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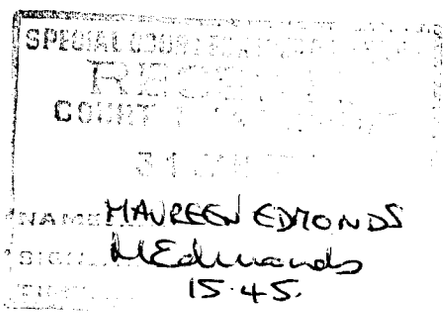
SCSL-04-14-T
(14688-14850)

14688

SPECIAL COURT FOR SIERRA LEONE

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



Interim Registrar: **Lovemore Munlo**

Date: **31st January 2006**

PROSECUTOR **against** **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-2004-14-T)

Issa Hassan Sesay
Morris Kallon
Augustine Gbao
(Case No.SCSL-2004-15-T)

PUBLIC DOCUMENT

PRINCIPAL DEFENDER'S MOTION FOR A REVIEW OF THE REGISTRAR'S DECISION TO INSTALL SURVEILLENCE CAMERAS IN THE DETENTION FACILITY OF THE SPECIAL COURT FOR SIERRA LEONE.

Office of the Principal Defender **The Registrar**

I. INTRODUCTION

1. This Motion is filed by the Office of the Principal Defender of the Special Court for Sierra Leone ("the OPD") at the request of all nine detainees presently held in the Detention Facility of the Special Court for Sierra Leone ("the Court"). The Motion seeks a review of the Registrar's decision authorizing the installation of surveillance cameras in the visitation area of the Detention Facility of the Court. Essentially, we submit that the installation of surveillance cameras in the Detention Facility strikes at the heart of fair trial rights and is therefore an unjustified interference with the rights of the accused persons protected by the *Statute of the Special Court* ("the *Statute*"), the *Rules of Procedure and Evidence* ("the *RPE*"), the *Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court* ("the *Rules of Detention*"),[1] the *International Covenant on Civil and Political Rights* ("*ICCPR*"),[2] under regional human rights treaties and at customary international law.

2. Under the *Statute*, the detainees are presumed innocent of the charges against them until proven guilty by a competent and impartial judicial tribunal. Thus, it is unreasonable to subject them to the same detention conditions as persons who have already been tried and convicted.[3] The OPD concedes that security considerations may warrant surveillance cameras within the vicinity of the Court. However, it is opposed to the installation of surveillance cameras in the visitation area of the Detention Facility. In the view of the detainees, the installation of surveillance equipment in the visitation area is a calculated measure to eavesdrop on their conversations with confirmed and or potential witness, as the Defence prepares to make its case. The detainees feel that this will adversely impact on their fair trial

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[1] As amended on 14 May 2005.
[2] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).
[3] *United Nation's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988),* ("*UN Detention Principles*") provides at Principle 36:

> 1. A detained person suspected of or charged with a criminal offence shall be presumed innocent ***and shall be treated as such*** until proved guilty according to law in a public trial at which he has ***had all the guarantees*** necessary for his defence. (Emphasis added).

rights since potential witness will be intimidated and therefore unwilling to visit the Detention Facility and or to testify.

3. The following sections sets out the factual and procedural background giving rise to this Motion, its legal basis, and the relief sought.

II. FACTUAL BACKGROUND

4. The detainees were arrested and sent to temporary detention on Bonthe Island between 10 March 2003 and 17 September 2003. They were subsequently transferred to the Court's permanent Detention Facility in Freetown.

5. On 15 September 2005, workers contracted by the Court's Facility and Management Unit were deployed to various section of the Detention Facility to prepare for the installation of surveillance cameras. In a notice dated the same day, the Chief of Detention for the first time notified the detainees that surveillance cameras were being installed in various areas of the facility, including the visitation area, and that the "installation of the security system is ***non-negotiable***" as it "has been approved by the Registrar."[4] The notice emphasised that "***the work will go on regardless of any complaints that you may have.***"[5] (Emphasis added). This measure caused the detainees great concern as they were suspicious of the motive for the installation. They consequently requested the OPD to intervene to ensure that their rights are protected.

III. PROCEDURAL BACKGROUND

6. In a letter dated 16 September 2005,[6] the Principal Defender (Dr. Vincent Nmehielle) wrote to the Registrar of the Court explaining, *inter alia*, that as the guardian of the rights of the accused persons under Rule 45 of the *RPE*, the OPD

[4] Notice to Detainees dated 15th September 2005.
[5] *Ibid.*
[6] Letter attached.

was concerned that the decision to install closed circuit television cameras would compromise the rights and privileges enjoyed by the accused persons under Article 17 of the *Statute*.

7. On 22nd September 2005,[7] the then Registrar (Mr. Robin Vincent) responded to the Principal Defender's letter maintaining, *inter alia*, that he was entitled to authorize the installation of video surveillance equipment in all areas of the Detention Facility, consistent with his power to monitor visits.[8]

8. On 21st October 2005, the Principal Defender directly filed an Application for a Review of the Registrar's Decision to install cameras in the visitation area of the Detention Facility to the President of the Court. The Registrar filed a Response to the Principal Defender's Application on 1st November 2005. The Principal Defender's Reply to the Registrar's Response was filed on 7th November 2005.[9]

9. In a letter dated 1st December 2005, the President of the Court refused to consider the Application because it was filed directly to him, rather than through the Court Management Section of the Court (which section had taken the view that it had no authority to receive the OPD Application, a position supported by the Registrar's Legal Office).

10. In his reply to the President's letter dated 2nd December 2005, the Principal Defender urged the President to reconsider his decision and to consider the Application on the merits since the matter was, in accordance with practice of the Court, properly before the President.[10]

11. On 26th January 2006, the President replied to the Principal Defender refusing to reconsider his decision not to address the matter.

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[7] **Letter attached.**

[8] **The Principal Defender did not receive the Registrar's letter until 6th October 2005,** after Mr. Robin Vincent had left the Court.

[9] All these are annexed.

[10] Moreover, the Applicants' judicious use of the time and processes of the Special Court should be welcomed given the Court's time-limited mandate, resources and Completion Strategy.

IV. LEGAL BASIS FOR THIS MOTION

12. The legal basis for this Motion is Article 17 of the *Statute* and Rules 45 and 54 of the *RPE*. In the light of the procedural history of this matter, and because the accused's fundamental Article 17 rights are at stake, we respectfully submit that they are entitled to invoke the inherent jurisdiction of the Court to review the legality or reasonableness of the Registrar's decision to permit the installation of surveillance cameras in the visitation area of the Detention Facility. The OPD further submits that it is in the interests of justice for the Trial Chamber to review the Registrar's decision, *inter alia*, because the detainees Article 17 rights are engaged. This position is rooted in the jurisprudence of both this Court and the ad hoc international criminal tribunals.[11]

V. ARGUMENT

A. The detainee's rights to a fair trial will be violated because potential witnesses will be intimidated by the presence of surveillance cameras

13. Article 17 of the *Statute* confers rights and minimum guarantees to all accused persons. In relevant part, Article 17(4)(b) provides that any accused person shall "have adequate time and ***facilities*** for the preparation of his or her defence ...". (Emphasis added). Article 17(4)(e) states that any accused person shall have the right to examine, or have examined, the witnesses against him and "to obtain the attendance and examination of witnesses on his behalf ***under the same conditions*** as witnesses against him or her." (Emphasis added).

[11] See *Prosecutor v. Brima*, SCSL-2004-16-PT-68, *Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel*, paras. 55- 71, and *Prosecutor v. Norman*, SCSL-04-14-16-PT-59, *Decision on Confidential Motion on Detention Issue*, paras. 8-10, 14, 17. This position is consistent with the practice of other international tribunals, e.g. *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayawiza*, ICTR-99-52-I, *Decision on the Defence Motion for Declaratory relief from Administrative Measures Imposed on Hassan Ngeze at the UNDF*, 9 May 2002.

14. The minimum fair trial rights enshrined in Article 17 of the *Statute* mirror those found in Article 14 of the *ICCPR* which affirms the presumption of innocence and the equality of all persons before the law in all tribunals. In addition, Article 14(3)(e) mirrors Article 17(4)(e) of the Court.[12]

15. Various regional human rights instruments also enshrine the core right of any accused person to a fair trial. For instance, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[13] provides that in the determination of his civil rights and obligations or of any criminal charge, everyone is entitled to a fair trial (Article 6(1)). Furthermore, under Article (6)(3)(d), everyone charged with a criminal offence has the fundamental right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf ***under the same conditions*** as witnesses against him." (Emphasis added).

16. Similarly, under the *American Convention on Human Rights*,[14] every person is entitled to a fair trial, including to be presumed innocent until proven guilty according to law (Article 8(2)). Importantly, during proceedings, every person is entitled to "adequate time and means for the preparation of his defence" (Article 8(2)(c)), "the right to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts" (Article 8(2)(d)).

17. It is therefore submitted that in ensuring the fairness and integrity of the trial proceedings, the rights of the detainees to "***obtain the attendance and examination of witnesses***"[15] and to examine or have examined witnesses against them "***under the same conditions*** as witnesses against" them is an integral and indivisible part of

[12] **Principle 29(2) of the *UN Detention Principles* states "A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention ...", *supra* note 3.**
[13] As amended by Protocols Nos. 3, 5,8, 11.
[14] O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.
[15] This minimum guarantee is found in many human rights instruments and under Article 17 of the *Statute*.

the judicial process. With the installation of video cameras in the visitation area, the detainees fear that confirmed/potential witnesses will be averse to appearing on their behalf. While Defence witnesses may not have yet requested protective measures in the CDF case, in the AFRC trial, most of the Defence witnesses, by function of their status as ex-combatants and serving personnel, are demanding protective measures. Intimidation of witnesses will amount to a denial of full equality to obtain the attendance guaranteed in the *Statute* and under the above instruments of international law.[16]

18. The OPD further notes that the issue is not whether the administration of the Court has ulterior motives in installing the cameras, but the perception reasonably held by the detainees and their potential witnesses and how that impacts on their right to a fair trial. Indeed, it is trite to say that justice must not only be done, but that it must also be seen to be done.

19. In his letter of 22nd September 2005, the Registrar contends that Rule 24 of the *Rules of Detention* "refers to video surveillance of detainees in their cells and not to other areas of the facility". In his view, Rule 24 restricts video surveillance in detainee cells to protect their privacy, and in turn, explains why there must be an order to install surveillance equipment in the cells. Indeed, according to him, the existence of Rule 24 implies that the whole Detention Facility may have surveillance cameras.

20. With due respect, the OPD reads Rule 24 differently from the Registrar. As the title of the provision suggests, the rule generally regulates video surveillance. Pursuant to Rule 24(A), the Chief of Detention may, with the Registrar's approval, order that a detainee's cell be monitored by video surveillance cameras. This,

[16] In *Dombo Beheer BV v. Netherlands*, the European Court of Human Rights held that under the principle of equality of arms, as one of the underlying features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. In the ICTY, the Court affirmed in *Prosecutor v. Brdanin* that the rights of victims must be taken into consideration; however, that tribunal's statute makes the rights of the accused the first consideration.

however, is only possible if one of the 3 pre-conditions established by Rule 24 are fulfilled: that is, there is danger to the i) security and good order of the Detention Facility; or ii) danger to the health and safety of a Detainee; or iii) another person.

21. Even where a pre-condition is fulfilled, the period of surveillance is ***not to exceed*** **2** weeks, if there are no renewals of the order for an additional 2 weeks by the Registrar, which renewal shall be notified to the President of the Court (Rule 24(B)). Importantly, the decision to monitor detainees by video is subject to review, upon challenge by the detainee, by the President of the Court (Rule 24(C)). In other words, if the installation of surveillance cameras is permissible in the entire Detention Facility without any regard for the rights of the detainees, why would the drafters of the *Rules of Detention* not have said so? In any event, as a general proposition, if there is any doubt regarding the substantive contents of the rule, as is the case here, it must be interpreted in favour of the detainee.

22. In addition, according to the Registrar, the use of video surveillance is also consistent with the right to monitor visits, which pursuant to Rule 41(B) of the *Rules of Detention*, must be within "the sight and ***sound*** of staff." (Emphasis added). While, as already noted, the OPD does not dispute the Registrar's duty to maintain security and good order in the Detention Facility, it is clear that he is empowered to generally regulate visits from family and others under Rules 40, 41, 46 and 47 of the *Rules of Detention*. Indeed, under the powers afforded to him by Rule 47, the Registrar may "monitor private telephone calls, and may prohibit, regulate or set conditions" on visits between a detainee and any other person, ***if*** that visit could disturb the maintenance of the security and good order in the Detention Facility. It is submitted that these less intrusive measures could have been adopted by the Registrar without necessarily violating the detainee's fundamental fair trial rights.

23. In our view, surveillance cameras placed at key positions of the Court premises, excluding the Detention Facility's visitation areas, would address the Registrar's concerns and at the same time preserve the fundamental fair trial rights of the

accused. This position would be consistent with the practice of the ICTY, where no cameras were installed in the visitation areas of the tribunal's detention facilities. The practice of the ICTY to monitor visits "in the flesh,"[17] rather than with surveillance equipment, confirms that it is possible to address security while preserving the rights of the accused in similar penal situations.

B. The detainee's right to freely communicate with their lawyers will potentially be compromised by the presence of surveillance cameras.

24. Pursuant to Article 17(4)(d) of the *Statute*, each accused person is entitled to defend himself in person or through legal assistance of his own choosing. A key corrollary to this right is found in Rule 97 of the *RPE* which provides that all communications between lawyer and client shall be regarded as privileged. This rule is so fundamental to the fair administration of justice, whether at the national or international levels, that only the accused can generally disclose, or permit to be disclosed, the contents of communications between him and his lawyer. Rule 97 (i) to (iii) of the *RPE* affirms this position. [18]

25. With the installation of surveillance cameras in the Detention Facility's visitation area, it is highly likely that full and frank communication between the detainees and their counsel would be curtailed, if not wholly compromised. To the extent that the detainees cannot freely communicate all information in their possession to their counsel for use in their defence, their right to a fair trial articulated in Article 17 would have been rendered meaningless.

[17] Letter from Deputy Chief of Detention, ICTY to Deputy Principal Defender.

[18] This principle is supported in the case law of international tribunals. In *Lanz v. Austria*, the European Court of Human Rights ruled that an accused's right to communicate with his defence counsel out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and flows from Art 6(3) of the *European Convention*. See also Principle 18 of the *UN Detention Principles*, *supra* note 3.

VI. RELIEF SOUGHT

26. For all the above reasons, the OPD respectfully requests this Honourable Court to:

i) Urgently issue an Interim Order enjoining the Registrar of the Court from authorizing the installation of surveillance cameras in the visitation area of the Detention Facility of the Court, pending the hearing and determination of this Motion;[19]

ii) Issue an Order revoking the decision of the Registrar to install surveillance cameras in the visitation area of the Detention Facility of the Court; and

iii) Issue such other Orders that this Honourable Court may deem just.

Respectfully submitted,

Vincent Nmehielle

Principal Defender (on behalf of nine detainees presently in detention at the Court).

[19] Such a provisional order would be recognizing the status quo as the Registrar had, consistent with the requirements of natural justice, suspended his decision authorizing installation of surveillance cameras during the time the Defence Application was put before the President.

ANNEXURE

1. Notice to Detainees dated 15th September 2005.
2. Letter from the Principal Defender to the Registrar of the Special Court dated 16th September 2005.
3. Registrar's response to the letter from the Principal Defender dated 22nd September 2005.
4. The Principal Defender's Application for review of the Registrar's Decision on the Installation of Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone dated 21st October 2005.
5. Registrar's Response to the Application for a Review of the Registrar's Decision on the Installation of Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone dated 1st November 2005.
6. OPD Reply to the Registrar's Response to the Application for a Review of the Registrar's Decision on the Installation of Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone dated 7th November 2005.
7. Letter dated 1st December 2005 from the President of the Special Court to the Principal Defender Re: Application for a Review of the Registrar's Decision on the Installation of Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone.
8. Letter dated 2nd December 2005 from the Principal Defender Replying to the President of the Special Court.
9. Letter dated 26th January 2006 from the President of the Special Court to the Principal Defender.
10. Letter dated 13th October 2005 from the Deputy Chief of Detention at the ICTY to the Principal Defender.

