Charter on Human and Peoples' Rights.[5] On 9 December 1998, the right to be released pending trial was also incorporated by the United Nations General Assembly in the "Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment":

[1] Response, paras. 8-9.
[2] Article 9, Section 3.
[3] Article 5.
[4] Article 7.
[5] Articles 6 & 7.

> "Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions".[6]

5. It has been accepted by both the ICTY and the ICTR that international human rights instruments, such as the conventions and charter mentioned above, form an integral part of international public law to be applied by international criminal tribunals.[7] Rule 65 must be read in the light of the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[8] In its Response, the Prosecution fails to explain why in cases before the Special Court an exception should be made to this well-established jurisprudence.

6. The Defence in addition submitted that the Brima case, issued on 22 July 2003, appears to establish that the first duty lies upon the prosecutor to demonstrate to the satisfaction of the Judge or Trial Chamber that there are "good reasons" to continue the detention of the accused. In the Brima case, Judge Benjamin Mutanga Itoe ruled:

> "In effect, just as the accused canvasses for and justifies his release, the Prosecution bears the traditional burden of equally demonstrating to the satisfaction of the Judge or Trial Chamber, that there are good reasons for continuing to deprive the detainee of his fundamental human right to liberty".[9]

According to the Defence, the Prosecution has to demonstrate in particular that a reasonable suspicion still exists that the accused committed the crime or crimes charged. The persistence of this reasonable suspicion that the accused committed the offences is, of course, a necessary condition for the lawfulness of the continued detention.

7. In the Application, the Defence also argued that this reasonable suspicion alone can never be sufficient to justify pre-trial detention beyond a short initial period. This submission is

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[6] Principle 39, Application, Annex 7.
[7] See e.g. ICTR, Appeals Chamber Decision, Barayagwiza, ICTR-97-19-AR72, 3 November 1999, para. 40.
[8] See e.g. ICTY, Trial Chamber, Hadzihasanovic et.al, IT-01-47-PT, Decisions granting Provisional Release, 13 December 2001, Judicial Supplement 30, p. 1.
[9] SCSL, Trial Chamber, Tamba Alex Brima, Ruling on Motion for Bail, SCSL-03-06-PT, 22 July 2003, pp. 9-10, Application, annex 1.

supported by the jurisprudence of the European Court of Human Rights, as explained by Clare Ovey and Robin White in their book on the European Convention:

> " [S]uspicion that the detained person has committed an offence, while a necessary condition, does not suffice to justify detention continuing beyond a short initial period, even where the accused is charged with a particularly serious crime and the evidence against him is strong."

8. The gravity of the crimes the accused is charged with and the possible duration of the sentence can in themselves never be a "good reason" for continuing pre-trial custody. The Prosecution must therefore show that *other* reasons exist to continue the detention and, in the view of the Defence, it has failed to do so.

Appearance at trial & no danger to witnesses

9. The Defence submits that Mr. Fofana should be released provisionally as he has offered all guarantees possible and necessary to secure his appearance at trial and the safety and security of witnesses.

10. In its Response, the Prosecution basically argues that the guarantees offered by the Defence are insufficient to secure the interests mentioned in Rule 65 (B). The Prosecution argument that Mr. Fofana in unlikely to appear for trial and that he might endanger the safety or security of others is almost entirely based on a "Declaration of Alan White", which allegedly states that Mr. Fofana has travelled to both Liberia and Guinea[10] and that he attended a meeting where people were warned not to co-operate with the Special Court.[11] For unknown reasons, this document was annexed to the Response, but not disclosed to the Defence. The Defence strongly objects to this procedure, for which neither the Statute nor the Rules offer any basis. The Trial Chamber is therefore kindly requested to order the disclosure of the "Declaration" to the Defence or to ignore it altogether, so that Mr. Fofana's right to a fair trial and to an adversarial process remains guaranteed[12].

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[10] Response, para. 14.
[11] Response, para. 17.
[12] See: ECHR, Lietzow v.Germany, 13 February 2001, Application no. 24479/94, para. 44, where the European Court of Human Rights argues that the right to an adversarial process also applies in pre-trial proceedings and

Oral Hearing

11. The Defence for Mr. Fofana finally and respectfully requests an oral hearing on the matter.

COUNSEL FOR THE ACCUSED

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Mr. Michiel Pestman

includes the right of the accused to all documents in the investigation file which are essential in order effectively to challenge the lawfulness of the detention.

Defence list of authorities

1. ICTR, Appeals Chamber Decision, Barayagwiza, ICTR-97-19-AR72, 3 November 1999, para. 40.

2. ICTY, Trial Chamber, Hadzihasanovic et.al, IT-01-47-PT, Decisions granting Provisional Release, 13 December 2001, Judicial Supplement 30.

3. ECHR, Lietzow v.Germany, 13 February 2001, Application no. 24479/94.

IN THE APPEALS CHAMBER

Original: English

Before:
Judge Gabrielle Kirk McDonald, Presiding
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar:
Mr. Agwu U Okali

Decision of:
3 November 1999

EAN-BOSCO BARAYAGWIZA

v.

THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

Counsel for the Appellant:
Mr. Justry P.L. Nyaberi

The Office of the Prosecutor:
Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

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(...)

III. APPLICABLE AND AUTHORITATIVE PROVISIONS

40. The relevant parts of the applicable Articles of the Statute, Rules of the Tribunal and international human rights treaties are set forth below for ease of reference. The Report of the U.N. Secretary-General establishes the sources of law for the Tribunal. The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.

A. The Statute

Article 8

Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 17

Investigation and Preparation of Indictment

1.[...]

2.The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3.[...]

4.Upon a determination that a prima facie case exists, the Prosecutor shall prepare an Indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the present Statute. The Indictment shall be transmitted to a Judge of the Trial Chamber.

Article 20

Rights of the accused

1.[...]

2.[...]

3.[...]

4.In the determination of any charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees, in full equality:

a.To be informed promptly and in detail in a language in which he or she understands of the nature and cause of the charge against him or her;
b.[...]
c.To be tried without undue delay;
d.[...]
e.[...]
f.[...]
g.[...]

Article 24

Appellate Proceedings

1.[...]

2.The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 28

Cooperation and Judicial Assistance

1.States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2.States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

a.The identification and location of persons;
b.[...]
c.[...]
d.The arrest or detention of persons;
e.The surrender or transfer of the accused to the International Tribunal for Rwanda.

B. The Rules

Rule 2 Definitions

[...]

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.

[...]

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction.

[...]

Rule 40

Provisional Measures

(A) In case of urgency, the Prosecutor may request any State:

i.to arrest a suspect and place him in custody; ii.to seize all physical evidence; iii.to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The state concerned shall comply forthwith, in accordance with Article 28 of the Statute.

(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

(C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

(D) The suspect shall be released if (i) the Chamber so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Rule 40bis

Transfer and Provisional Detention of Suspects

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

(F) At the end of the period of detention, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an inter partes hearing, to extend the provisional detention for a period not exceeding 30 days.

(G) At the end of that extension, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an inter partes hearing, to extend the detention for a further period not exceeding 30 days.

(H) The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if

appropriate, be delivered to the authorities of the State to which the request was initially made.

(I) The provisions in Rules 55(B) to 59 shall apply mutatis mutandis to the execution of the order for the transfer and provisional detention of the suspect.

(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

(L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply mutatis mutandis to the provisional detention of persons under this Rule.

Rule 58

National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 62

Initial Appearance of Accused

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected

(ii) read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

(iv) in case of a plea of not guilty, instruct the Registrar to set a date for trial.

Rule 72

Preliminary Motions

A.Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all material envisaged by Rule 66(A)(I), and in any case before the hearing on the merits.

B.Preliminary motions by the accused are:

i.objections based on lack of jurisdiction;
ii.[...]
iii.[...]
iv.[...]

C.The Trial Chamber shall dispose of preliminary motions in limine litis.

D.Decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right.

E.Notice of Appeal envisaged in Sub-Rule (D) shall be filed within seven days from the impugned decision.

F.Failure to comply with the time-limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

C. International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14

1.[...]

2.[...]

3.In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality:

a.To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
b.[...]
c.[...]
d.[...]
e.[...]
f.[...]
g.[...]

4.[...]

5.[...]

6.[...]

7.[...]

D. European Convention on Human Rights

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

a.[...]

b.[...]

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

d.[...]

e.[...]

f.the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 6

1.[...]

2.[...]

3.Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b.[...]
c.[...]
d.[...]
e.[...]

E.American Convention on Human Rights

Article 7

1.[...]

2.[...]

3. No one shall be subject to arbitrary arrest or detention.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before judge or other law officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In states Parties whose law provides that anyone who believes himself to be threatened

with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7.[...]

Article 8

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a.[...]
b.prior notification in detail to the accused of the charges against him;
c.[...]
d.[...]
e.[...]
f.[...]
g.[...]
h.[...]

3.[...]

4.[...]

5.[...]

TRIAL CHAMBERS

The Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura - Case No. IT-01-47-PT

"Decisions granting Provisional Release to Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura"

•19 December 2001
•Trial Chamber III (Judges Wolfgang Schomburg [Presiding], Florence Mumba and Carmel A. Agius)

Rule 65 of the Rules of Procedure and Evidence - Interpretation - International Covenant on Civil and Political Rights - European Convention for the Protection of Human Rights and Fundamental Freedoms - Principle of proportionality.

(1) Rule 65 of the Rules of Procedure and Evidence must be read in the light of the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms;
(2) *De jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court;
(3) The general principle of proportionality must be taken into account when interpreting Rule 65 of the Rules.