LIST OF AUTHORITIES

1. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 March 1976, 999 UNTS 71; Art. 14; online: *www1.umn.edu/humanrts/instree/b3ccpr.htm*.
2. United Nation's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988); Principles 18, 29(2), 36; online: *www1.umn.edu/humanrts/instree/g3bpppdi.html*.
3. European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 Nov. 1950, entered into force 3 Sept. 1953, 213 UNTS 221; Art. 6(3); online: *www1.umn.edu/humanrts/instree/z17euroco.html*;
4. American Convention on Human Rights (Pact of San José), signed 22 Nov. 1969, entered info force 18 July 1978, 9 ILM 673 (1970); Art. 8; online: *www.oas.org/juridico/english/Treaties/b-32.htm*
5. *Dombo Beheer BV v. Netherlands*, [1993] IIHRL 87 (27 October 1993) 66 1993, Series A No.274; para. 33; online: *www.worldlii.org/eu/cases/ECHR/1993/49.html;*
6. ***Prosecutor v. Brdanin***, Decision on a third motion by Prosecution for protective measures, 8th November 2000; para. 13; online: www.un.org/icty/brdjanin/trialc/decision-e/01108PM213938.htm.

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September 15 2005

NOTICE TO DETAINEES

Workmen have been deployed to various areas of the Detention Facility, the court and the perimeter to prepare for the installation of a close circuit television security system. All public areas of the court and the detention facility will be monitored by security camera. This includes the common hallways of both A and B blocks, the visitation centre and the medical clinic hallway.

No private areas such as ablutions, livings quarters, prayer room, recreation room and the dining room will be subject to monitoring by camera. Furthermore the camera's have no capability to pick up any audio or to record any conversations. The camera's are strictly video.

The installation of this security system is non-negotiable, it has been approved by the Registrar and the work will go on regardless of any complaints that you may have. I understand that it could be quite noisy when the workmen are drilling and hammering in your living area, however I ask you to be patient and bear with the intrusion. Do not harass the workers as they are only doing their job and the work must go on.

Chief of Detention

~~[illegible]~~
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INTEROFFICE MEMORANDUM

To: Robin Vincent, Registrar

From: Vincent O. Nmehielle, Principal Defender

CC Chief of Detention, Norman Defence Team, Kallon Defence Team, Sessay Defence Team, Kondewa Defence Team, Gbao Defence Team, Kamara Defence Team, Kanu Defence Team, Brima Defence Team, Fofana Defence Team

Date: 16 September 2005

Subject: Notice to Detainees on the Installation of Closed Circuit Television Security System

Dear Robin:

I write on the above subject pursuant to the notice of 15 September 2005 from the Chief of Detention (herein attached), which I received by chance yesterday rather than being copied on it. The said notice indicated that "all public areas of the court and the detention facility will be monitored by security camera. This includes the common hallways of both A and B blocks, the visitation centre and the medical clinic hallway." The notice goes further to state that "the installation of this security system is non-negotiable, it has been approved by the Registrar and the work will go on regardless of any complaints that you may have."

The Office of the Principal Defender as the guardian of the Article 17 statutory rights of the accused persons under Rule 45 of the Rules of the Procedure of the Special Court will not unnecessarily oppose any general security initiatives that the Registrar as the Chief Administrative Officer of the court may choose to implement. However, the office is concerned in this particular case of closed circuit television cameras, as it relates to the rights and privileges that the accused persons have. While the general detention area may be subject to security surveillance, such surveillance must be carried out in accordance with the Rules of Detention and in this particular case, I am afraid that it is not being done in accordance with the Rules of Detention. Surveilling the "the visitation centre" will interfere with the privacy rights of accused persons to enjoy visits with their family, counsel, witnesses and investigators who may need to consult with accused persons without fear of being watched and possibly recorded. According to the provisions of Rule 24 of the Rules of Detention, which deals with video surveillance,

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(A) In case of danger to the security and good order of the detention facility or danger to the health and safety of a Detainee or any other person, the Chief of Detention may, with the approval of the Registrar, order that the cell of the detainee be monitored by video surveillance equipment for a period not exceeding fourteen days.

(B) The Registrar may, upon request by the Chief of Detention, renew such video surveillance for periods not exceeding fourteen days each. Renewals shall be reported to the President.

(C) The Detainee shall be immediately provided with a copy of the decision to be monitored by video surveillance, together with a copy of the reason therefore. The Detainee may appeal the decision to the President.

The provisions of Rule 24 above are quite clear of the area to be surveilled, which is the cell of the detainee where there is danger to the health and safety of the detainee or any other person or where there is danger to the security and good order of the detention facility. The Rules do not call for the surveillance of the visitation area of the detention facility. Surveilling the visitation centre will be in violation of the accused persons' privacy to meet with their families, counsel and other such persons that may be associated with their cases in a confidential manner. It will also amount to a disregard of the rights of the accused persons under Article 17 of the Statute of the Special Court. The Rules of Detention have ample checks on visits under Rules 40 and 41, which set out what visitors need to comply with.

It is therefore my submission that while my office does not oppose the security initiative of having surveillance cameras in the general areas of detention facility, as a security measure, such surveillance should not extend to the private areas of the detention facility such as the visitation centre. There is no apparent danger to the detention facility or to an accused person that would warrant video surveillance of the visitation area.

Thank you for your kind consideration in this regard.

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Vincent Nmehielle
Principal Defender
Defence Office
Special Court for Sierra Leone

22 September 2005

REF: REG/292/2005

Dear Vincent,

RE: VIDEO SURVEILLANCE IN DETENTION FACILITY

In your memorandum of 16 September 2005 you have argued that video surveillance cameras should not be used in the visiting area of the Detention Facility because;

1. it is contrary to Rule 24 of the Rules of Detention, and
2. it is contrary to Article 17 of the Statute of the Special Court.

Rule 24 refers to video surveillance of detainees in their cells and not to other areas of the facility. The reason that there is this restriction on the video surveillance of the cell area is because of the privacy issue that you raise in your letter. There therefore needs to be an order specific to the cell area before there can be any video surveillance.

However, I cannot accept your interpretation that Rule 24 extends to the whole of the Detention Facility. It is clear that Rule 24 refers only to the cell area of the detainee. In fact the existence of Rule 24, by implication, accepts that the Detention Facility may have video surveillance facilities and that Rule 24 seeks to confine its use to areas other than the cell area, to which special rules shall apply.

The use of video surveillance is also consistent with the right to monitor visits which, pursuant to Rule 41 (B) of the Detention Rules, must be within sight and sound of the staff. Even legal visits under Rule 44 (D) must be within the sight of staff. In these circumstances I cannot accept your argument that visiting areas cannot be monitored by video surveillance.

There have been a number of incidents in the Detention Facility with visitors passing or trying to pass unauthorised substances and articles to the detainees as well as the detainees passing unauthorised documents to visitors to take out of the facility. The use of video surveillance equipment is a legitimate method of monitoring this unauthorised activity and, as a consequence, assists in maintaining the good order of the Detention Facility which is a legitimate aim under the Rules of Detention.

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You have also argued that the use of the video surveillance equipment is contrary to Article 17 of the Statute of the Special Court. However you do not elaborate as to why this might be the case. Article 17 refers to the rights of fair trial of the detainees and I cannot see how the use of this equipment in any way breaches the provisions of that article.

I therefore cannot accept your arguments seeking to prevent the installation of the video surveillance equipment in the visiting area and wish to inform you that the installation will be completed as planned within the Detention Facility.

Yours sincerely,

Robin Vincent
Registrar Special Court for Sierra Leone.

Cc Chief of Detention

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INTEROFFICE MEMORANDUM

To: Justice A. Raja N. Fernando, President.

From: Vincent O. Nmehielle, Principal Defender.

Cc. Lovemore Munlo, Interim Registrar; Barry Wallace, Chief of Detention; All Detainees; Brima Defence Team; Fofana Defence Team; Gbao Defence Team; Kallon Defence Team; Kamara Defence Team; Kanu Defence Team; Kondewa Defence Team; Norman Defence Team; Sesay Defence Team; Elizabeth Nahamya, Deputy Principal Defender; Charles Jalloh, Legal Adviser, Haddijatou Kah-Jallow, Duty Counsel, RUF; Claire Carlton-Hanciles, Duty Counsel, CDF; Silas Chekera, Intern.

Date: 21st October 2005.

Subject: Application for a review of the Registrar's decision on the installation of surveillance cameras in the visitation areas of the detention facility of the Special Court for Sierra Leone.

Honourable Justice Fernando:

On behalf of the detainees currently held in the Detention Facility of the Special Court for Sierra Leone, please find attached the Defence Office's Application for a review of the Registrar's decision permitting the installation of surveillance cameras in the visitation areas of the Special Court's Detention Facility.

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Before: Justice A. Raja N. Fernando, President.

Interim Registrar: Mr. Lovemore Munlo.

Date Filed: 21st October 2005.

PROSECUTOR Against

Alex Tamba Brima
Moinina Fofana
Augustine Gbao
Morris Kallon
Brima Bazzy Kamara
Santigie Borbor Kanu
Allieu Kondewa
Sam Hinga Norman
Issa Hassan Sesay

APPLICATION FOR A REVIEW OF THE REGISTRAR'S DECISION ON THE INSTALLATION OF SURVEILLENCE CAMERAS IN THE DETENTION FACILITY OF THE SPECIAL COURT FOR SIERRA LEONE.

The Registrar

Office of the Principal Defender.
Defence Counsel for Alex Tamba Brima.
Defence Counsel for Moinina Fofana.
Defence Counsel for Augustine Gbao.
Defence Counsel for Morris Kallon.
Defence Counsel for Brima Bazzy Kamara.
Defence Counsel for Santigie Borbor Kanu.
Defence Counsel for Allieu Kondewa.
Defence Counsel for Sam Hinga Norman.
Defence Counsel for Issa Hassan Sesay.

I. INTRODUCTION

1. This Application is made on behalf of all nine detainees, presently held in the Detention Facility of the Special Court for Sierra Leone ("the Special Court"), to review the decision of the Registrar permitting the installation of surveillance cameras in the Detention Facility of the Special Court. This Application is being submitted pursuant to Rule 19(A) of the *Rules of Procedure and Evidence of the Special Court* ("the *Rules of Procedure*").[1]

2. Essentially, this Application argues that the installation of surveillance cameras in the Detention Facility strikes at the heart of fair trial rights and is therefore an unjustified interference with the rights of the detainees protected by the *Statute of the Special Court for Sierra Leone* ("the *Statute of the Special Court*"), the *Rules of Procedure*, the *Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone* ("the *Rules of Detention*"),[2] the *International Covenant on Civil and Political Rights* ("*ICCPR*"),[3] under regional human rights treaties and at customary international law.

3. Under the *Statute of the Special Court* and international law, the detainees are presumed innocent of the charges against them until proven guilty by a competent and impartial judicial tribunal. Thus, it is unreasonable to subject them to the same detention conditions as persons who have already been tried and convicted.[4] The Defence Office concedes that security considerations may warrant surveillance cameras within the vicinity of the Special Court. However, the Defence Office is opposed to the

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[1] As amended on 14 May 2005.
[2] As amended on 14 May 2005.
[3] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.
[4] The *United Nation's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988)*, ("*United Nation's Principles of Detention*") provides at Principle 36:

> 1. A detained person suspected of or charged with a criminal offence shall be presumed innocent ***and shall be treated as such*** until proved guilty according to law in a public trial at which he has ***had all the guarantees*** necessary for his defence. (Emphasis added).

installation of surveillance cameras in the visitation area of the Detention Facility. In the view of the detainees, the installation of surveillance equipment in the visitation area is a calculated measure to eavesdrop on their conversations with potential witness, as the Defence prepares to make its case. The detainees feel that this will adversely impact on their fair trial rights since potential witness will be intimidated and therefore unwilling to visit the Detention Facility and or to testify.

4. The following sections sets out the factual and procedural background giving rise to this Application, its legal basis, and the relief sought.

II. FACTUAL BACKGROUND

5. The detainees were arrested and sent to the temporary detention site on Bonthe Island between 10 March 2003 and 17 September 2003. They were subsequently transferred to the permanent Detention Facility of the Special Court in Freetown.

6. On 15 September 2005, workers contracted by the Facility and Management Unit of the Special Court were deployed to various section of the Detention Facility to prepare for the installation of surveillance cameras. In a notice dated the same day, the Chief of Detention for the first time notified the detainees that surveillance cameras were being installed in various areas of the facility, including the visitation area, and that the "installation of the security system is ***non-negotiable***" as it "has been approved by the Registrar."[5] The notice emphasised to the detainees that "***the work will go on regardless of any complaints that you may have.***"[6] (Emphasis added). This measure caused the detainees great concern as they were suspicious of the motive for the installation. They consequently requested the Office of the Principal Defender ("the Defence Office") to intervene to ensure that their rights are protected.

[5] See attached Notice to Detainees dated 15th September 2005.
[6] *Ibid.*

III. PROCEDURAL BACKGROUND

7. In a letter dated 16 September 2005,[7] the Principal Defender (Dr. Vincent Nmehielle) wrote to the Registrar of the Special Court explaining, *inter alia*, that:

(i) The Defence Office as the guardian of the rights of the accused persons under Rule 45 of the *Rules of Procedure* of the Special Court will not unnecessarily oppose any general security initiatives that the Registrar as the Chief Administrative Officer of the court may choose to implement. However, the Defence Office was concerned that the decision to install closed circuit television cameras would compromise the rights and privileges enjoyed by the accused persons.

(ii) Surveilling the visitation area will interfere with the privacy rights of the accused persons to enjoy visits with their family, counsel, witnesses and investigators who may need to consult with accused persons without fear of being watched and possibly recorded.

(iii) Rule 24 of the *Rules of Detention* is quite clear regarding the area that can be put under surveillance in the Special Court, that is to say, the detainee's cells. In addition, even under that provision, certain pre-conditions must be met before the rule would apply.

(iv) The installation of the cameras will also amount to a disregard of the rights of the accused person under Article 17 of the *Statute of the Special Court*.

(v) There is no apparent danger to the Detention Facility or to an accused person that would warrant video surveillance of the visitation area.

8. On 22nd September 2005,[8] the then Registrar (Mr. Robin Vincent) responded to the Principal Defender's letter maintaining, *inter alia*, that:

[7] The letter is attached.
[8] Letter is attached; however, it is unsigned – as explained above.

(i) Rule 24 refers to video surveillance of detainee's cell and not to other areas of the Detention Facility. The reason for the restriction on the video surveillance of the cell area is because of the privacy issue.

(ii) Rule 24 refers only to the cell area of the detainee, rather than the whole of the Detention Facility. In fact, the provision implies that the Detention Facility may install video surveillance facilities elsewhere.

(iii) The use of video surveillance is also consistent with the right to monitor visits.

(iv) There have been a number of incidents in the Detention Facility with visitors passing unauthorised substances and articles to the detainees as well as the detainees passing unauthorised documents to visitors to take out of the facility.

9. It is important to note that the Principal Defender did not receive the Registrar's letter until the 6th October 2005, after Mr. Robin Vincent had left the Special Court.

IV. LEGAL BASIS FOR THIS APPLICATION

10. At a general level, the applicable laws of the Special Court include the *Statute of the Special Court*, the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court*, the *Rules of Procedure*, other regulations lawfully enacted by the Special Court, and where relevant, treaties, principles and rules of international customary law as well as general principles of law derived from the national laws of legal systems of the world.[9]

V. ARGUMENT

11. This section of the Application presents three separate but related submissions. The first submission is the Defence Office's contention that the fair trial rights of the detainees guaranteed under the *Statute of the Special Court* and international law will

[9] As is confirmed by Rule 72 *(bis)* of the *Rules of Procedure* of the Special Court.

be compromised by the installation of video cameras in the visitation area of the Detention Facility because their potential witnesses will be intimidated. The second submission is related to the first and highlights the detainees concern that the installation of video cameras in the Detention Facility would likely lead to breaches of lawyer-client privilege (protected by the *Rules of Procedure*), thereby impacting negatively on their ability to mount a proper defence. The third and final submission relates to the role of the Defence Office, itself an institutional evolution in international criminal justice, as custodian of the rights of suspects and accused persons under the *Rules of Procedure* of the Special Court. The following sections of the Application will consider each of these arguments in turn.

A. The detainee's rights to a fair trial will be violated because potential witnesses will be intimidated by the presence of surveillance cameras

12. Article 17 of the *Statute of the Special Court* confers rights and minimum guarantees to all accused persons appearing before the Special Court. In relevant part, Article 17(4)(b) provides that any accused person shall "have adequate time and ***facilities*** for the preparation of his or her defence ...". (Emphasis added). Article 17(4)(e) states that any accused person shall have "the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his behalf ***under the same conditions*** as witnesses against him or her." (Emphasis added).

13. The minimum fair trial rights enshrined in Article 17 of the *Statute of the Special Court* mirror those found in Article 14 of the *ICCPR*. Article 14 of the *ICCPR* affirms the equality of all persons before the law, and notes that in all tribunals, the presumption of innocence is to be guaranteed. Article 14(3)(e) further provides that everyone shall be entitled "to examine, or have examined, the witnesses against him

and to obtain the attendance and examination of witnesses on his behalf ***under the same conditions*** as witnesses against him." (Emphasis added).[10] Article 17(2)

14. Various regional human rights instruments also enshrine the core right of any accused person to a fair trial. For instance, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("the *European Convention*")[11] provides that in the determination of his civil rights and obligations or of any criminal charge, everyone is entitled to a fair trial (Article 6(1)). Everyone is also entitled "to have adequate time and facilities for the preparation of his defence" (Article 6(3)(b). Furthermore, under Article (6)(3)(d), everyone charged with a criminal offence has the fundamental right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf ***under the same conditions*** as witnesses against him." (Emphasis added).

15. Similarly, under the *American Convention on Human Rights*,[12] every person is entitled to a fair trial, including the right to be presumed innocent until his or her guilt has been proven according to law (Article 8(2)). Importantly, during the proceedings, every person is entitled to "adequate time and means for the preparation of his defence" (Article 8(2)(c)), "the right to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts" (Article 8(2)(d)).

16. It is therefore submitted that in ensuring the fairness and integrity of the trial proceedings, the rights of the detainees to "***obtain the attendance and examination of witnesses***"[13] and to examine or have examined witnesses against them "***under the same***

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[10] According to Principle 29(2) of the *United Nations Principles of Detention*, "A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention ...", *supra* note 3.

[11] As amended by Protocols Nos. 3, 5,8,11, which entered into force on 21st September 1970, 20 December 1971, 1 January 1990 and 1st November 1998 respectively.

[12] O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[13] This is a minimum guarantee contained in many international human rights instruments and under Article 17 of the *Statute of the Special Court*.

conditions as witnesses against" them is an integral and indivisible part of the judicial process. With the installation of video cameras in the visitation area, the detainees fear that potential witnesses will be averse to appearing on their behalf. This will amount to a denial of full equality to obtain the attendance guaranteed in the *Statute of the Special Court* and under the above instruments of international law.

17. This submission is consistent with the jurisprudence of international tribunals. In *Dombo Beheer BV v. Netherlands*,[14] the European Court of Human Rights held that under the principle of equality of arms, as one of the underlying features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.

18. In the Special Court's sister tribunal ICTY, the court affirmed in *Prosecutor v. Brdanin*[15] that the rights of victims must be taken into consideration; however, that tribunal's statute makes the rights of the accused the first consideration.

19. The Defence Office further notes that the issue is not whether the administration of the Special Court has ulterior motives in installing the cameras, but the perception reasonably held by the detainees and their potential witnesses and how that impacts on their right to a fair trial. Indeed, it is trite to say that justice must not only be done, but that it must also be seen to be done.

20. It is conceded that the rights of detainees are not absolute and have to be balanced against other considerations like security. However, we maintain that their rights, especially the fair trial rights referred to above, should only defer to security considerations where there is reasonable justification. In this case, the detainees have generally been of good behaviour and there have been no reports of major security breaches. There is no apparent reason to believe that the detainees' cooperation with the

[14] 27th October 1993, Series A No.274, p. 39, para. 33.
[15] Decision on a third motion by Prosecution for protective measures November 8 2000. para. 13.

officials of the Detention Facility will change.[16] The minor security breaches referred to in the Registrar's letter do not justify violating the detainees' fundamental rights to a fair trial.

21. In his letter of 22nd September 2005, the Registrar of the Special Court contends that Rule 24 of the *Rules of Detention* "refers to video surveillance of detainees in their cells and not to other areas of the facility".[17] In his view, Rule 24 restricts video surveillance in detainee cells to protect their privacy, and in turn, explains why there must be an order to install surveillance equipment in the cells. Indeed, according to the Registrar, the existence of Rule 24 implies that the whole Detention Facility may have surveillance cameras.

22. As Rule 24 (Video Surveillance) is central to the Registrar's argument, it is worth setting out in full:

> (A) In case of danger to the security and good order of the Detention Facility or danger to the health and safety of a Detainee or any other person, the Chief of Detention may, with the approval of the Registrar, order that the cell of the Detainee be monitored by video surveillance cameras for a period not exceeding fourteen days.
>
> (B) The Registrar may, upon request by the Chief of Detention, renew such video surveillance for periods not exceeding fourteen days each. Renewals shall be reported to the President.
>
> (C) The Detainee shall be immediately provided with a copy of the decision to be monitored by video surveillance, together with the reasons therefore. The Detainee may appeal the decision to the President.

23. With due respect, the Defence Office reads Rule 24 differently from the Registrar.[18] As the title of the provision indicates, it is clear from a plain reading that the rule

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[16] There are no records of major disturbances.
[17] See Registrar's letter cited earlier.
[18] The rule of interpretation *expressio unius exclusio alterius* will apply. Under this rule, where a word or phrase is expressly mentioned or included, it implies the exclusion of others. Thus, because Rule 24 only anticipates and regulates the installation of surveillance equipment in the cell area of the detention facility, it means that such equipment cannot be installed in other areas. For more on the rule, see *R. v. Multiform manufacturing Co.* [1990] 2 S.C.R. 624 at p. 631.

generally regulates video surveillance. Pursuant to Rule 24(A), the Chief of Detention may, with the approval of the Registrar, order that the cell of a Detainee be monitored by video surveillance cameras. This, however, is only possible if one of the three pre-conditions established by the rule are fulfilled by the Chief of Detention who must show that there is danger to the i) security and good order of the Detention Facility; or ii) danger to the health and safety of a Detainee or iii) another person.

24. Even where a pre-condition is fulfilled thereby triggering the application of the rule, the period of surveillance is ***not to exceed*** two weeks, if there are no renewals of the order for an additional two weeks by the Registrar, which renewal shall be notified to the President of the Special Court (Rule 24(B)). Importantly, the decision to monitor detainees by video is subject to review, upon challenge by the detainee, by the President of the Special Court (Rule 24(C)).

25. In our view, if Rule 24 were intended to permit a total invasion of privacy of the detainees, as submitted by the Registrar, there would be no need to have such a provision in the *Rules of Detention*, and furthermore, to subject its application to review by the President of the Court. In other words, if the installation of surveillance cameras is permissible in the entire Detention Facility without any regard for the rights of the detainees, why would the drafters of the *Rules of Detention* not have said so? In any event, as a general proposition, if there is any doubt regarding the substantive contents of the rule, it must be interpreted in favour of the detainee.

26. In addition, according to the Registrar, the use of video surveillance is also consistent with the right to monitor visits, which pursuant to Rule 41(B) of the *Rules of Detention*, must be within "the sight and ***sound*** of staff." (Emphasis added). The Registrar further justified the decision to install surveillance cameras in visitation areas on the basis that it is a legitimate method of monitoring unauthorized activity (alleged passing of substances and documents to the detainees by visitors) and of ensuring good order in the Detention Facility.

27. While, as already noted, the Defence Office does not dispute the Registrar's duty to maintain security and good order in the Detention Facility, it is clear that he is empowered to generally regulate visits from family and others under Rules 40, 41, 46 and 47 of the *Rules of Detention*. Indeed, under the powers afforded to him by Rule 47, the Registrar may "monitor private telephone calls, and may prohibit, regulate or set conditions" on visits between a detainee and any other person, ***if*** that visit could disturb the maintenance of the security and good order in the Detention Facility. It is submitted that these less intrusive measures could have been adopted by the Registrar without necessarily violating the detainee's fundamental fair trial rights.

28. In our view, surveillance cameras placed at key positions of the Special Court premises, excluding the detention facility, would address the Registrar's concerns and at the same time preserve the fundamental fair trial rights of the accused. This position would be consistent with the practice of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), where no cameras were installed in the visitation areas of the tribunal's detention facilities. The practice of the ICTY to monitor visits "in the flesh,"[19] rather than with surveillance equipment, confirms that it is possible to balance the need for security while preserving the rights of the accused in similar penal situations.

B. The detainee's right to freely communicate with their lawyers will potentially be compromised by the presence of surveillance cameras.

29. Pursuant to Article 17(4)(d) of the *Statute of the Special Court*, each accused person is entitled to defend himself or herself in person or through legal assistance of his or her own choosing. A key corrollary to this right is found in Rule 97 of the *Rules of Procedure* of the Special Court which provides that all communications between lawyer and client shall be regarded as privileged.[20] This rule is so fundamental to the

[19] See attached letter from the Deputy Chief of Detention at the ICTY to the Deputy Principal Defender.

[20] All communications between Lawyer and Client shall be regarded as privileged and consequently disclosure cannot be ordered, unless ;

fair administration of justice, whether at the national or international levels, that only the accused can generally disclose, or permit to be disclosed, the contents of communications between him and his lawyer. Rule 97 (i) to (iii) of the *Rules of Procedure* of the Special Court affirms this position.[21]

30. This principle is supported in the case law of international tribunals. In *Lanz v. Austria*,[22] the European Court of Human Rights ruled that an accused's right to communicate with his defence counsel out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and flows from Art 6(3) of the *European Convention.*

31. With the installation of surveillance cameras in the visitation area of the Detention Facility, it is highly likely that full and frank communication between the detainees and their counsel would be curtailed, if not wholly compromised. To the extent that the detainees cannot freely communicate all information in their possession to their counsel for use in their defence, their right to a fair trial articulated in Article 17 would have been rendered meaningless.

(i) The Client consents to such disclose; or
(ii) The client has voluntary disclosed the content of the communication to a third party and that third party then gives evidence of the disclosure.
(iii) The client has alleged in effective assistance of Counsel, in which case the privilege is waived as to all communications relevant to the claim of ineffective assistance.

[21] According to the *United Nations Principles of Detention, supra* note 3, at Principle 18:

> 1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
> 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
> 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
> 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
> 5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

[22] [2002] ECHR 24430/94.

C. The role of the Defence Office in upholding the rights of suspects and accused requires that it be consulted or notified when the detainee's rights are at stake

32. The Defence Office of the Special Court is a novel concept in international criminal justice. The functions of the office are set out in Rule 45 of the *Rules of Procedure*. Distinct from the fee paying, solely administrative structures of the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), the Defence Office is mandated to ensure that the rights of all suspects and accused are continuously upheld [23] As the principal guardian of the rights and interests of the detainees, its role is to represent them at the various stages of the legal proceedings where, for whatever reason, they are without representation or assigned Counsel. Because the role of the Defence Office is crucial in ensuring adequate protection for the rights of the detainees, the Principal Defender should be notified or consulted on matters affecting the enjoyment of those rights. Thus, Rule 45 of the *Rules of Procedure* should be read in conjunction with the requirements for a fair trial contained in Article 17 of the *Statute of the Special Court*.

33. The Registrar's failure to consult with the detainees or the Defence Office before approving the request to install video cameras in the Detention Facility is arbitrary given the fair trial rights guaranteed in the *Statute of the Special Court* and under

[23] Rule 45 of the *Rules of Procedure* provides that:

> The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused. The Defence Office shall be headed by the Special Court Principal Defender.
>
> (A) The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to:
>
> (i) suspects being questioned by the Special Court or its agents under Rule 42, including non-custodial questioning;
>
> (ii) Accused persons before the Special Court.
>
> (B) The Defence Office shall fulfill its functions by providing, *inter alia*:
>
> (i) initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned;
>
> (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
>
> (iii) Adequate facilities for counsel in the preparation of the defence.
>
> (C) The Principal Defender shall, in providing an effective defence, maintain

international law. As Sierra Leoneans, the detainees and their potential witnesses have limited experience, if any, with video surveillance equipment. Therefore, the detainees' apprehension that they will be denied a fair trial is understandable, as is witnesses fear that they will be victimized for testifying on behalf of the detainees.

34. The Defence Office further submits that fair trial rights are the cornerstone of the judicial process.[24] In order to maintain the integrity, transparency and fairness of the process before the Special Court, the accused person's rights must be seen to have been given due and paramount consideration. For the Registrar to have delayed installation of the video cameras for well over two years, when the Prosecution has closed its case and on the eve of the commencement of the Defence case may, without any intention on the Registrar's part, call the transparency and integrity of the entire process into question.

VI. RELIEF SOUGHT

35. The foundation of this Application is the universally recognized right to a free and fair trial. For all the above reasons, in particular our concerns about ensuring that the Article 17 rights of the accused are adequately protected, the Defence Office respectfully requests your honour to revoke the decision of the Registrar to install surveillance cameras in the visitation area of the Detention Facility of the Special Court.

For Dr. Vincent O. Nmehielle, Principal Defender

[24] The Defence Office emphasizes that the overriding consideration in credible judicial proceeding is the fairness of the proceedings, as confirmed by Rule 26 *bis* of the *Rules of Procedure and Evidence* and Article 20(1) and 19(1) of the ICTY and ICTR Statutes respectively. Fair trials must ensure adequate protection for the detainee's rights. This position finds ample support in the jurisprudence of national and international tribunals.

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SPECIAL COURT FOR SIERRA LEONE

Before: Justice A. Raja N. Fernando, President

Interim Registrar: Mr. Lovemore Munlo

Date: 1 November 2005

PROSECUTOR

Against

ALEX TAMBA BRIMA
MOININA FOFANA
AUGUSTINE GBAO
MORRIS KALLON
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU
ALLIEU KONDEWA
SAM HINGA NORMAN
ISSA HASSAN SESAY

REGISTRAR'S RESPONSE TO THE APPLICATION FOR A REVIEW OF THE REGISTRAR'S DECISION ON THE INSTALLATION OF SURVEILLANCE CAMERAS IN THE DETENTION FACILITY OF THE SPECIAL COURT FOR SIERRA LEONE

The Registrar

Defence Office
Defence Counsel for Alex Tamba Brima
Defence Counsel for Moinana Fofana
Defence Counsel for Augustine Gbao
Defence Counsel for Morris Kallon
Defence Counsel for Brima Bazzy Kamara
Defence Counsel for Santigie Borbor Kanu
Defence Counsel for Allieu Kondewa
Defence Counsel for Sam Hinga Norman
Defence Counsel for Issa Hassan Sesay

I. Introduction

1. The Registrar makes these submissions in response to the Application of the Principal Defender on behalf of the nine detainees for a Review of the Registrar's Decision on the Installation of Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone ("the Application").
2. The Application for review is made under Rule 19(A) of the Rules of Procedure and Evidence ("the Rules"). The relief sought is an order revoking the decision of the Registrar to install surveillance cameras in the visitation area of the Detention Facility (paragraph 35).

II. Jurisdiction

3. The functions of the Registrar include responsibility for the administration and servicing of the Special Court (Article 16(1) of the Statute and Rule 33(A)). Rule 33(C) provides as follows:

> "The Registrar, mindful of the need to ensure respect for human rights and fundamental freedoms and particularly the presumption of innocence, shall, with the approval of the Council of Judges, adopt and amend rules governing the detention of persons awaiting Trial or Appeal or otherwise detained by the Special Court and ensure conditions of detention."

4. Rule 3 of the Rules of Detention provides as follows:

> "...Under the authority of the Registrar, the Chief of Detention shall have responsibility for all aspects of the daily management of the Detention Facility, including security and good order, and may make all decisions relating thereto, except where otherwise provided in the Rules."

5. The Rules of Detention expressly provide for the exercise of authority by the President in respect of detention matters in three specific instances under Rules 22, 24 (C) and 47(G).[1]

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[1] Under Rule 22, the President may order an inquiry into the circumstances of the death, serious illness or serious injury of a detainee. Rule 24 (C) provides that a detainee may appeal to the President from a decision by the Registrar to monitor the detainee's cell by video surveillance equipment. Rule 47 allows the Registrar, inter alia, to prohibit, regulate or set conditions for communications by or visits to a detainee (paragraph (A)) and to make arrangements for the interception of communications by any or all of the detainees (paragraph (B)). Paragraph (G) provides that a detainee may request the President to reverse a decision made by the Registrar under Rule 47.

6. President Robertson in a decision[2] considered the role of the Judges of the Court in respect of detention matters. The President noted:

> "The Detention Rules give necessary powers to the Head of Detention, subject to direction by the Registrar. Judges have no part in administering or ordering these rules, although in three difficult or urgent situations the President does have a role ...These are serious situations where it is right that the President, as head of the Special Court, should oversee the Registrar. Otherwise, judges are not involved in administrative detention matters unless they impact significantly upon the right under Article 17(4)(b) of the Statute to adequate preparation of the defence, when they may be raised by motion before the Trial Chamber judges who are best placed to make such a determination." [3]

7. The Registrar submits that this case is not one of the situations in which the President may act under the Rules of Detention. In the absence of an express right for a detainee to apply to the President under the Rules of Detention for a review of the decision, the Applicants have no basis on which to bring this application for review.