Procedural Background

- On 15 and 16 November 2001, Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura filed Motions for Provisional Release pursuant to Rule 65 of the Rules of Procedure and Evidence1.
- On 28 and 29 November 1999, the Prosecutor responded and objected to the provisional release without applying for a stay of the decision under Rule 65(E) of the Rules. The Prosecutor submitted that the use of the word "may" in Rule 65(C) suggests that the Trial Chamber retains a degree of discretion when the other prerequisites explicitly mentioned are met2.
- Heard under Rule 65(B), the host country did not object to the possible provisional release.
- On 12 and 13 December 2001, the Trial Chamber heard the parties and the representatives of the Government of Bosnia and Herzegovina. At the end of the hearing, it granted the Motions and ordered the provisional release of the three co-accused under certain terms and conditions. The Prosecution stated that it would not apply for a stay of the proceedings3.

The Reasoning

The Trial Chamber underscored that justice means *inter alia* "respect for the alleged perpetrators' fundamental rights." Therefore, it considered that "no distinction can be drawn between persons facing criminal procedures in their home country or on an international level."4 The Trial Chamber concluded that Rule 65 must be read in the light of the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") and

the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "ECPHRFF"). It found that the application of these principles "stipulates that *de jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court."5 Since, unlike national courts, the Tribunal does not have its own coercive powers to enforce its decisions, the Trial Chamber stated that at the Tribunal "pre-trial detention *de facto* seems to be rather the rule"6.

It found that "Rule 65 allows for provisional release, leaving the aforementioned human rights unchanged but applying them specifically for the purposes of an international criminal court." The Trial Chamber referred to the Judgement rendered by the European Court of Human Rights on 26 July 2001 in the case *Ilijkov v. Bulgaria*7 and held that "[a]ny system of mandatory detention on remand is *per se* incompatible" with Article 5(3) of the ECPHRFF8. Considering this, it held that it "must interpret Rule 65 with regard to the factual basis of the single case and with respect to the concrete situation of the individual human being and not *in abstracto*."

The Trial Chamber added that "[w]hen interpreting Rule 65, the general principle of proportionality must be taken into account." It reiterated that "[a] measure in public international law is proportional only when (1) suitable (2) necessary and (3) when its degree and scope remain in a reasonable relationship to the envisaged target." The Trial Chamber stressed that "[p]rocedural measures should never be capricious or excessive" and that "[i]f it is sufficient to use a more lenient measure, it must be applied."

In its application of these criteria, the Trial Chamber found "it no longer necessary to execute the order for detention on remand pending trial." It was satisfied that the 17 guarantees offered by each of the three co-accused and "the 7 guarantees offered by the Government of Bosnia and Herzegovina reasonably safeguard the proper conduct of the procedure." The Trial Chamber pointed out that it was aware that "there will never be a total guarantee that an accused will appear for trial and, if released, will not pose a danger to sources of evidence." It considered that it must take into account that the three co-accused had "surrendered voluntarily" to the Tribunal. Lastly, the Trial Chamber found that the fact that Enver Hadzihasanovic had used his right to remain silent could not be held against him.

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1. "(A) Once detained, an accused may not be released except upon an order of a Chamber.
(B) Release may be ordered by a Trial Chamber only after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.
(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.
(D) Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown. Subject to paragraph (F) below, applications for leave to appeal shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, the application shall be filed within seven days of the oral decision, unless

> (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
> (ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

(E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.
(F) Where the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision.

(G) Where the Trial Chamber orders a stay of its decision to release the accused pending an appeal by the Prosecutor, the accused shall not be released until either:

> (i) the time-limit for the filing of an application for leave to appeal by the Prosecutor has expired, and no such application is filed;
> (ii) a bench of three Judges of the Appeals Chamber rejects the application for leave to appeal;
> (iii) the Appeals Chamber dismisses the appeal; or
> (iv) a bench of three Judges of the Appeals Chamber or the Appeals Chamber otherwise orders.

(H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty. The provisions of Section 2 of Part Five shall apply *mutatis mutandis*.
(I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that:

> (i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;
> (ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and
> (iii) special circumstances exist warranting such release.

The provisions of paragraphs 65 (C) and 65 (H) shall apply *mutatis mutandis*."
2. See *The Prosecutor v Radoslav Brdjanin & Momir Talic* ("Krajina"), Case No. IT-99-36-PT, Trial Chamber II, Decision on Motion by Radoslav Brdjanin for Provisional Release, 25 July 2000 (summarised in *Judicial Supplement* No. 18).
3. See Press Release No. XT/P.I.S./649e of 13 December 2001.
4. See *The Prosecutor v Momcilo Krajisnik & Biljana Plavsic* ("Bosnia and Herzegovina"), Case No. IT-00-39 & 40-PT, Trial Chamber III, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, in which the Judge deemed that "[w]hile the Tribunal's lack of a police force, its inability to execute its arrest warrants in States and its corresponding reliance on States for such execution may be relevant in considering an application for provisional release, on no account can that feature of the Tribunal's regime justify either imposing a burden on the accused in respect of an application under Rule 65 or rendering more substantial such a burden, or warranting a detention of the accused for a period longer than would be justified having regard to the requirement of public interest, the presumption of innocence and the rule of respect for individual liberty" (para. 11) Judge Robinson expressed the view that in interpreting Article 9(3) of the International Covenant on Civil and Political Rights, which "reflects a customary norm that detention shall not be the general rule", in the context of the Tribunal was "wholly wrong to employ a peculiarity in the Tribunal system, namely its lack of a police force and its inability to execute its warrants in other countries, as a justification for derogating from that customary norm" (para. 12).
5. *Ibidem*. Judge Robinson noted that there could be no doubt that the effect of this customary norm, based on the presumption of innocence, "is to make pre-trial detention an exception, which is only permissible in special circumstances" (para. 6). The Judge added that "there must be cogent reasons" for pre-trial detention (para. 7), the purpose of which "is simply to ensure that the accused will be present for his trial" (para. 12).
6. *Ibidem*. Judge Robinson considered that the Tribunal practice established "a culture of detention that is wholly at variance with the customary norm that detention shall not be the general rule" and stated that it was wrong "to justify a principle that provisional release is the exception and not the rule on the basis of the absence within the Tribunal of a police force to execute its own warrants" (para. 22)
7. European Court of Human Rights, *Ilijkov v. Bulgaria*, Judgement, 26 July 2001, paras. 84 and 85.
8. "Everyone arrested or detained [...] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."
See also the Dissenting Opinion of Judge Robinson in the above mentioned case, in which the Judge considered that "[a]ny system of mandatory detention is *per se* incompatible with Article 9(3) of the ICCPR" which provides *inter alia* that '[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial".

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

FIRST SECTION

CASE OF LIETZOW v. GERMANY

(Application no. 24479/94)

JUDGMENT

STRASBOURG

13 February 2001

In the case of Lietzow v. Germany,

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

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr T. PANȚÎRU, *judges*,
Mr H. JUNG, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 23 January 2001,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 December 1998. It originated in an application (no. 24479/94) against the Federal Republic of Germany lodged with the Commission under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Hugo Lietzow ("the applicant"), on 4 March 1994.

2. The applicant was represented by Mr E. Kempf, a lawyer practising in Frankfurt am Main (Germany). The German Government ("the Government") were represented by their Agent, Mrs H. Voelskow-Thies, *Ministerialdirigentin*, Federal Ministry of Justice.

3. The case concerns the applicant's complaint that, in the proceedings for the review of his detention on remand, his defence counsel had no access to the criminal files. The applicant relied on Article 5 § 4 of the Convention.

4. On 14 January 1999 a panel of the Grand Chamber decided, in accordance with Article 5 § 4 of Protocol No. 11 to the Convention taken together with Rules 100 § 1 and 24 § 6 of the Rules of Court, that the case should be dealt with by a Chamber constituted within one of the Sections of the Court. Subsequently the President of the Court assigned the case to the First Section. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr G. Ress, the judge elected in respect of Germany, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr H. Jung to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. The applicant and the Government each filed written observations on the merits (Rule 59 § 1).

6. On 12 October 1999 the Chamber decided, pursuant to Rule 59 § 2 *in fine*, not to hold a hearing in the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a German national born in 1925 and living in Schwalbach.

8. On 30 January 1992 the Frankfurt am Main District Court (*Amtsgericht*) issued a warrant for the applicant's arrest on suspicion of fraud (*Betrug*) and corruption (*Bestechlichkeit*).

According to the District Court, there was a strong suspicion that, between 1981 and 1989, the applicant, in his position as director of the Vordertaunus Sewage Disposal Department (*Abwasserverband*), had regularly accepted payments by the owner of an engineering company, Mr N., and his deputy, Mr W., and that these amounts, increased by at least 100%, were subsequently included in bills for public construction works financed by the Vordertaunus Sewage Disposal Department. Moreover, the applicant had also received a jacuzzi. Mr N. and Mr W. were the subject of separate investigations. There was an agreement between them and the applicant to the effect that the applicant ensured that contracts were regularly given to the engineering company by the Sewage Disposal Department. The District Court added that the account of the facts given in the arrest warrant resulted from statements made by Mr N. and Mr W. as well as from the investigations; no further details were given about their precise content.

The District Court further considered that there was a risk of collusion (*Verdunkelungsgefahr*) within the meaning of Article 112 of the German Code of Criminal Procedure (*Strafprozeßordnung*), on the ground that if the applicant remained free he might try to contact other accomplices or witnesses, in particular officials of the Sewage Disposal Department or employees of the engineering company, with a view to coordinating their statements or changing or destroying written evidence, thereby hindering the establishment of the facts.

9. The applicant was arrested on 6 February 1992.

10. On 7 February 1992 Mr Kempf, counsel for the applicant, requested the Frankfurt District Court to hold an oral hearing on the applicant's detention on remand (*Haftprüfung*). With reference to this request, he also

applied to the Frankfurt public prosecutor (*Staatsanwalt*) for leave to consult the investigation file, or at least the statements made by Mr N. and Mr W., since the arrest warrant made reference to them.