8. The Detention Facility is in the country in which the conflict took place and therefore the conditions affecting the security and good order of the Facility may change quickly and must remain under active consideration by the Chief of Detention. It is submitted that the decisions of the Chief of Detention pursuant to Rule 3 regarding security and good order are not amenable to review by the President.

9. Further, the Registrar submits that administrative decisions which are alleged to violate the fair trial rights of the accused under Article 17 of the Statute are not properly the subject of review by the President under Rule 19(A). The Court has jurisdiction to judicially review such administrative decisions under its inherent powers.[4] It is submitted that the jurisdiction of the Trial and Appeals Chambers regarding Article 17 rights is exclusive. If the President has concurrent jurisdiction with the Trial and Appeals Chambers, there is the potential for inconsistent

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[2] *Prosecutor v Norman,* SCSL 03-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, paragraph 5.

[3] Ibid, at paragraph 5.

[4] *Prosecutor v Brima and others*, Case No. SCSL-04-16-T, Decision on Applicant's Motion against Denial by the Acting Principal Defender to enter a Legal Service Contract for the Assignment of Counsel, Trial Chamber I, 6 May 2004.

decisions regarding the interpretation and application of Article 17. Further, an accused would not have a right of appeal from a decision of the President.

10. In the event that the Honorable President does not accept the Registrar's submissions on jurisdiction, the merits of the submissions made by the Applicants are addressed below.

III. Factual Background

11. The Applicants submit that the detainees have generally been of good behaviour and there have been no reports of major security breaches (paragraph 20 and footnote 16 of the Application). Contrary to the Applicants' submissions there have been a number of incidents in which the security and good order of the Detention Facility has been threatened, some of which involved visits to detainees. Examples include:
    a. In July 2005 a defence investigator visiting a detainee to deliver documents was searched before he entered the Facility and a mobile phone was found hidden in his sock;
    b. In 2004 and 2005, there have been numerous incidents in which one detainee has violated the Rules of Detention relating to communications with the media by causing documents to be published without obtaining the consent of the Registrar. It is the belief of the Chief of Detention that documents have been passed to visitors by the detainee and smuggled out of the Facility;
    c. Various attempts have been made by visitors to smuggle suspected drugs and other unauthorised items into the Facility; and
    d. On 6 October 2005, a detainee attacked contractors installing the video surveillance cameras in the Detention Facility. The detainee threw a stone hitting one contractor on his head and another contractor was sprayed in the eyes with insecticide.
12. The project to install the video surveillance system has been ongoing since 2003. Various delays have occurred in the installation of the system due to procurement issues. There was no intention to cause a delay until the commencement of defence cases (paragraph 34 of the Application.)

IV. Arguments of the Office of the Principal Defender

A. The Rules of Detention

13. The Registrar refers to Rule 3 of the Rules of the Detention. The Chief of Detention is conferred a general power to make all decisions relating to security and good order and his power is subject only to the express restriction "except where otherwise provided in the Rules." On a proper interpretation of Rule 3, there is no requirement for every measure adopted to maintain security and good order to be expressly provided for in the Rules.

14. The decision by the Chief of Detention to install a video surveillance system in the Detention Facility was made in order to protect the security and good order of the Facility, taking into account a range of factors including:

    a. The security risks posed from the location of the Detention Facility in the country in which the conflict took place, including the risk of escape of the detainees with the assistance of third parties; and

    b. Due to staffing constraints only one detention officer is available to carry out random patrols of the visiting rooms. The means of monitoring of visits needs to be improved in light of the incidents described in paragraph 11 above.

15. The issue to be determined is whether the monitoring of visits by video surveillance by the Chief of Detention is prohibited. The Applicants argue that Rule 24 (Video Surveillance) generally regulates the use of video surveillance and that use of video surveillance for purposes other than for monitoring the cell of a detainee is not permitted (paragraphs 23 to 25 of the Application). The Registrar submits that the Applicants' interpretation of Rule 24 is incorrect.

16. When read together with Rule 3, the natural and ordinary meaning of Rule 24 is clear. Rule 24 does not purport to generally regulate the use of video surveillance. The Rule is expressly limited to monitoring of a Detainee's cell only and the conditions under which this may take place. The principle of interpretation *expressio unius exclusio alterius* (footnote 18 of the Application) is not of any assistance in this case as the Rule, interpreted in light of Rule 3, does not purport to deal with the use of video surveillance in the Detention Facility as a whole.

17. The Rules of Detention restrict any right of privacy by expressly providing for visits to be monitored under Rule 41(B) (Visits from Family and Others) and Rule 44 (D)

(Communications with and Visits from Counsel). The purpose of monitoring of visits is to maintain security and good order. No challenge has been made to the lawfulness of these Rules.

18. Rule 41(B) provides that "[a]ll visits shall be conducted in the sight and within hearing of the staff of the Detention Facility." In respect of legal visits, Rule 44(D) provides that visits "shall be conducted in the sight of but not within the hearing for the staff of the Detention Facility."
19. The capacity of the video surveillance system is limited to recording images only: it cannot be used to monitor detainees' conversations with visitors. This was made explicit in the Notice to Detainees dated 15 September 2005. There is no basis for the detainees' apprehension that the installation of the system is a calculated measure to eavesdrop on their conversations or that there are ulterior motives (see paragraphs 3 and 19 of the Application.)
20. Rules 41(B) and 44(D) do not require that the staff of the Detention Facility be physically present in the visiting areas to carry out monitoring. The surveillance system simply provides another mechanism for the monitoring by sight provided for in the Rules, that is, staff can monitor footage of the visits in other locations within the Detention Facility.
21. The measures would not change the conditions under which legal visits take place under Rule 44 of the Rules of Detention, that is, with monitoring by sight only.
22. The Registrar submits that the monitoring allowed by Rules 41(B) and 44 (D) does not become unlawful merely because such monitoring is now proposed to be done through video surveillance.

B. Fair Trial Rights of Detainees under Article 17

23. The first argument made by the Applicants is that their rights under Article 17(4)(e) would be denied as a result of the installation of video cameras in the visiting area (paragraph 16 of the Application).
24. The accused fear that potential witnesses would be averse to appearing on their behalf. In paragraph 33 of the Application, the Applicants explain that potential witnesses who are Sierra Leonean have "limited experience, if any, with video surveillance equipment" and witnesses fear they will be "victimized for testifying

on behalf of the detainees." The Registrar is not in a position to comment on the submission that the measures would in fact operate to deter potential witnesses from appearing for the defence. It is noted that, currently, all visitors to the detainees are monitored in one form or another upon entering the site of the Court. Any witness who appears for the defence at trial may have his or her identity and evidence broadcast unless the witness is a protected witness.

25. The purpose of the minimum guarantees protected by Article 17(4)(e) (and the equivalent guarantees in the European Convention[5] and the ICCPR[6]) is to ensure that the accused has the same legal powers of compelling the attendance of witnesses and examining or cross-examining any witnesses as are available to the prosecution. [7] The measures which are the subject of this application relate to the conditions of the detention of the accused and do not in any way, directly or indirectly, affect the legal powers of the accused protected by Article 17(4)(e).
26. The second argument made by the Applicants is that the right of the accused to freely communicate with their lawyers may be compromised by the measures (paragraphs 29 to 31). The Applicants refer to the minimum guarantees set out in Article 17(4)(d) (entitlement to defend him- or herself through legal assistance of his or her own chosing) and Rule 97 (lawyer-client privilege).
27. Under Rule 44 of the Rules of Detention lawyer client privilege may only be removed pursuant to an order of a Judge or Chamber (Rule 44(A)).
28. As explained in paragraphs 19 to 21 above, privileged communications during legal visits would remain confidential as the surveillance system does not record sound. The Registrar submits that there is no basis for the Applicants' submission that the result of the measures would be that "it is highly likely that full and frank communication between the detainees and their counsel would be curtailed, if not wholly compromised." (Paragraph 31 of the Application.)
29. It is submitted that the rights of the accused under Article 17 would be preserved upon the introduction of the measures.

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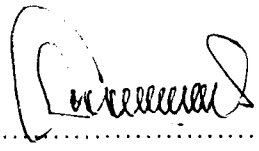
[5] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as amended.
[6] International Covenant on Civil and Political Rights.
[7] Joseph et al, The International Covenant on Civil and Political Rights, Cases Materials, and Commentary, 2nd Edn, Oxford University Press, 2004, pages 446-7, paragraph 14.121.
Clayton and Tomlinson, The Law of Human Rights, Volume I, Oxford University Press, 2000, paragraphs 11.252-254.

30. The Registrar submits that the practices adopted in the ICTY Detention Facility, as set out in paragraph 28 of the Application, are not relevant as the ICTY Facility is not located in the country of conflict.

V. Conclusion

31. Based on the submissions above, the Registrar submits that the Application should be dismissed.

Respectfully submitted,



Mr. Lovemore Munlo
Interim Registrar

Dated: 1 November 2005

List of Authorities

1. *Prosecutor v Norman,* SCSL 03-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003.

2. *Prosecutor v Brima and others*, Case No. SCSL-04-16-T, Decision on Applicant's Motion against Denial by the Acting Principal Defender to enter a Legal Service Contract for the Assignment of Counsel, Trial Chamber I, 6 May 2004.

3. Joseph et al, The International Covenant on Civil and Political Rights, Cases Materials, and Commentary, 2nd Edn, Oxford University Press, 2004.

4. Clayton and Tomlinson, The Law of Human Rights, Volume I, Oxford University Press, 2000, paragraphs 11.252-254.

THE LAW OF HUMAN RIGHTS

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may have passed muster in the days when the English common law offences did not receive critical scrutiny from national judicial guarantees of a rights-based jurisprudence, but these days will soon be over. English judges will then be applying a Human Rights Convention which has the effect of prescribing that a criminal offence must be clearly defined in law. I do not accept [Counsel's] submission that it is impossible to define the kind of conduct his clients wish to prohibit with greater precision, or that it is satisfactory to leave it to individual magistrates to decide, assisted only by some arcane case-law, whether or not activities of the type which the Council complains in this case amounts to a breach of good order so as to render the licensees liable to criminal penalties.[593]

C. The Law Under the European Convention

(1) Introduction

Article 6 of the Convention provides that: **11.150**

> (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 interest 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.
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (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) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

In the most general terms, Article 6 applies to proceedings which constitute a determination of criminal charges or the civil rights and obligations of accused persons. As the Convention provides no definition of 'criminal charge', 'civil rights and obligations' or 'determination', the interpretation of those phrases has fallen **11.151**

[593] *Westminster City Council v Blenheim Leisure* (1999) 163 JP 401.

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agent provocateurs[892] rather than being detected by undercover agents.[893] The Court has made it clear that, while the rise in organised crime requires appropriate measures, 'the public interest cannot justify the use of evidence obtained as a result of police incitement'.[894]

11.217 *Cross-examination of witnesses.* In criminal trials witnesses must generally be made available for cross-examination by the accused regardless of the form in which their evidence originally comes before the court. For example, in *Unterpertinger v Austria*[895] family members who were allegedly assaulted by the applicant exercised their right under Austrian law not to give oral testimony, and the prosecution obtained a conviction of the accused 'mainly' on the basis of their sworn statements to the police. The Court found a breach of Article 6(1) as the right of the accused to a defence was 'appreciably restricted'. The decision was followed in *Kostovski v Netherlands*[896] where the conviction was 'to a decisive extent' based on the statements of two witnesses who failed to give evidence at trial and remained anonymous out of fear that their testimony would lead to reprisals by organised crime in which the accused had been involved. These cases suggest that an infringement of Article 6 will occur where the evidence of the missing witness is the 'main' or 'decisive' evidence before the Court. However, in *Asch v Austria*[897] the Court appeared to relax the general rule: holding that there would be no breach where the evidence is absolutely uncorroborated unless it is the 'only' piece of evidence on which the conviction was based. However, the defence must be given an 'adequate and proper opportunity to question a witness against him' at some stage of the proceedings.[898] Where there are potential threats to the life, liberty or security of witnesses, it is permissible for them to remain anonymous[899] and to give evidence from behind a screen.[900] The defence must be able to question the witness, in order to test his credibility and the reliability of the evidence.

11.218 **Right to a reasoned judgment.** A court must give reasons for its judgment so that any party with an interest in the case is informed of the basis of the decision,

[892] As in the *Teixeira de Castro* case (n 891 above)
[893] As in *Lüdi v Switzerland* (1992) 15 EHRR 173.
[894] *Teixeira de Castro* (n 891 above) para 36.
[895] (1986) 13 EHRR 175.
[896] *Kostovski v Netherlands* (1989) 12 EHRR 434; see also *Lüdi v Switzerland* (1992) 15 EHRR 173 (breach was found where the evidence was not the sole evidence, but had 'played a part in' the conviction).
[897] *Asch v Austria* (1991) 15 EHRR 597 (no breach was found where other corroborating evidence was present); see also *Artner v Austria* (1992) Series A No 242-A.
[898] *Asch v Austria* (n 897 above) para 27; it is difficult to reconcile this statement of principle with the decision in the case, see the dissenting opinions of Judges Sir Vincent Evans and Bernhardt, see also *Ferantelli and Santangelo v Italy* (1996) 23 EHRR 288 and see generally, O Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) 212.
[899] *Doorsen v Netherlands* (1996) 22 EHRR 330 paras 68–71.
[900] See *X v United Kingdom* (1992) 15 EHRR CD 113.

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some proceedings by filing in the court registry.[992] The form of publicity to be given to the judgment is to be assessed in the light of the special features of the case and by reference to the object and purpose of Article 6(1).[993]

(4) Minimum standards of fairness in criminal proceedings

(a) Introduction

11.235 Articles 6(2) and 6(3) provide for specific rights in relation to criminal proceedings. These guarantees are specific aspects of the right to fair trial in Article 6(1).[994] These provisions must be read with those of Article 6(1). A criminal trial could be 'unfair' even if the minimum rights guaranteed by Article 6(3) are respected.[995] In addition, Article 6, read as a whole, guarantees the right of an accused to participate effectively in his trial.[995a] This right was violated when two ten-year-olds were tried for the murder of a young boy in a highly publicised trial in the Crown Court.[995b] It should be noted that the provisions of Article 6 do not, of themselves, create any right to compensation for miscarriage of justice.[996]

(b) Presumption of innocence

11.236 Article 6(2) provides that a person 'charged with a criminal offence shall be presumed innocent until proved guilty according to law'. This applies to persons subject to a 'criminal charge', which has the same autonomous Convention meaning as it does under Article 6(1).[997] As a result, Article 6(2) is not relevant where a person is merely suspected of a crime, or detained for a purpose, such as extradition[998] or deportation[999] that does not involve criminal prosecution. It has not been applied to practices such as blood tests,[1000] medical examinations[1001] or production of documents.[1002]

11.237 Article 6(2) requires:

> that when carrying out their duties, the members of a court should not start with

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[992] *Preto v Italy* (1983) 6 EHRR 182; *Axen v Germany* (1983) 6 EHRR 195 (Court of Appeal proceedings).

[993] *Preto v Italy* (n 992 above).

[994] *Edwards v United Kingdom* (1992) 15 EHRR 417 para 33.

[995] *Jespers v Belgium* (1981) 27 DR 61 para 54, EComm HR, cf, P van Dijk and G van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer, 1998) 463.

[995a] *Stanford v United Kingdom* (1994) A 282-A para 26; *T v United Kingdom* (2000) 7 BHRC 659.

[995b] *T v United Kingdom* (n 995a above) paras 97–98 (concurring opinion of Lord Reed).

[996] *Masson and Van Zon v Netherlands* (1995) 22 EHRR 491; this right is provided for in Protocol 7, Art 3 (not ratified by the United Kingdom); for the English law, see para 11.138 above.

[997] *Adolf v Austria* (1982) 4 EHRR 313 para 30; and see para 11.174 above.

[998] *X v Austria* (1963) 6 YB 484, EComm HR.

[999] *X v Netherlands* (1965) 8 YB 228, EComm HR.

[1000] *X v Netherlands* (1978) 16 DR 184, EComm HR.

[1001] *X v Germany* (1962) 5 YB 192, EComm HR.

[1002] *Funke v France* (1993) 16 EHRR 297.