11. On the same day, the public prosecutor, referring to Article 147 § 2 of the Code of Criminal Procedure, refused counsel's request, including the request to consult only Mr N.'s and Mr W.'s statements, on the ground that to decide otherwise would endanger the purpose of the ongoing investigations, which formed part of very complex proceedings concerning economic offences (*Wirtschaftsstrafverfahren*), including corruption, and involving a large number of public officials and employees. In addition, the investigation against the applicant could not be separated from the other issues with which they were concerned.

12. In view of the hearing to be held before the District Court (see paragraph 10 above), on 10 February 1992 the public prosecutor forwarded to that court six volumes of a special file relating to the applicant's detention, which was composed of copies taken from the general investigation file relating to all the accused.

13. In written submissions of 12 February 1992, the applicant, through his counsel, commented on the charges.

14. On 17 February 1992 the applicant asked the Frankfurt Court of Appeal (*Oberlandesgericht*) for a judicial review (*Antrag auf gerichtliche Entscheidung*) of the public prosecutor's decision of 7 February 1992 (see paragraph 11 above).

15. On 19 February 1992 the applicant, when questioned by the public prosecutor, mainly referred to his submissions of 12 February 1992 (see paragraph 13 above).

16. On 24 February 1992 the Frankfurt District Court, following the applicant's request of 7 February 1992, held a hearing for the review of his detention on remand. On questioning, the applicant clarified some statements contained in his submissions of 12 February 1992 regarding the venue of his meetings with Mr W. He further explained his general position in relation to the Sewage Disposal Department and the circumstances in which he had contacted Mr W. shortly before his arrest.

At the end of the hearing, the District Court ordered the applicant's continued detention on remand. As regards the strong suspicion against the applicant, the court confined itself to confirming in one sentence that it still existed as stated in the arrest warrant. Furthermore, the court found that there remained a risk of collusion, having regard in particular to the applicant's statement at the hearing that he had contacted Mr W. shortly before his own arrest. The court therefore considered that the applicant had already at that stage attempted to influence another suspect and to induce him to make a favourable statement if questioned by the public prosecutor's office. In that context, particular weight was to be given to the fact that all of this had occurred before the applicant knew the concrete charges against

him, the nature of the relevant evidence or the content of the statements made by witnesses or other suspects. The District Court also noted that the public prosecutor's office had made progress in the investigations, which might therefore be completed soon.

17. The applicant filed further written comments on the charges against him on 5 and 13 March 1992. On 18 March 1992 he was again heard by the police in the presence of his counsel.

18. On 27 March 1992 the applicant appealed (*Beschwerde*) against the decision of 24 February 1992. As a consequence, the Frankfurt District Court decided on 3 April 1992 to suspend the execution of the arrest warrant on condition that the applicant did not change residence – or notified any change to the Frankfurt public prosecutor's office –, that he complied with any summons in the case, that he refrained from any conversation about the criminal proceedings with officials of the Vordertaunus Sewage Disposal Department or with the employees of the engineering company concerned and that he deposited 200,000 German marks (DEM) as security. The applicant was released the same day.

19. On 24 April 1992 the Frankfurt Court of Appeal declared the applicant's request for judicial review of the public prosecutor's decision of 7 February 1992 inadmissible.

The court first considered that the impugned decision was a measure of judicial administration (*Justizverwaltungsakt*) which could in principle be the subject of a judicial review under sections 23 et seq. of the Introductory Act to the Courts Organisation Act (*Einführungsgesetz zum Gerichtsverfassungsgesetz*). However, that remedy was of a subsidiary nature and could therefore not be used here, as other remedies were available to the applicant for the purposes of challenging the lawfulness of the decision denying him access to the investigation file.

The Court of Appeal found that it was for the trial judge to decide on the applicant's access to the file, once the public prosecutor's investigations had been completed. This decision would then be open to an appeal by the applicant. This kind of subsequent judicial review fulfilled the constitutional requirements regarding judicial protection, and the temporary absence of a remedy until the preliminary investigation was over had to be accepted in the interest of the efficiency of criminal justice. The Court of Appeal added that the constitutional right to a court remedy ensures a right to judicial review within a reasonable time, rather than an immediate judicial review.

Furthermore, the fact that the applicant was detained on remand could not be regarded as a special circumstance calling – as in the case of an arbitrary prosecution – for a judicial remedy before the end of the preliminary investigation. In the Court of Appeal's view, the applicant's rights were sufficiently secured by the judicial review of his continued detention on remand, under Articles 120 et seq. of the Code of Criminal Procedure. Of course, courts reviewing an accused's detention on remand

were prevented in principle from deciding whether or not to grant access to the file, that being a matter within the sole competence of the public prosecutor's office. However, the absence of such immediate judicial supervision did not amount to a denial of judicial protection, since the competent court had also to examine whether the denial of access to the file to a remand prisoner was in breach of procedural safeguards such as those laid down in Article 5 § 4 of the Convention and, if so, to order his release.

The Court of Appeal's decision was served on the applicant on 6 May 1992.

20. On 13 May 1992 the applicant, noting that Mr W. had died in the meantime, applied to the public prosecutor's office for leave to consult the statements made by him in the course of the criminal proceedings.

21. On 19 May 1992 the public prosecutor's office rejected the request pursuant to Article 147 § 2 of the Code of Criminal Procedure, on the ground that access to the file would still endanger the purpose of the investigations.

22. On 3 June 1992 the applicant lodged a constitutional complaint (*Verfassungsbeschwerde*) against the decisions of 7 February and 24 April 1992.

23. On 27 April 1993 the applicant's counsel renewed his request for access to the file. The public prosecutor, referring to his previous decision, rejected the request on 3 May 1993.

24. On 29 October 1993 the Federal Constitutional Court (*Bundesverfassungsgericht*) decided not to entertain the applicant's constitutional complaint. The decision was served on 5 November 1993.

25. On 8 July 1994 the Frankfurt District Court set aside the arrest warrant against the applicant.

26. On 31 August 1994 the applicant's counsel was granted access to the file.

27. On 25 January 1995 the applicant's counsel requested the public prosecutor to discontinue the proceedings against his client, arguing that there were insufficient grounds for suspecting him. In this connection, he referred to the result of the investigations thus far and discussed in detail the statements of the co-accused, including their wording and later amendments.

28. On 18 December 1995 the Frankfurt public prosecutor discontinued the proceedings in respect of events prior to February 1987, which had become time-barred, and issued an indictment against the applicant, charging him with two counts of corruption.

29. On 8 July 1996 the Frankfurt District Court convicted the applicant of corruption on two counts and imposed on him a fine of DEM 40,000. The applicant lodged an appeal, which he subsequently withdrew for personal reasons.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. Articles 112 et seq. of the Code of Criminal Procedure (*Strafprozeßordnung*) concern the arrest and detention of a person on reasonable suspicion of having committed an offence. According to Article 112, a person may be detained on remand if there is a strong suspicion that he or she has committed a criminal offence and if there is a reason for arrest, such as the risk of absconding or the risk of collusion. Article 116 regulates the suspension of the execution of an arrest warrant.

31. Under Article 117 of the Code of Criminal Procedure, remand prisoners can ask at any time for judicial review of the arrest warrant. An oral hearing will be held at the request of the remand prisoner, or if the court so decides of its own motion (Article 118 § 1). If the arrest warrant is held to be valid following the hearing, the remand prisoner is entitled to a new oral hearing only if the detention has lasted for three months altogether and if two months have elapsed since the last oral hearing (Article 118 § 3). Article 120 provides that an arrest warrant has to be quashed if reasons justifying the detention on remand no longer persist or if the continued detention appears disproportionate. Any prolongation of detention on remand beyond an initial six months is to be decided by the Court of Appeal (Articles 121-22).

32. Articles 137 et seq. of the Code of Criminal Procedure concern the defence of a person charged with having committed a criminal offence, in particular the choice of defence counsel or appointment of official defence counsel. According to Article 147 § 1, defence counsel is entitled to consult the files which have been presented to the trial court, or which would be presented to the trial court in case of an indictment, and to inspect the exhibits. Paragraph 2 of this provision allows for a refusal of access to part or all of the files or to the exhibits for as long as the preliminary investigation has not been terminated, if the purpose of the investigation would otherwise be endangered. Pending the termination of the preliminary investigation, it is for the public prosecutor's office to decide whether to grant access to the file or not; thereafter it is for the president of the trial court (Article 147 § 5). By an Act amending the Code of Criminal Procedure (*Strafverfahrensänderungsgesetz*, *Bundesgesetzblatt*, 2000, vol. I, p. 1253) with effect from 1 November 2000, the latter provision has been amended to the effect, *inter alia*, that an accused who is in detention is now entitled to ask for judicial review of the decision of the public prosecutor's office denying access to the file.

33. Articles 151 et seq. of the Code of Criminal Procedure regulate the principles of criminal prosecution and the preparation of the indictment. Article 151 provides that any trial has to be initiated by an indictment. According to Article 152, the indictment is to be preferred by the public

prosecutor's office which is, unless otherwise provided, bound to investigate any criminal offence for which there exist sufficient grounds of suspicion.

34. Preliminary investigations are to be conducted by the public prosecutor's office according to Articles 160 and 161 of the Code of Criminal Procedure. On the basis of these investigations, the public prosecutor's office decides under Article 170 whether to prefer an indictment or to discontinue the proceedings.

35. According to Article 103 § 1 of the Basic Law (*Grundgesetz*), every person involved in proceedings before a court is entitled to be heard by that court (*Anspruch auf rechtliches Gehör*).