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> the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution and any doubt should benefit the accused.[1003]

This also implies that it is for the prosecution to inform the accused of the nature of the case against him.[1004] The presumption will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty.[1005] It is not necessary for there to be a formal finding if there is some reasoning suggesting that the Court regards the accused as guilty.[1006]

11.238 Article 6(2) does not prohibit presumptions of fact and law but the State must

> confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[1007]

Thus, it has been held that the following do not violate Article 6(2):

- the requirement that a person charged with criminal libel prove the truth of the statement;[1008]
- the presumption that a person, having come through customs in possession of prohibited goods, had smuggled them;[1009]
- the presumption that a man living with a prostitute was knowingly living off immoral earnings;[1010]
- a presumption that a dog was a member of a specified breed;[1011]
- the burden on the accused to establish the defence of insanity.[1011a]

Furthermore, strict liability offences, which require no mens rea element, will not be a violation of Article 6(2).[1012] The presumption of innocence does not require that guilt be proved 'beyond a reasonable doubt': Article 6(2) simply requires evidence 'sufficiently strong in the eyes of the law to establish . . . guilt'.[1013]

[1003] *Barberà Messegué and Jabardo v Spain* (1988) 11 EHRR 360 para 77; *Austria v Italy* (1963) 6 YB 740.

[1004] Ibid.

[1005] *Allenet de Ribemont v France* (1995) 20 EHRR 557 para 35.

[1006] *Minelli v Switzerland* (1983) 5 EHRR 554 para 37 (acquitted defendant ordered to pay the costs on the basis that he would, 'very probably' have been convicted had he not had the advantage of a limitation defence).

[1007] *Salabiaku v France* (1988) 13 EHRR 379 para 28.

[1008] *Lingens and Leitgens v Austria* (1982) 4 EHRR 373, 290–291, EComm HR.

[1009] *Salabiaku v France* (n 1007 above) para 30.

[1010] *X v United Kingdom* (1972) 42 CD 135, EComm HR.

[1011] *Bates v United Kingdom* [1996] EHRLR 312, EComm HR; (the presumption was held to be within reasonable limits because the accused had an opportunity to rebut it).

[1011a] *H v United Kingdom* Application 15023/89, 4 Apr 1990, contrast the position in Canada, see para 11.405A below.

[1012] *Salabiaku v France* (n 1007 above).

[1013] *Austria v Italy* (1963) 6 YB 740, EComm HR.

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Other obligations with respect to evidence under Article 6(2) overlap with the general 'fair hearing' requirement of Article 6(1), as well as with Article 6(3)(d). The presumption of innocence means that the accused must be able to rebut evidence brought against him.[1014] Article 6(2) was not violated by: the admission of a statement made when the accused was not informed of his right to silence,[1015] disclosure of the accused's criminal record to the court prior to conviction,[1016] the arrest of a defence witness for perjury immediately after his testimony,[1017] re-trial of the accused by the court that heard his bail application,[1018] or procedure providing for a guilty plea.[1019] **11.239**

Article 6(2) also protects the accused from prejudicial statements by public officials which disclose the view that the applicant is guilty before he has been tried and convicted. In *Krause v Switzerland*,[1020] the Swiss Minister of Justice stated on public television that the applicant, who had been held on remand pending trial for aircraft hijacking, had 'committed common law offences for which she must take responsibility', adding later that he did not know whether she would be convicted. In *Allenet de Ribemont v France*,[1021] a senior police officer, supported by other officials, stated at a press conference that the applicant, who had been arrested and hence 'charged ' under Article 6(2), was one of the 'instigators' of a murder. However, Article 6(2) does not preclude the authorities from providing factual information to the public about criminal investigations, as long as this does not amount to a declaration of guilt.[1022] **11.240**

(c) Information as to the accusation (Article 6(3)(a))

Article 6(3)(a) provides that a person charged with a criminal offence be 'informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. It is arguable that the guarantee will apply as soon as the accused is 'charged' in accordance with Article 6[1023] and is certainly applicable no later than at the point of indictment in a civil law system.[1024] **11.241**

[1014] *Albert and Le Compte v Belgium* (1983) 5 EHRR 533; *Schenk v Switzerland* (1988) 13 EHRR 242.
[1015] *X v Germany* (1971) 38 CD 77, EComm HR.
[1016] *X v Austria* (1966) 9 YB 550, EComm HR.
[1017] *X v Germany* (1983) 5 EHRR 499, EComm HR.
[1018] *X v Germany* (1966) 9 YB 484, EComm HR.
[1019] *X v United Kingdom* (1972) 40 CD 69, EComm HR.
[1020] *Krause v Switzerland* (1980) 13 DR 213.
[1021] (1995) 20 EHRR 557.
[1022] *Krause v Switzerland* (1978) 13 DR 73, EComm HR.
[1023] D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) 250–251; the Commission expressly left the question open in *X v Netherlands* (1981) 27 DR 37, EComm HR.
[1024] *Kamasinki v Austria* (1989) 13 EHRR 36; in *Brozicek v Italy* (1989) 12 EHRR 371, neither Commission nor Court made a clear finding that Art 6(3)(a) had to be complied with upon commencement of a preliminary investigation, but held, nevertheless, that judicial notification of the investigation complied with it.

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Once an accused has been arrested, the exact point at which Article 6(3)(a) starts to run is less relevant because reasons will also be available to him under Article 5(2).[1025]

11.242 What needs to be communicated to the accused is the 'nature' of the accusation or offence with which he is charged and the 'cause' or relevant facts giving rise to the allegation. This will depend, in part, on what he can be taken to have learned during the investigation process and other circumstances of the case[1026] as well as what he might have gleaned had he taken advantage of existing opportunities to learn of the accusation before him.[1027] The words 'in detail'[1028] imply that the information to be provided under Article 6 is to be 'more specific and more detailed' than that which is provided under Article 5(2).[1029] However, it is not necessary that the accused even be informed as to the evidence on which the charge is based: it is sufficient for the accused to be informed of the offences with which he is charged together with the date and place of their alleged commission.[1030] There is no requirement that the information be provided in writing; Article 6(3)(a) will be complied with where the accused has been given sufficient communication orally. It must, however, be provided in a language understandable to either the accused or his lawyer,[1031] failing which the state must provide an appropriate translation[1032] of key documents or statements in order to meet the information requirements.

(d) Adequate time and facilities to prepare a defence (Article 6(3)(b))

11.243 Article 6(3)(b) provides that a person charged with a criminal offence shall be provided with adequate time and facilities for the preparation of his defence. The time element of this guarantee acts as a safeguard to protect the accused against a hasty trial.[1033] Like the other guarantees as to timeliness under the Convention, Article 6(3)(b) applies from the moment the accused is arrested or is otherwise substantially affected[1034] or when he is given notice of charges against him,[1035] and

[1025] See para 10.127ff above.
[1026] *Ofner v Austria* (1960) 3 YB 322.
[1027] *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165: fact that a prisoner failed to attend a preliminary hearing was detrimental to his claim that he had not been adequately informed of the accusation against him.
[1028] Which are not present in Art 5(2).
[1029] *Nielsen v Denmark* (1959) 2 YB 412, EComm HR.
[1030] *Brozicek v Italy* (1989) 12 EHRR 371 para 42.; see also *X v Belgium* (1962) 5 YB 168 ('you are accused of corruption' was sufficient); and see *X v Belgium* (1977) 9 DR 169, EComm HR.
[1031] *X v Austria* (1975) 2 DR 68, EComm HR.
[1032] *Brozicek v Italy* (1989) 12 EHRR 371.
[1033] *Kröcher and Möller v Switzerland* (1981) 26 DR 24, EComm HR.
[1034] *X and Y v Austria* (1978) 15 DR 160, EComm HR.
[1035] *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165.

the adequacy of the time allocation depends on all circumstances of the case.[1036] The right to adequate facilities means that the accused must have the opportunity to organise his defence appropriately, with the view to enabling him to put all relevant arguments before the trial court.[1037] The accused must be allowed to acquaint himself with the results of police or preliminary investigations in the case.[1038] The role of Article 6(3)(b) in this regard is to achieve equality of arms between the prosecution and the defence, a principle also considered an element of fairness under the general fair trial guarantee of Article 6(1).

11.244 The most important issue considered under this head is the right to communications with a lawyer. This is of particular significance to those persons in detention on remand pending trial. A prisoner must be allowed to receive a visit from his lawyer in private in order to convey instructions or to pass or receive confidential information relating to the preparation of his defence.[1039] Restrictions on lawyer's visits must be justified in public interests such as prevention of escape or prevention of the obstruction of justice. It may be permissible for a lawyer to be restricted from discussing with his client information about the case that would disclose the name of an informer.[1040]

(e) Defence in person or through legal assistance (Article 6(3)(c))

11.245 Article 6(3)(c) provides that a person charged with a criminal offence is guaranteed the right to 'defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. The purpose of the guarantee is to ensure adequate representation in the case, equality of arms to the accused and vigilance by the defence over procedural regularity on behalf of his client and of public interests generally. Its scope does not extend to proceedings concerning detention on remand, which are covered by Article 5(4),[1041] but otherwise applies at the pre-trial stage,[1042] during trial[1043] and, subject to special considerations, to appeal proceedings[1044] following conviction. Although this provision does not expressly

[1036] Relevant factors include the complexity of the case: *Albert and Le Compte v Belgium* (1983) 5 EHRR 533; defence lawyer's workload: *X and Y v Austria* (1978) 15 DR 160, EComm HR; the stage of proceedings: *Huber v Austria* (1974) 46 CD 99; accused's representation of himself: *X v Austria* (1967) 22 CD 96, EComm HR.

[1037] *Can v Austria* (1985) 8 EHRR 121; see also *Twalib v Greece* RJD 1998–IV 1415.

[1038] *Kamasinski v Austria* (1989) 13 EHRR 36; *Kremzow v Austria* (1993) 17 EHRR 322; *Jespers v Belgium* (1981) 27 DR 61, EComm HR.

[1039] *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165; *Can v Austria* (1985) 8 EHRR 121.

[1040] *Kurup v Denmark* (1985) 42 DR 287, EComm HR.

[1041] *Woukam Moudefo v France* (1989) 51 DR 62.

[1042] *S v Switzerland* (1991) 14 EHRR 670.

[1043] *Quaranta v Switzerland* (1991) Series A No 205.

[1044] *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205; *Quaranta v Switzerland* (1991) Series A No 205.

guarantee the freedom to communicate with a defence lawyer 'without hindrance', it has been held that:

> an accused's right to communicate with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society.[1045]

This is because, without confidentiality the lawyer's assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights which are practical and effective.

11.246 The right of everyone under Article 6(3)(c) to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.[1046] This provision does not provide an absolute right to choose between defending oneself and obtaining legal counsel but it does preclude a state from forcing a person to defend himself in person.[1047] The law of some states precludes the person charged from acting on his own behalf, requiring that a lawyer assist him with his defence at the trial stage[1048] or on appeal.[1049] This is not incompatible with Article 6(3)(c).

11.247 An accused person who lawfully chooses to defend himself in person waives his right to be represented by a lawyer,[1050] and, as a result, the state is entitled to expect that he will exhibit a degree of diligence, failing which the state will not be responsible for any resulting deficiencies in the proceedings.[1051] If the accused does not wish to defend himself in person he is entitled to legal representation by his own lawyer or, subject to certain conditions, by a legal aid lawyer.[1052] He cannot be deprived of the right to legal representation on grounds of his failure to appear in court,[1053] though a state may find such denial to be an effective means of discouraging the unjustified absence of the accused.[1054]

11.248 If an accused person chooses legal assistance, Article 6(3)(c) does not provide him with an absolute right to decide which particular lawyer will be appointed to act

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[1045] *S v Switzerland* (1991) 14 EHRR 670 para 48.
[1046] *Poitrimol v France* (1993) 18 EHRR 130 para 34.
[1047] *Pakelli v Germany* (1983) 6 EHRR 1.
[1048] *Croissant v Germany* (1992) 16 EHRR 135.
[1049] *Philis v Greece* (1990) 66 DR 260, EComm HR.
[1050] *Melin v France* (1993) 17 EHRR 1.
[1051] Ibid.
[1052] *Poitrimol v France* (1993) 18 EHRR 130.
[1053] Art 6(3)(c) guarantees the accused's right to be present at the trial: *FCB v Italy* (1991) 14 EHRR 909; in *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 a rule generally denying legal representation before a prison disciplinary body was found to be a breach of Art 6(3)(c), quite apart from the fact that the accused had refused to appear; the absentia of the accused, even without excuse, will not justify depriving him of his right to be defended by counsel under Art 6(3)(c): *Lala v Netherlands* (1994) 18 EHRR 586.
[1054] Denial of legal assistance as a penalty or coercive tactic to ensure the appearance and arrest under warrant of an accused who has absconded after conviction is also an infringement of Art 6(3)(c), on the basis it is not proportionate: *Poitrimol v France* (1993) 18 EHRR 130.

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as counsel in the case. The general rule is that the accused's choice of lawyer should be respected.[1055] However, this is not absolute and is subject to limitations where free legal aid is concerned and where the court appoints defence lawyers.[1056] The right is also subject to the regulatory powers of the state, by which it governs qualifications and standards of professional conduct of lawyers.[1057] It is permissible for states to restrict the number of lawyers the accused may appoint, as long as the presentation of the defence is not disadvantaged in relation to the prosecution.[1058]

11.249 The right to legal aid under Article 6(3)(c) is subject to two conditions: it will only be provided if the accused lacks 'sufficient means to pay' for the legal assistance and 'where the interests of justice so require'. There is no definition of 'sufficient means' in the Convention and no case law as to the factors to be taken into account in the means test to determine an award of legal aid: the onus is on the applicant to demonstrate at least 'some indications'[1059] that he lacks sufficient means to retain his own counsel. For example, the test was met where the applicant had spent two years in custody prior to the case, had delivered a statement of means upon which the Commission had awarded him legal aid to bring an application under another Article of the Convention, and had proposed to make a similar submission to the German Federal Court.[1060] An accused who is subsequently able to pay for the costs of the free legal assistance may then be required to do so.[1061]

11.250 Whatever the means of the applicant, the state is not required to provide legal aid lawyers unless it is in the interests of justice to do so. The Court has made its own assessment on the facts.[1062] The test as to whether provision of legal aid is in the 'interests of justice' is not that the presentation of the defence must have sustained actual prejudice, but whether it appears 'plausible in the particular circumstances' that a lawyer would be of assistance on the facts[1063] of the case. The following circumstances are relevant:

[1055] *Pakelli v United Kingdom* (1983) 6 EHRR 1; *Goddi v Italy* (1982) 6 EHRR 457.

[1056] *Croissant v Germany* (1992) 16 EHRR 135 para 29.

[1057] *Ensslin, Baader and Raspe v Germany* (1978) 14 DR 64, EComm HR (professional ethics); *X and Y Germany* (1972) 42 CD 139, EComm HR (refusal to wear gown); *X v United Kingdom* (1975) 2 Digest 831, EComm HR (lack of respect for the court); *K v Denmark* Application 19524/92, (1993) unreported (barrister appearing as a witness for the defence); *X v United Kingdom* (1978) 15 DR 242, EComm HR (personal interests involved in barrister son's representation of father).

[1058] *Ensslin, Baader and Raspe v. Germany* (n 1057 above).

[1059] It is not necessary that the lack of sufficient means be shown beyond a reasonable doubt: *Pakelli v Germany* (1983) 6 EHRR 1.

[1060] Ibid.

[1061] *Croissant v Germany* (1992) 16 EHRR 135.

[1062] *Quaranta v Switzerland* (1991) Series A No 205.

[1063] *Artico v Italy* (1980) 3 EHRR 1.

- the complexity of the case;[1064]
- the contribution that the particular accused could make if he defended himself;[1065]
- the seriousness of the offence with which the accused is charged and the potential sentence involved.[1066]

Where deprivation of liberty is at stake, 'the interests of justice in principle call for legal representation'.[1067] Where the effective exercise of a right of appeal under national law requires legal assistance, legal aid must be provided, no matter how slight the accused's chances of success.[1068]

11.251 The legal assistance guaranteed by Article 6(3)(c), whether chosen by the accused himself or provided through legal aid, must be effective. It must actually be delivered[1069] and counsel must be qualified to represent the accused at the particular stage of the proceedings for which the assistance is sought.[1070] If legal assistance is effective it may not have been provided by a qualified lawyer.[1071] A state 'cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes'[1072] and will not be obliged to intervene unless inadequacy in the representation is apparent or is sufficiently brought to its attention.[1073] There may be a breach of Article 6(3)(c) where defence lawyers are frequently changed,[1074] inadequate time is allowed for their preparation of the case,[1075] or where the accused is not represented at a hearing because of the failure of the state to notify the correct lawyer.[1076]

[1064] *Granger v United Kingdom* (1990) 12 EHRR 469; *Quaranta v Switzerland* (1991) Series A No 205; *Pham Hoang v France* (1992) Series A No 243.