According to the Federal Constitutional Court (*Bundesverfassungsgericht*), this rule requires a court decision to be based only on those facts and evidential findings which could be commented upon by the parties. In cases involving arrest and detention on remand, the arrest warrant and all court decisions upholding it must be founded only on those facts and pieces of evidence of which the accused was previously aware and on which he was able to comment (Federal Constitutional Court, decision of 11 July 1994 (*Neue juristische Wochenschrift*, 1994, p. 3219), with further references).

In the aforementioned decision, the Federal Constitutional Court held that, following his arrest, an accused had to be informed of the content of the arrest warrant and promptly brought before a judge who, when questioning him, had to inform him of all relevant incriminating evidence as well as of evidence in his favour. Moreover, in the course of ensuing review proceedings, the accused must be heard and, to the extent that the investigation will not be prejudiced, the relevant results of the investigation at that stage must be given to him. In some cases, such oral information may not be sufficient. If the facts and the evidence forming the basis of a decision in detention matters cannot or can no longer be communicated orally, other means of informing the accused, such as a right to consult the files (*Akteneinsicht*), are to be used. On the other hand, statutory limitations on an accused's access to the files until the preliminary investigation are completed are to be accepted if the efficient conduct of criminal investigations so requires. However, even while those investigations are in progress, an accused who is detained on remand has a right of access to the files through his lawyer if and to the extent that the information which they contain might affect his position in the review proceedings and oral information is not sufficient. If in such cases the prosecution refuses access to the relevant parts of the files pursuant to Article 147 § 2 of the Code of Criminal Procedure, the reviewing court cannot base its decision on those facts and evidence and, if necessary, has to set the arrest warrant aside (Federal Constitutional Court, op. cit.).

PROCEEDINGS BEFORE THE COMMISSION

36. Mr Lietzow applied to the Commission on 4 March 1994. He complained under Article 5 § 4 of the Convention that he had been denied access to the investigation file in connection with the judicial review of his detention on remand. He further submitted that, in breach of Article 6 § 3 (b), he had not been given sufficient time to prepare his defence.

37. On 10 April 1997 the Commission declared admissible the complaint under Article 5 § 4 and the remainder of the application (no. 24479/94) inadmissible. In its report of 17 September 1998 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry.], it expressed the opinion, by twenty-seven votes to five, that there had been a violation of Article 5 § 4.

FINAL SUBMISSIONS TO THE COURT

38. In their written submissions, the Government requested the Court to find that the Federal Republic of Germany had not violated its obligations under the Convention.

39. The applicant requested the Court to hold that his rights under Article 5 § 4 of the Convention had been violated and to award him compensation for non-pecuniary damage and for legal costs and expenses under Article 41.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

40. The applicant complained about the proceedings for the review of his detention on remand. He relied on Article 5 § 4 of the Convention, which reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Arguments before the Court

41. The applicant stated that the review proceedings were not truly adversarial. The arrest warrant indicated that the strong suspicion against

him was based on the statements made by two other suspects, Mr N. and Mr W. In his view, the summary information which it provided on the charges against him did not offer a sufficient basis on which to ensure his defence. Without access to the file and knowledge of the details of the said statements, which turned out to be decisive pieces of evidence against him, his counsel had not been able to put the credibility of Mr N. and Mr W. in doubt and to argue properly that the suspicions of fraud and corruption were not sufficiently established and his detention was therefore unlawful. Not until January 1995, following inspection of the relevant files, had his counsel been in a position to set out effectively his defence and discuss the statements made by Mr N. and Mr W.

42. According to the Government, Article 5 § 4 did not provide for a general right for a person detained on remand or his counsel to inspect the files concerning the investigations against him. What mattered was to ensure that the person concerned was in a position to exercise effectively his rights and this could be done by different means.

In the present case, the information stated in the arrest warrant was sufficient to allow the applicant to exercise his defence rights properly, as it contained details about all relevant facts and pieces of evidence which grounded the suspicion against him, along with the reasons justifying his detention in the District Court's opinion. In addition, at the hearing of 24 February 1992, the applicant was orally informed of the reason why the District Court considered that there existed a danger of collusion: shortly before his arrest the applicant had attempted to influence another suspect. In the Government's view, the applicant had failed to state what specific piece of information he still missed in order to be able to exercise his defence rights adequately.

As regards the denial of access to the investigation file, it was to be explained by the fact that the investigations against the applicant formed part of a complex set of proceedings concerning more than 160 accused. Having regard to the conspiratorial behaviour of all those concerned, and the collusion established in the course of the investigations, the establishment of the truth would have been seriously hindered if access had been granted too early.

43. In substance, the Commission shared the applicant's view. It considered that, given the importance in the review proceedings of the statements by Mr N. and Mr W., the applicant or his counsel should have been given an opportunity to read them in full, in order to be able to challenge them properly.

B. The Court's assessment

44. The Court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are

essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine "not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention".

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among other authorities, *Lamy v. Belgium*, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29, and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II).