[1065] *Granger v United Kingdom* (n 1064 above) para 47.

[1066] *Boner v United Kingdom* (1994) 19 EHRR 246; *Maxwell v United Kingdom* (1994) 19 EHRR 97. Where the potential sentence is imprisonment this factor alone may require that legal aid be granted.

[1067] *Quaranta* (n 1064 above) paras 32-38; *Benham v United Kingdom* (1996) 22 EHRR 293 para 61.

[1068] *Boner v United Kingdom* (1994) 19 EHRR 246.

[1069] In *Artico v Italy* (1980) 3 EHRR 1 (violation when the state nominated a lawyer to act for the applicant, but claiming other commitments and sickness, he never met with the accused and the Italian Court of Cassation refused to appoint another lawyer).

[1070] *Biondo v Italy* (1983) 64 DR 5, EComm HR.

[1071] *X v Germany* (1960) 3 YB 174, EComm HR (assistance from a probationary lawyer training in the West German criminal system was satisfactory).

[1072] *Kamasinski v Austria* (1989) 13 EHRR 36 para 65.

[1073] Ibid, *Artico v Italy* (1980) 3 EHRR 1; *Stanford v United Kingdom* (1994) Series A No 280-A; *Tripodi v Italy* (1994) 18 EHRR 295; *Daud v Portugal* RJD 1998-II 739; see also *Imbrioscia v Switzerland* (1993) 17 EHRR 441 para 41.

[1074] *Koplinger v Austria* (1966) 9 YB 240, EComm HR.

[1075] These have also been treated under Art 6(3)(b) (right to adequate facilities): see *X v United Kingdom* (1970) 32 CD 76, EComm HR; *Murphy v United Kingdom* (1972) 43 CD 1, EComm HR.

[1076] *Goddi v Italy* (1984) 6 EHRR 457.

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(f) Examination of witnesses (Article 6(3)(d))

11.252 Article 6(3)(d) guarantees an accused person the right to examine witnesses for the prosecution and to call and examine witnesses on his behalf under the same conditions as witnesses against him.[1077] The right applies during trial and appeal proceedings, but not at the pre-trial stage.[1078] 'Witness' includes expert witnesses called by the prosecution or the defence[1079] as well as those persons whose statements are produced as evidence before a court even though they may not give oral evidence.[1080]

11.253 Neither the right of the accused to cross-examine witnesses against him nor to call and examine his own witnesses is absolute; but limitations must not contravene the principle of equality of arms, which is the essential aim of Article 6(3)(d).[1081] Where witnesses against the accused are excused from giving oral testimony[1082] the accused must have the opportunity to confront the person providing the statement during the preceding investigation,[1083] although statements taken from witnesses abroad[1084] or evidence from foreign court proceedings against the accused[1085] are admissible. The court will consider the importance of hearsay evidence in the context of the proceedings as a whole.[1086] The exclusion of the accused himself may be permissible under Article 6(3)(d) to ensure a candid statement by the witness, if his lawyer is allowed to remain and conduct a cross-examination.[1087]

11.254 The national courts have a wide discretion in the determination as to which defence witnesses are appropriate to be called,[1088] and in control over the accused's questioning of them.[1089] A court must give reasons for not summoning a defence witness expressly requested by the accused,[1090] and found that if properly called by the defence, a court must take all steps within its control[1091] to ensure that

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[1077] See also, para 11.217 above.

[1078] In particular an accused cannot examine a witness being questioned by the police: *X v Germany* (1979) 17 DR 231, EComm HR; or an investigating judge: *Ferraro-Bravo v Italy* (1984) 37 DR 15, EComm HR.

[1079] *Bönisch v Austria* (1985) 9 EHRR 191, EComm HR.

[1080] *Kostovski v Netherlands* (1989) 12 EHRR 434.

[1081] *Engel and others v Netherlands (No 1)* (1976) 1 EHRR 647 para 91; see also *Brandstetter v Austria* (1991) 15 EHRR 378 para 45.

[1082] For example, a police informer (cf *Kostovski v Netherlands* (1989) 12 EHRR 434).

[1083] See *Ferantelli and Santangelo v Italy* (1996) 23 EHRR 288; and see para 11.217 above.

[1084] *X v Germany* (1987) 10 EHRR 521, EComm HR.

[1085] *S v Germany* (1983) 39 DR 43, EComm HR.

[1086] See para 11.204 above; and cf the analysis of Art 6(3)(d) by the English courts, para 11.129 above.

[1087] *Kurup v Denmark* (1985) 42 DR 287, EComm HR.

[1088] *Vidal v Belgium* (1992) Series A No 235-B.

[1089] *Engel and others v Netherlands* (1976) 1 EHRR 647, 706.

[1090] *Bricmont v Belgium* (1989) 12 EHRR 217; *Vidal v Belgium* (1992) Series A No 235-E.

[1091] There is,however, no liability if a defence witness fails to appear for reasons beyond the court's control or at a time other than that requested by the accused, unless the presentation of the defence is affected.

witnesses appear.[1092] The state is not liable for the failure of defence counsel to call a particular witness.[1093]

(g) Assistance of an interpreter (Article 6(3)(e))

11.255 Article 6(3)(e) guarantees the right of a person charged with a criminal offence to have the free assistance of an interpreter if he cannot understand or speak the language used in court. The guarantee applies once the individual is 'charged' for the purposes of Article 6, and to the pre-trial,[1094] trial and appeal proceedings. The guarantee is intended to enable the accused to understand the language of the court, and does not entitle him to insist on the services of a translator to enable him to conduct his defence in his language of choice.[1095] Whether the accused is incapable of understanding the language is a determination of fact for the state to make, and the onus is on the accused to show the inaccuracy of its assessment.[1096] Article 6(3)(e) provides an unqualified 'exemption or exoneration'[1097] from any requirement on the part of the accused to pay the cost of providing the interpreter, whether or not his means would allow it, or he is ultimately convicted.[1098] The state must make free interpretation a part of criminal justice facilities so that the financial cost of an interpreter does not deter the accused from obtaining such assistance and thus prejudice the fairness of the trial.

11.256 The substance of the 'assistance' required by Article 6(3)(e) extends beyond provision of an interpreter at the hearing to include translations of 'all statements which it is necessary for him to understand in order to have a fair trial'.[1099] This will not require a written translation of every official document,[1100] but it implies that communications between the accused and his legal aid lawyer must be translated[1101] and that, where a lawyer (but not the accused) understands the language in which the hearing is conducted, that the accused be given a personal translation of the proceedings in order to enable him to properly instruct his lawyer.[1102]

[1092] *X v Germany* Application 3566/68 (1969) 31 CD 31; *X v Germany* Application 4078/69 (1970) 35 CD 125.

[1093] *F v United Kingdom* (1992) 15 EHRR CD 32.

[1094] Police questioning prior to a 'charge' is not covered by Article 6(3)(e), but following the charge an accused is entitled to an interpreter during questioning or preliminary investigations prior to trial: *Kamasinski v Austria* (1989) 13 EHRR 36.

[1095] *K v France* (1983) 35 DR 203; *Bideault v France* (1986) 48 DR 232, EComm HR.

[1096] *X v Germany* (1967) 24 CD 50; *X v United Kingdom* (1978) 2 Digest 916.

[1097] *Luedicke, Belkacem and Koç v Germany* (1978) 2 EHRR 149 para 40.

[1098] See also in *Öztürk v Germany* (1984) 6 EHRR 409.

[1099] *Kamasinski v Austria* (1989) 13 EHRR 36 para 74.

[1100] This may depend on the amount of oral information as to its contents given to the accused; see *Kamasinski v Austria* (n 1099 above), where failure to translate either indictment or judgment was a breach.

[1101] If the accused appoints his own lawyer he must choose one that can communicate with him if such a lawyer is available: *X v Germany* (1983) 6 EHRR 353, EComm HR.

[1102] The Court in *Kamasinski v Austria* (1989) 13 EHRR 36 did not clearly rule on the point, but considered the arguments of the accused as to interpretation at trial, even though his English-speaking lawyer was in attendance.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Cases, Materials, and Commentary

Second Edition

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14

Right to a Fair Trial—Article 14

ARTICLE 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall

be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge 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) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[14.01] The right to a fair trial and equality before the courts have historically been regarded as fundamental rules of law. Article 14 of the ICCPR sets out a series of rights which are required in both civil and criminal proceedings. The aim of the provisions is to ensure the proper administration of justice.[1] Article 14(1) outlines the general guarantee, whereas article 14(2) to (7) sets out specific guarantees in relation to criminal trials and criminal appeals.[2] The guarantees outlined in article 14(1) apply to all stages of the proceedings in all courts. They also supplement the article 14(3) requirements by acting as a residual guarantee.[3]

[14.02] ***GENERAL COMMENT 13***

¶ 5. The second sentence of article 14, paragraph 1, provides that 'everyone shall be entitled to a fair and public hearing'. Paragraph 3 of the article elaborates on the requirements of a 'fair hearing' in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.[4]

Article 14(1)

'SUIT AT LAW'

[14.03] ***GENERAL COMMENT 13***

¶ 2. In general, the reports of States parties fail to recognise that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of 'criminal charge' and 'rights and obligations in a suit at law' are interpreted in relation to their respective legal systems.

[14.04] Article 14(1) guarantees various rights with regard to determinations of one's rights and obligations in criminal prosecutions, as well as in 'suits at law'. The meaning of the latter term is very important, as it is the only element of article 14 which specifically addresses non-criminal proceedings. The definition of 'suits at law' arose in the following case.

[1] General Comment 13, para 1.

[2] In *Gerardus Strik v Netherlands* (1001/01), the HRC confirmed that the provisions of art 14(2)–(7), as well as art (15), do not apply to employment disciplinary measures; they apply only to criminal charges (para 7.3).

[3] D. McGoldrick, *The Human Rights Committee* (Clarendon Press, Oxford, 1994), 417. See, e.g., *Maleki v Italy* (699/96) [14.99], where a breach of art 14(1) was found even though a reservation had been entered to the relevant guarantee in art 14(3).

[4] See also Mr Wennergren's separate opinion in *Karttunen v Finland* (387/89).

Y.L. v CANADA (112/81)

In this case the Committee dealt with the question whether the claim by a former member of the Army for a disability pension was a 'suit at law'. Y.L. was dismissed from the Canadian army owing to an alleged medical condition. Y.L.'s application for a disability pension was rejected by a Pension Commission. This decision was confirmed on appeal, and two subsequent applications to the Pension Commission were rejected. The applicant's application to the Entitlement Board of the Commission was also unsuccessful, and his appeal to the Pension Review Board confirmed the earlier rulings. The author argued that the proceedings had been conducted unfairly, in breach of article 14(1).

The State Party argued that the complaint should be declared inadmissible for the following reasons:

¶ 4. The Canadian Government requests that the communication be declared inadmissible. As far as the proceedings before the Pension Review Board are concerned, it contends primarily that the complaints of the author are outside the scope of application of the Covenant *ratione materiae* because those proceedings did not constitute a 'suit at law' as envisaged under article 14, paragraph 1, of the Covenant. . . .

The HRC ultimately found that the author's communication was inadmissible, as the availability of judicial review of the Pension Board's decision meant that he had no claim under article 2 of the Optional Protocol (OP).[5] In relation to the expression 'suit at law' the Committee made the following comments:

¶ 9.1. With regard to the alleged violation of the guarantees of 'a fair and public hearing by a competent, independent and impartial tribunal established by law', contained in article 14, paragraph 1, of the Covenant, it is correct to state that those guarantees are limited to criminal proceedings and to any 'suit at law'. The latter expression is formulated differently in the various language texts of the Covenant and each and every one of those texts is, under article 53, equally authentic.

¶ 9.2. The *travaux préparatoires* do not resolve the apparent discrepancy in the various language texts. In the view of the Committee, the concept of a 'suit at law' or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in the light of its particular features.

¶ 9.3. In the present communication, the right to a fair hearing in relation to the claim for a pension by the author must be looked at globally, irrespective of the different steps which the author had to take in order to have his claim for a pension finally adjudicated.

[5] Para 9.4. Such availability would also raise issues regarding the exhaustion of domestic remedies (see, generally, Chap 6).

Article 14(3)(b)—Preparation of the Defence

[14.76] *GENERAL COMMENT 13*

¶ 9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is 'adequate time' depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

[14.77] *GRIDIN v RUSSIAN FEDERATION (770/97)*

¶ 8.5. With respect to the allegation that the author did not have a lawyer available to him for the first 5 days after he was arrested, the Committee notes that the State party has responded that the author was represented in accordance with the law. It has not, however, refuted the author's claim that he requested a lawyer soon after his detention and that his request was ignored. Neither has it refuted the author's claim that he was interrogated without the benefit of consulting a lawyer after he repeatedly requested such a consultation. The Committee finds that denying the author access to legal counsel after he had requested such access and interrogating him during that time constitutes a violation of the author's rights under article 14, paragraph 3 (b). Furthermore, the Committee considers that the fact that the author was unable to consult with his lawyer in private, allegation which has not been refuted by the State party, also constitutes a violation of article 14, paragraph 3 (b) of the Covenant.

[14.78] *PHILLIP v TRINIDAD and TOBAGO (594/92)*

¶ 7.2. The Committee notes that the information before it shows that the author's counsel requested the court to allow him an adjournment or to withdraw from the case, because he was unprepared to defend it, since he had been assigned the case on Friday 10 June 1988 and the trial began on Monday 13 June 1988. The judge refused to grant the request allegedly because he felt the author would be unable to afford counsel of his own choice. The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the trial by the lawyer is not incompatible with the interests of justice. The Committee considers that in a capital case, when counsel for the accused who was not experienced in such cases requests an adjournment because he is unprepared to proceed the Court must ensure that the accused is given an opportunity to prepare his defence. The Committee is of the opinion that in the instant case, Mr Phillip's counsel should have been granted an adjournment. In the circumstances, the Committee finds that Mr Phillip was not effectively represented on trial, in violation of article 14, paragraph 3 (b) and (d), of the Covenant.

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WHAT IS 'ADEQUATE TIME'?

[14.79] ***SMITH v JAMAICA (282/88)***

¶ 10.4. As to the author's claims that he was not allowed adequate time to prepare his defence and that, as a result, a number of key witnesses for the defence were not traced or called to give evidence, the Committee recalls its previous jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms. [See Communications Nos. 253/1987 (*Paul Kelly v Jamaica*), Views adopted on 8 April 1991, paragraph 5.9; 283/1988 (*Aston Little v Jamaica*), Views adopted on 1 November 1991, paragraph 8.3.] The determination of what constitutes 'adequate time' requires an assessment of the circumstances of each case. In the instant case, it is uncontested that the trial defence was prepared on the first day of the trial. The material before the Committee reveals that one of the court appointed lawyers requested another lawyer to replace him. Furthermore, another attorney assigned to represent the author withdrew the day prior to the trial; when the trial was about to begin at 10 a.m., the author's counsel asked for a postponement until 2 p.m., so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before. The Committee notes that the request was granted by the judge, who was intent on absorbing the backlog on the court's agenda. Thus, after the jury was empanelled, counsel had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner. This, in the Committee's opinion, is insufficient [time] to prepare adequately the defence in a capital case. There is also, on the basis of the information available, the indication that this affected counsel's possibility of determining which witnesses to call. In the Committee's opinion, this constitutes a violation of article 14, paragraph 3(b), of the Covenant.

[14.80] ***SAWYERS, MCLEAN and MCLEAN v JAMAICA (226, 256/87)***

In this case, the Committee noted that:[76]

¶ 13.6. . . . The determination of what constitutes 'adequate time' depends on an assessment of the circumstances of each case. While it is uncontested that none of the accused met with their lawyers more than twice prior to trial, the Committee cannot conclude that the lawyers were placed in a situation where they were unable properly to prepare the case for the defence. In particular, material before the Committee does not reveal that an adjournment was requested on grounds of insufficient time, nor has it been argued that the judge would have denied an adjournment. . . .

In a number of other cases, the HRC denied a breach of article 14(3)(b) where the accused had not asked for an adjournment.[77] Failure to request an adjournment is perhaps analogous to a failure to exhaust local remedies for which the State cannot be held liable.

[76] See also *Grant v Jamaica* (353/88), para 8.4.

[77] See, e.g., *Wright v Jamaica* (349/1989), para 8.4; *Henry v Jamaica* (230/87), para 8.2; *Thomas v Jamaica* (272/88), para 11.4.

WHAT ARE 'ADEQUATE FACILITIES'?

[14.81] *YASSEEN and THOMAS v REPUBLIC of GUYANA (676/96)*

¶ 7.10. With regard to the missing diaries and notebooks, the Committee notes that the authors claim that these may have contained exculpatory evidence. The State party has failed to address this allegation. In the absence of any explanation by the State party, the Committee considers that due weight must be given to the authors' allegations, and that the failure to produce at the last trial (1992) police documents which were produced at the first trial (1988) and which may have contained evidence in favour of the authors, constitutes a violation of article 14, paragraph 3, (b) and (e), since it may have impeded the authors in preparation of their defence.

[14.82] *HARWARD v NORWAY (451/91)*

¶ 9.4. Article 14 of the Covenant protects the right to a fair trial. An essential element of this right is that an accused must have adequate time and facilities to prepare his defence, as is reflected in paragraph 3(b) of article 14. Article 14, however, does not contain an explicit right of an accused to have direct access to all documents used in the preparation of the trial against him in a language he can understand. The question before the Committee is whether, in the specific circumstances of the author's case, the failure of the State party to provide written translations of all the documents used in the preparation of the trial has violated Mr Harward's right to a fair trial, more specifically his right under article 14, paragraph 3(b), to have adequate facilities to prepare his defence.

¶ 9.5. In the opinion of the Committee, it is important for the guarantee of fair trial that the defence has the opportunity to familiarise itself with the documentary evidence against an accused. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. The Committee notes that Mr Harward was represented by a Norwegian lawyer of his choice, who had access to the entire file, and that the lawyer had the assistance of an interpreter in his meetings with Mr Harward. Defence counsel therefore had opportunity to familiarise himself with the file and, if he thought it necessary, to read out Norwegian documents to Mr Harward during their meetings, so that Mr Harward could take note of its contents through interpretation. If counsel would have deemed the time available to prepare the defence (just over six weeks) inadequate to familiarise himself with the entire file, he could have requested a postponement of the trial, which he did not do. The Committee concludes that, in the particular circumstances of the case, Mr Harward's right to a fair trial, more specifically his right to have adequate facilities to prepare his defence, was not violated.

RIGHT TO COMMUNICATE WITH COUNSEL OF ONE'S OWN CHOOSING

[14.83] *KELLY v JAMAICA (537/93)*

¶ 9.2. . . . According to the file, . . . the author, when brought into the police station in Hanover on 24 March 1988, told the police officers that he wanted to speak to his lawyer,

Mr McLeod, but the police ignored the request for five days. In the circumstances, the Committee concludes that the author's right, under article 14, paragraph 3(b), to communicate with counsel of his choice, was violated.

This right overlaps substantially with the rights contained in article 14(3)(d) and will be further considered below.

[14.84] The Committee has confirmed on numerous occasions that detention incommunicado breaches article 14(3)(b) as it renders access to legal assistance impossible. The shortest period of detention incommunicado so far found to constitute a breach of this article is forty days in *Drescher Caldas v Uruguay* (43/79).[78] Presumably, a lesser period, such as the five days prescribed in *Kelly*, would also suffice to breach the provision. Such cases have not yet come before the HRC.

Article 14(3)(c)—Trial without Undue Delay

[14.85] ***GENERAL COMMENT 13***

¶ 10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal.

[14.86] Article 14(3)(c) overlaps substantially with article 9(3) which guarantees pre-trial detainees a right to be tried 'within a reasonable time'.[79] Article 9(3) however only regulates the length of detention before trial. Article 14(3)(c) regulates the actual time between arrest and trial, regardless of whether one is detained or not.

[14.87] The determination of 'undue delay' depends on the circumstances and complexity of the case. In this respect, the criminal 'expedition' rule mirrors the 'expedition' rule, incorporated into article 14(1), regarding civil trials [14.58–14.60]. In *Wolf v Panama* (289/88), a delay of four and a half years between arrest and the delivery of the judgment in a fraud case did not breach article 14(3)(c), as the HRC observed 'that investigations into allegations of fraud may be complex and the author had not shown that the facts did not necessitate prolonged proceedings'.[80]

[14.88] ***HILL and HILL v SPAIN (526/93)***

In this case the author's complaint regarding a violation of article 14(3)(c) was upheld by the HRC after a delay of three years between arrest and final appeal.

[78] See N. Rodley, 'Rights and Responses to Terrorism', in D. Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, Oxford, 1995), 129. See also *Carballal v Uruguay* (33/78), *Izquierdo v Uruguay* (73/80), and *Machado v Uruguay* (83/80).

[79] See [11.35–11.38].

[80] Para 6.4.

deficiencies in the defence of the accused or alleged errors committed by the defence lawyer, unless it was manifest to the trial judge that the lawyer's behaviour was incompatible with the interests of justice. In the present case, there is no indication that author's counsel, a Queen's Counsel, was not acting other than in the exercise of his professional judgement by deciding to ignore certain of the author's instructions and not to call a witness. This claim is accordingly inadmissible under article 2 of the Optional Protocol.

[14.120] The *Taylor* decision is very similar to the above decision in *Campbell* [14.114], which concerned a legal aid lawyer. It therefore seems that the HRC does not in fact require a State to guarantee a different standard of competence for private and public lawyers.[121] Counsel's incompetence, whether he/she is privately retained or not, will ground a complaint only when his/her actions are manifestly contrary to the interests of justice.[122]

Article 14(3)(e)—Rights Regarding Witness Attendance and Examination

[14.121] *GENERAL COMMENT 13*

¶ 12. Subparagraph 3 (e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

GORDON v JAMAICA (237/87)

¶ 6.3. As to the author's allegation that he was unable to have witnesses testify on his behalf, although one, Corporal Afflick, would have been readily available, it is to be noted that the Court of Appeal, as is shown in its written judgement, considered that the trial judge rightly refused to admit Corporal Afflick's evidence, since it was not part of the *res gestae*. The Committee observes that article 14, paragraph 3 (e), does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel. It is not apparent from the information before the Committee that the court's refusal to hear Corporal Afflick was such as to infringe the equality of arms between the prosecution and the defence. In the circumstances, the Committee is unable to conclude that article 14, paragraph 3(e), has been violated.

Thus, article 14(3)(e) is not concerned with the right to call witnesses *per se*; it is concerned with equality of rights to call witnesses as between the defence and the

[121] See also *Perera v Australia* (536/93), para 6.3.

[122] See [14.116] ; see also *Reece v Jamaica* (796/98), paras 7.2 and 7.4. See however, *Griffin v Spain* (493/92) [6.10], regarding potential different standards regarding application of the exhaustion of local remedies rule. Cf De Zayas, above, note 108, who implies at 686 that the conduct of a privately retained lawyer never engages the responsibility of the State. It is however arguable that the State's responsibility is engaged if a court wilfully ignores the poor conduct of a private lawyer.

prosecution. It is for the author to establish that the failure of a court to permit examination of a certain witness violated his/her 'equality of arms'.[123]

[14.122] *PRATT and MORGAN v JAMAICA (210, 225/87)*

¶ 13.2. . . . [The Committee is not] in a position to ascertain whether the failure of Mr Pratt's lawyer to insist upon calling the alibi witness before the case was closed was a matter of professional judgement or of negligence. That the Court of Appeal did not of itself insist upon the calling of this witness is not in the view of the Committee a violation of article 14, paragraph 3(e), of the Covenant.

PEART and PEART v JAMAICA (464, 482/91)

¶ 11.3. With regard to the authors' claim that the unavailability of the expert witness from the Meteorological Office constitutes a violation of article 14 of the Covenant, the Committee notes that it appears from the trial transcript that the defence had contacted the witness but had not secured his presence in court, and that, following a brief adjournment, the judge then ordered the Registrar to issue a subpoena for the witness and adjourned the trial. When the trial was resumed and the witness did not appear, counsel informed the judge that he would go ahead without the witness. In the circumstances, the Committee finds that the State party cannot be held accountable for the failure of the defence expert witness to appear.

Thus, the HRC will not address a failure by the accused's counsel to call material witnesses, even if counsel was provided by the State,[124] as this is essentially a matter for counsel's professional judgement. If counsel fails to call a witness, it is not for the domestic court to do so *ex officio*.[125]

[14.123] The following cases demonstrate violations of article 14(3)(e).

GRANT v JAMAICA (353/88)

¶ 8.5. The author . . . contends that he was unable to secure the attendance of witnesses on his behalf, in particular the attendance of his girlfriend, P.D. The Committee notes from the trial transcript that the author's attorney did contact the girlfriend, and, on the second day of the trial, made a request to the judge to have P.D. called to court. The judge then instructed the police to contact this witness, who . . . had no means to attend. The Committee is of the opinion that, in the circumstances, and bearing in mind that this is a case involving the death penalty, the judge should have adjourned the trial and issued a subpoena to secure the attendance of P.D. in court. Furthermore, the Committee considers that the police should have made transportation available to her. To the extent that P.D.'s failure to appear in court was attributable to the State party's authorities, the Committee finds that the criminal proceedings against the author were in violation of article 14, paragraphs 1 and 3 (e), of the Covenant.

[123] *Párkányi v Hungary* (410/90), para 8.5.

[124] See also *Young v Jamaica* (615/95), para 5.5; see *Perera v Australia* (536/93), para 6.3, for a similar decision regarding privately retained counsel.

[125] See *Van Meurs v Netherlands* (215/86), para 7.2.

[14.124] ***PEART and PEART v JAMAICA (464, 482/91)***

¶ 11.4. With regard to the evidence given by the main witness for the prosecution, the Committee notes that it appears from the trial transcript that, during cross-examination by the defence, the witness admitted that he had made a written statement to the police on the night of the incident. Counsel then requested a copy of this statement, which the prosecution refused to give; the trial judge subsequently held that defence counsel had failed to put forward any reason why a copy of the statement should be provided. The trial proceeded without a copy of the statement being made available to the defence.

¶ 11.5. From the copy of the statement, which came into counsel's possession only after the Court of Appeal had rejected the appeal and after the initial petition for special leave to appeal to the Judicial Committee of the Privy Council had been submitted, it appears that the witness named another man as the one who shot the deceased, that he implicated Andrew Peart as having had a gun in his hand, and that he did not mention Garfield Peart's participation or presence during the killing. The Committee notes that the evidence of the only eye-witness produced at the trial was of primary importance in the absence of any corroborating evidence. The Committee considers that the failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants. The Committee finds therefore that the facts before it disclose a violation of article 14, paragraph 3(e), of the Covenant.

[14.125] ***FUENZALIDA v ECUADOR (480/91)***

The author complained that his trial, at which he was convicted of rape, was unfair.

¶ 3.5. The author also claims that—in view of the submission by the victim of a laboratory report on samples (blood and semen) taken from her and samples of blood and hair taken from him against his will and showing the existence of an enzyme which the author does not have in his blood—he requested the court to order an examination of his own blood and semen, a request which the court denied. . . .

The HRC found in favour of the author on this point, and highlighted the importance of expert evidence in fair trials:

¶ 9.5. . . . The Committee has considered the legal decisions and the text of the judgement dated 30 April 1991, especially the court's refusal to order expert testimony of crucial importance to the case, and concludes that this refusal constitutes a violation of article 14, paragraphs 3 (e) and 5, of the Covenant.

Article 14(3)(f)—Right to Free Assistance of an Interpreter if Needed

[14.126] ***GENERAL COMMENT 13***

¶ 13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by

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Before: Justice A. Raja N. Fernando, President.

Interim Registrar: Mr. Lovemore Munlo.

Date Filed: 7th November 2005.

PROSECUTOR Against

Alex Tamba Brima
Moinina Fofana
Augustine Gbao
Morris Kallon
Brima Bazzy Kamara
Santigie Borbor Kanu
Allieu Kondewa
Sam Hinga Norman
Issa Hassan Sesay

DEFENCE REPLY TO THE REGISTRAR'S RESPONSE TO THE APPLICATION FOR A REVIEW OF THE REGISTRAR'S DECISION ON THE INSTALLATION OF SURVEILLANCE CAMERAS IN THE DETENTION FACILITY OF THE SPECIAL COURT FOR SIERRA LEONE.

The Registrar

Office of the Principal Defender.
Defence Counsel for Alex Tamba Brima.
Defence Counsel for Moinina Fofana.
Defence Counsel for Augustine Gbao.
Defence Counsel for Morris Kallon.
Defence Counsel for Brima Bazzy Kamara.
Defence Counsel for Santigie Borbor Kanu.
Defence Counsel for Allieu Kondewa.
Defence Counsel for Sam Hinga Norman.
Defence Counsel for Issa Hassan Sesay.

I. INTRODUCTION

1. This Reply addresses the issues raised by the Registrar's Response to the Application filed by the Office of the Principal Defender ("the Defence Office") for a Review of the Registrar's Decision on the Installation of Surveillance Cameras in the Detention Facility of the Special Court for Sierra Leone ("Application for a Review of the Registrar's Decision").

II. PROCEDURAL BACKGROUND

2. On Friday 21st October 2005, the Defence Office, acting on behalf of the nine accused persons currently held by the Special Court for Sierra Leone ("the Special Court"), filed an Application for a Review of the Registrar's Decision before the Honourable Justice A. Raja N. Fernando, President of the Special Court. The Application was also served, on the same day, on the Interim Registrar as well as the Chief of Detention of the Special Court.

3. On Wednesday 2nd November 2005, the Interim Registrar of the Special Court filed his Response ("the Response") to the said Application which response was also served on the Defence Office.

III. INTERIM REGISTRAR'S ARGUMENTS

A. Jurisdiction (paragraphs 3 to 10)

Paragraphs 5 – 7

4. According to the Response, the *Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone* ("the *Rules of Detention*"),[1] expressly provide for the exercise of authority by the President in respect of detention matters only in three specific cases under Rules 22 (Death, Serious Illness or Injury), 24(C) (Video Surveillance) and 47(G) (Prohibition or Conditions on

[1] As amended on 14 May 2005.

Communications and Visits). Thus, the Application for a Review of the Registrar's Decision should be dismissed because "this is not one of the situations in which the President may act under the Rules of Detention." Furthermore, "[i]n the absence of an express right for a detainee to apply to the President under the Rules of Detention for a review of the decision, the Applicants have no basis on which to bring this application for review" (paragraph 7).

5. The Defence Office submits that Rules 22, 24(C) and 47(G) must be read in the light of the requirements of Rules 19(A)[2] and 33(A)[3] of the *Rules of Procedure and Evidence of the Special Court* ("the *Rules of Procedure*")[4] and Rule 2[5] of the *Rules of Detention*. The issue in this instance is not solely administrative in nature and was therefore brought to the President of the Special Court in his administrative capacity as overseer of the activities of the Registrar of the Special Court under Rule 19(A). The mere fact that the fair trial rights of the accused are implicated does not necessarily mean that the matter may not be addressed administratively under the President's inherent supervisory jurisdiction.[6]

Paragraph 8

6. The Defence Office agrees that the location of the Special Court in the country in which the conflict took place raises legitimate and ongoing concerns about the

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[2] Rule 19(A) provides that "The President shall preside at all plenary meetings of the Special Court, coordinate the work of the Chambers and ***supervise the activities of the Registry*** as well as exercise all the other functions conferred on him by the Agreement, the Statute and the Rules." (Emphasis added).

[3] Rule 33(A) (Functions of the Registrar) implicitly confirms that the Registrar is administratively subject to supervision by the President. It provides, in relevant part, that "***Under the authority of the President***, he shall be responsible for the administration and serving of the Special Court and shall serve as a channel of communication." (Emphasis added).

[4] As amended on 14 May 2005.

[5] Rule 2(A) (Application of the Rules) confirms that "The Rules shall be applied in conjunction with the relevant provisions of the Agreement, the Statute, the Rules of Procedure and Evidence and the Headquarters Agreement."

[6] This position is consistent with the practice of other international tribunals. For example, in *The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayawiza*, Case No. ICTR-99-52-I, *Decision on the Defence Motion for Declaratory relief from Administrative Measures Imposed on Hassan Ngeze at the UNDF*, 9 May 2002, the Registrar of the International Criminal Tribunal for Rwanda opposed a motion by the Accused that seized the Trial Chamber of a matter for which they could have submitted a written complaint under Rules 82 and 83 of that tribunal's Detention Rules. The Chamber ruled that the Accused had not exhausted all the (administrative) remedies available to them as they could have raised the issue with the Commanding Officer whose decision was appealable to the Registrar and then the President (the Chamber did, however, entertain the motion for relief based on different grounds). In this instance, the detainees have expressed their concerns to the Chief of Detention and the Registrar and are now appealing to the President of the Special Court who has administrative oversight over both officials. Available online at: <http://65.18.216.88/ENGLISH/cases/Nahimana/decisions/090502.htm>.

security and good order of the Detention Facility. However, it does not follow, merely because of this, that the decisions of the Chief of Detention taken under Rule 3[7] of the *Rules of Detention* are not "amenable to review" by the President of the Special Court (paragraph 8). The Chief of Detention's exercise of authority under Rule 3 is clearly subject to the authority of the Registrar. The Registrar's decisions, whether in relation to detention matters or otherwise, are in turn subject to the authority of the President under Rules 19(A) and 33(A). It would follow that if the Registrar, who oversees the work of the Chief of Detention is subject to the supervision of the President, the Chief of Detention's decisions regarding the Detention Facility would also be amenable to direction and, where necessary, review by the President of the Special Court. That is part of the function of the President as overall supervisor of the activities of the Registry.