These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see, *mutatis mutandis*, *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, pp. 27-28, § 67).

45. In the present case, the arrest warrant served on the applicant on 6 February 1992 contained a summary of the facts underlying the charges against him, the reasons justifying in the District Court's opinion the applicant's detention and a short reference to the evidence relied on by the Court, that is to say the statements of two other suspects in the case, Mr N. and Mr W., along with the results of the ongoing investigations, no further details being provided, however, as to the precise content of the evidence referred to.

On 7 February 1992 the applicant's counsel asked the District Court for judicial review of his client's detention. He also requested the public prosecutor to grant him access to the case file or, in the alternative, to provide him at least with copies of the statements of Mr N. and Mr W., as they appeared to have been decisive in the District Court's decision to order the applicant's detention. Referring to Article 147 § 2 of the Code of Criminal Procedure, the public prosecutor rejected this request on the ground that the consultation of these documents would endanger the purpose of the investigations. On 10 February 1992 the public prosecutor forwarded to the District Court six volumes of a file relating to the investigations against the applicant and other accused.

On 24 February 1992 the District Court ordered the applicant's continued detention. While it held that the strong suspicion against him persisted, it provided no further details about the relevant facts and confined itself to referring to the arrest warrant. The court further held that, given the attempts made by the applicant before his arrest to influence other suspects in the case, there was still a serious risk of collusion if his detention was discontinued.

46. The statements of Mr N. and Mr W. thus appear to have played a key role in the District Court's decision to prolong the applicant's detention on remand. However, while the public prosecutor and the Frankfurt District Court were familiar with them, their precise content had not at that stage been brought to the applicant's or his counsel's knowledge. As a consequence, neither of them had an opportunity to challenge adequately the findings referred to by the public prosecutor and the District Court, notably by questioning the reliability or conclusiveness of the statements made by Mr N. and Mr W., who were themselves affected by investigations in the applicant's case.

It is true that, as the Government point out, the arrest warrant gave some details about the facts grounding the suspicion against the applicant. However, the information provided in this way was only an account of the facts as construed by the District Court on the basis of all the information made available to it by the public prosecutor's office. In the Court's opinion, it is hardly possible for an accused to challenge properly the reliability of such an account without being made aware of the evidence on which it is based. This requires that the accused be given a sufficient opportunity to take cognisance of statements and other pieces of evidence underlying them, such as the results of the police and other investigations, irrespective of whether the accused is able to provide any indication as to the relevance for his defence of the pieces of evidence to which he seeks to be given access.

47. The Court is aware that the public prosecutor denied the requested access to the file documents on the basis of Article 147 § 2 of the Code of Criminal Procedure, arguing that to act otherwise would entail the risk of compromising the success of the ongoing investigations, which were said to

be very complex and to involve a large number of other suspects. This view was endorsed by the Frankfurt Court of Appeal in its decision of 24 April 1992 (see paragraph 19 above).

The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer.

48. In these circumstances, and given the importance in the District Court's reasoning of the statements made by Mr N. and Mr W., which could not be adequately challenged by the applicant as they had not been communicated to him, the procedure before the Frankfurt District Court, which reviewed the lawfulness of the applicant's detention on remand, did not comply with the guarantees afforded by Article 5 § 4 of the Convention. This provision has therefore been violated.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. Under Article 41 of the Convention,

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

A. Non-pecuniary damage

50. The applicant claimed a sum of not less than 5,000 German marks (DEM) for non-pecuniary damage. He stressed that owing to the denial of access to the investigation file, he was totally unable to avert his detention on remand, which lasted for as long as almost two months, from 6 February until 3 April 1992, and appeared to have been disproportionate given that the District Court sentenced him only to a fine. As he was already 66 years old and in bad health at that time, he even came to feel faint during a transfer between places of detention.

51. The Government did not comment on this issue.

52. The Court considers that it is impossible to determine whether or not the applicant's arrest warrant would have been set aside by the Frankfurt District Court if there had been no violation of Article 5 § 4 of the Convention. As to the alleged frustration suffered by the applicant on account of the absence of adequate procedural guarantees during his

detention, the Court finds that in the particular circumstances of the case the finding of a violation is sufficient (see *Nikolova*, cited above, § 76).

B. Costs and expenses

53. In addition, the applicant claimed DEM 968.87 in respect of the costs and expenses relating to his legal representation before the domestic courts. He also claimed reimbursement of the costs of his representation before the Convention organs, but provided no details as to their amount.

54. The Government did not comment on this issue.

55. As regards the costs and expenses incurred by the applicant in respect of his legal representation, the Court, making an assessment on an equitable basis, awards the applicant DEM 2,000, together with any value-added tax that may be chargeable.

C. Default interest

56. According to the information available to the Court, the statutory rate of interest applicable in Germany at the date of adoption of the present judgment is 8.42% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, DEM 2,000 (two thousand German marks) for costs and expenses, together with any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 8.42% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 13 February 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President