Paragraph 9

7. The Registrar submits that the decision to install the surveillance cameras in the Detention Facility, which the detainees maintain will violate their fair trial rights under Article 17 of the *Statute of the Special Court*, should not be reviewed by the President under Rule 19(A) on the basis that 1) the jurisdiction of the Trial and Appeals Chamber in respect of fair trial rights is inherent and exclusive, 2) concurrent jurisdiction with Chambers in respect of Article 17 rights has the potential for inconsistent decisions and 3) the accused persons would not have a right of appeal from a decision of the President.

8. It is clear that a violation of the fundamental rights of the accused persons contained in Article 17 of the *Statute of the Special Court* can be reviewed by way of a Motion before the Trial Chamber of the Special Court.[8] However, we submit that

[7] Rule 3(Responsibility for Detention Facility) states:

> The Special Court shall retain sole responsibility for all aspects of detention pursuant to the Rules. Under the authority of the Registrar, the Chief of Detention shall have sole responsibility for all aspects of the daily management of the Detention Facility, including security and good order, and may make all decisions relating thereto, except where otherwise provided in the Rules.

[8] See *Prosecutor v. Brima*, SCSL-2004-16-PT, *Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel*, paras. 55-65 (The Chamber held that it had authority, based on its inherent jurisdiction, to review the legality or reasonableness of the Registrar's administrative

the jurisdiction of the President and the Trial and Appeals Chambers regarding Article 17 rights is concurrent, not exclusive, since it is possible for fair trial issues to arise in an administrative context, and for those issues to be reviewed and resolved administratively by the President of the Special Court as part of his inherent supervisory power over the Registrar.

9. In addition, the Applicants fail to see how concurrent jurisdiction between the President and Chambers regarding Article 17 rights will necessarily lead to inconsistent decisions on fair trial issues when the President, as a judge of the Special Court, will presumably interpret and apply administrative decisions affecting fair trial rights in a manner that is consistent with the jurisprudence of the Special Court. This is particularly so because the President would likely have participated in making such determinations. Furthermore, he also would be acutely aware of the negative impact of any violations of the fair trial rights of the accused persons (especially given the gravamen of the charges against them) as well as their implications for the Special Court in the eyes of the people of Sierra Leone.

10. In any event, while there is no right of appeal of the President's administrative determinations *stricto sensu*, it is clear that the Applicants always have the option to file a Motion before one of the Trial Chambers of the Special Court to vindicate their fair trial rights. That the Applicants would wish to address the matter administratively first, rather than judicially, demonstrates their desire to amicably resolve the issue with the Registrar, and from a practical perspective, is desirable because it eases the burden on the docket of the Special Court.[9]

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decisions on detention matters, particularly in the light of the mandatory provisions of Article 17(4)(d) of the *Statute of the Special Court*) and *Prosecutor v. Norman*, SCSL-04-14-T, *Decision on Confidential Motion on Detention Issue*, paras. 8-10, 14, 17, (affirming that the Chamber may, in limited circumstances in the interests of justice, review decisions of the Registrar where they may affect the fundamental trial rights of an accused and hence negatively impact on the requirements of Article 17).

[9]Moreover, the Applicants' judicious use of the time and processes of the Special Court should be welcomed in the light of the Special Court's time-limited mandate, resources and the Completion Strategy.

B. The Registrar's Factual Background (paragraphs 11 to 22)

Paragraph 11

11. With due respect, the examples of incidents cited in this paragraph are not major security breaches that would threaten the security and good order of the Detention Facility, and that would because of their gravity, justify a severe encroachment on the fundamental fair trial rights of the detainees. This is particularly so considering the amount of time that has elapsed since the accused were detained by the Special Court and the opprobrium associated with the crimes for which they stand charged.

12. As noted in our Application, the alleged security breaches can be addressed under the *Rules of Detention* through less invasive measures on the fundamental human rights of the accused. We reiterate that while not absolute, the fundamental fair trial guarantees rights that attach to the detainees under Article 17 of the *Statute of the Special Court* and international human rights law should only defer to security considerations where there is reasonable justification. Reasonable justification simply does not exist here.

13. Whatever the case, of the four incidents cited by the Response, the first refers to a defence assistant, not an investigator (sub-paragraph 41. a.); the second and third are based on the *belief* of the Chief of Detention instead of solid evidence (sub-paragraphs 41.b and .c), and the final – and relatively more serious incident (sub-paragraph 41.d.) – was prompted by the installation of the surveillance cameras to which the accused detainees had objected. That a detainee of generally good behaviour throughout his time in the Detention Facility would resort to such a measure actually demonstrates the extent to which the accused feel that their rights to fair trials would be rendered nugatory because potential witnesses would refuse to appear on their behalf after surveillance equipment are installed in the visitation area.

B. The Registrar's Interpretation of the Rules of Detention (paragraphs 13 to 22)

Paragraph 13

14. We submit that the Chief of Detention does not have unfettered discretion to make whatever decision he perceives to be in the interest of security and good order of the Detention Facility. Indeed, as confirmed by the *Rules of Detention*, even the Registrar's decisions that may seriously affect the rights of the accused persons are open to review by the President of the Court in at least 3 instances. In any event, reasonable decisions made by the Chief of Detention in the name of security and good order would have to be compatible with the fundamental human rights and interests of the detainees, which are designed to provide a regime of humane treatment for unconvicted persons, under Article 17 of the *Statute of the Special Court* and at international law.

Paragraph 14

15. While the Defence Office does not dispute the Registrar's power to adopt measures ensuring security and good order in the Detention Facility, we reiterate that the decisions of the Registrar and his subordinates, including the Chief of Detention, must always be considered against the rights of the accused to a fair trial. In this regard, staffing constraints, while important, are not sufficient to justify a flagrant breach of as fundamentally important rights as those of the accused to properly defend themselves against the serious allegations against them – a key aspect of which is the ability to summon relevant witnesses to aid in their defence.

Paragraph 15

16. We respectfully submit that the issue is not simply whether the monitoring of visits by video surveillance is prohibited. Rather, the issue is whether the monitoring of the visitation area of the Detention Facility by video surveillance, even if permissible, will not undermine or wholly compromise the detainees' ability to obtain fair trials.

Paragraph 16

17. It is clear that Rule 3, which is derived from the *Rules of Detention* that stand far below in the hierarchy of laws applicable before the *Statute of the Special Court*, cannot be read to override or emasculate the fundamental rights of the detainees to fair trials recognized in Article 17 of the Special Court's primordial instrument – the Statute – as well as under conventional and customary international law. In other words, even if the Registrar is correct in construing Rules 24 and Rule to mean that he is permitted to allow the installation of video surveillance in the entire Detention Facility excepting the cells, that reading must be understood in the light of the requirements of Article 17 of the *Statute of the Special Court*, Rule 72*bis* (General Provisions on Applicable Law) of the *Rules of Procedure and Evidence* and Rule 2(A) (Application of the Rules) of the *Rules of Detention*.

Paragraphs 18 – 22

18. With due respect, whether the video surveillance system installed in the Detention Facility is limited to image, as opposed to sound, recording is not dispositive. As stated in our Application, the issue is the perception reasonably held by the detainees and their potential witnesses that they are being monitored, and how that perception will impact upon the accused's right to respond to the charges against them using all available evidence, including relevant witnesses. Furthermore, that the installation of the surveillance cameras provoked such reaction among the detainees demonstrates how strongly they felt that their fundamental rights to fair trials are at stake.[10]

D. The Registrar's Characterization of the Fair Trial Rights of the Detainees under Article 17 (paragraphs 23 to 30)

Paragraph 23-24

19. While the identity of visitors to the Special Court is not secret, the impact on a potential witness of providing his personal information (such as name and address)

[10] In any event, it is also possible for experts to "lip read" what a non-audible person is saying.

on a Visitor's Log is different from the uneasy feeling that the same witness would have of constant scrutiny of his every move by video recording equipment. We agree that unless witnesses are protected, their identity ***"may"*** be revealed (paragraph 24); however, the very fact that even protected witnesses' identity could be known because they were previously recorded on a visit to the Detention Facility could undermine the efficacy of witness protection measures and points to the reasonableness of the detainees' concern that their fair trial rights would be violated by the installation of surveillance equipment in the visitation area.

20. To the extent that surveillance measures dissuade potential witnesses from appearing on behalf of the Defence, the impact of the measures would extend far beyond merely affecting the "conditions of detention" of the accused to obliterate the sacrosanct rights enshrined in Article 17(4) of the *Statute of the Special Court*. Under that provision, it must be recalled, the accused are entitled 1) to have adequate time and ***facilities*** to prepare their defence (Article 17(4)(d)) and 2) to secure ***the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them***. The detainees' fear for those rights must be read in the broader context of the trial process in which the Prosecution has closed one of its cases (CDF), is about to do so in a second one (AFRC) and is about to commence the Defence case which entails, among other things, finalizing witness lists, cross-checking witness statements, etc. The detainees' fear must also be considered against an even larger backdrop wherein potential witnesses for the Defence have been subject to different forms of harassment by government agents.

21. The Registrar contends that monitoring does not become unlawful simply because it is done through video surveillance. However, it is clear that the method of monitoring makes a big difference as to the lawfulness of a particular measure – even under the *Rules of Detention*. Indeed, if the method of monitoring detainees does not matter, why would Rule 24 require that there be danger to the health or security of a detainee before the Chief of Detention, with the approval of the Registrar, can order that the cell of a detainee be monitored? Moreover, why

would the Registrar's decision to monitor a detainee be subject to appeal by a detainee before the President of the Special Court (Rule 24(C))?

Paragraph 25 – 29

22. With due respect, what is material here is the detainees' fear of the presence of surveillance equipment and the inhibiting effect of that fear on frank communication between them, their counsel and potential witnesses.

Paragraph 30

23. The Defence Office agrees that on the face of it, the practice of the ICTY Detention Facility not to install video equipment in visitation areas of their detention facility would not appear to be relevant because that tribunal is located away from the scene of the conflict. On the contrary, we submit that it is the very fact that the Special Court is located in Sierra Leone that makes the example apposite, especially given that the outcome of the trials of the accused will be judged not only on whether they were actually fair, but also whether they were ***seen to*** be fair, by the accused, the people of Sierra Leone and the rest of the world.

24. For the foregoing reasons, in particular the detainees' concerns about ensuring that their fundamental Article 17 rights to adequately prepare their defence are protected, the Defence Office respectfully reiterates its request for your honour to revoke the decision of the Registrar to install surveillance cameras in the visitation area of the Detention Facility of the Special Court.

Respectfully submitted,

_____

Vincent O. Nmehielle, Principal Defender

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1st December 2005

Dr. Vincent O. Nmehielle,
Principal Defender,
Special Court for Sierra Leone

Re: Your Interoffice Memorandum of 21 October 2005 Re: Application for a Review of the Registrar's Decision on the Installation of Surveillance Cameras in the Visitation Areas of the Detention Facility of the Special Court for Sierra Leone

Dear Dr. Nmehielle,

I acknowledge receipt of your Interoffice Memorandum dated 21st October 2005, in which you seek my review of the Registrar's decision to install surveillance cameras in the visitation areas of the Detention Facility of the Special Court for Sierra Leone.

I have carefully considered your Memorandum, as well as the submissions made by the Registrar in Response on 1st November 2005 and by yourself in Reply on 7th November 2005.

The review you are requesting is of a judicial nature made in an informal way. As such, if you wish to pursue this application, it should be sought by way of a proper application made through the Court Management Section in accordance with Article 1(A) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone, in order to respect the Accused right to a fair and public hearing pursuant to Article 17(2) of the Statute of the Special Court for Sierra Leone.

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Since your application was not filed through the Court Management Section, but simply brought informally to me by way of an Interoffice Memorandum, I am sorry to inform you that I am not properly seized of your application and that I cannot therefore consider it.

Yours sincerely,

Fernando

Hon. Justice Raja Fernando,
President of the Special court for Sierra Leone

CC: The Registrar

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
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02 December 2005

The Honourable Justice Raja Fernando
President of the Special Court for Sierra Leone
125 Jomo Kenyatta Road, New England
Freetown, Sierra Leone

Re: Your Interoffice Memorandum of 21 October 2005 Re; Application for Review of the Registrar's Decision on the Installation of Surveillance Cameras in the Visiting Areas of the Detention Facility of the Special Court for Sierra Leone

Dear Honourable President:

I have been served with an electronic copy of your letter dated 1 December 2005 on the above subject. I feel compelled to reply to your letter because our application to the Honourable President has been mischaracterized as a memorandum and as not properly before the Honourable President. It is indeed an Application as envisaged within the applicable Rules. In addition, Court Management did not accept the Application as the Defence Office sought to file it with that office because it is not covered under the Practice Direction on filing documents before the Special Court. The position of Court Management was affirmed by the Registrar's Legal Office. In this regard, the Defence Office makes the following submission.

Article 1(A) of the Practice Direction on the filing of documents before the Special Court for Sierra Leone (Practice Direction),[1] which the Honourable President relies on deals with "documents filed in accordance with the Rules" (meaning the Rules of Procedure and Evidence in force) rather than other Rules.

This provision by implication, squarely excludes applications filed before the President of the Court in his administrative capacity. This argument is further buttressed by Article 3 of the Practice direction which deals with opening and numbering of case files in relation to the accused persons case as currently being tried in the Trial Chambers or in relation to matters on appeal.

I therefore submit that the application for a review of the Registrar's decision on the installation of cameras in the visitation area of the detention facility by these very provisions, does not fall into any of the categories provided for in the Practice Direction. The provisions can only be read as excluding matters of administration, which the Court Management does not concern itself with in the practice of the Special Court. Furthermore, the Practice Direction makes reference to motions and other process, but fails to mention applications concerning administrative decisions or matters.

[1] The Practice Direction as amended on 1 June 2004 and 10 June 2005 entered force on 27 February 2003.

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The Learned President in his letter referred to Article 17(2) of the Statute of the Special Court for Sierra Leone which provides; that "the accused person shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses." Reference to this provision is inapplicable and has no bearing on the application before the President. The Defence Office acts on behalf of the accused persons and files the application to the President in his administrative capacity. This does not preclude the Defence Office from filing a motion before the trial chamber if the Defence office deems it necessary in order to address the concerns of the accused persons. It is premature at this time to raise the issue of a fair and public hearing at this stage.

Rule 24 of the Rules Governing the Detention of Person's Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone[2] makes provisions for video surveillance in the cells of the detainee and grants the detainee a right to appeal the decision of the Registrar to the President in respect of video surveillance in the cell of the detainee. In this regard, the application to the President would be in his administrative capacity. Accordingly, the Practice Direction that the Honourable President relied on cannot apply to an application from the Defence Office to the President in his administrative capacity.

The supervisory role of the President in the context of our application is, in the humble submission of the Defence Office solely administrative to which the Practice Direction that the learned President referred to does not apply. It will have to take an amendment of the Practice Direction and all applicable Rules to require the filing of Applications to the President in his administrative capacity through Court Management.

The Defence Office would therefore urge the Honourable President to consider the Application before him on its merits, as the Application is in accordance with the practice of the Special Court properly before the Honourable President.

Respectfully submitted

Vincent O. Nmehielle
Principal Defender of the Special Court for Sierra Leone

Cc: Mr. Lovemore G. Munlo, SC, Registrar
All Defence Teams

[2] Adopted on the 7th March 2003, amended on 14th May 2005.

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26th January 2005

Dr. Vincent O. Nmehielle,
Principal Defender,
Special Court for Sierra Leone

Re: Your Letter of 2 December 2005 – Re: Cameras in the visitation areas of the Detention Facility

Dear Dr. Nmehielle,

I acknowledge receipt of your Letter of 2nd December 2005, by which I understand that you are requesting me to reconsider my letter of 1st December 2005.

Your submissions can be summarised as follows:

1/ You submit that the Interoffice Memorandum you sent to me was indeed an application.

2/ You submit that Court Management refused to take the application when the Defence Office sought to file it because it was not covered under the application for filing Documents before the Special Court. You add that this position was affirmed by the Registrar's Legal Office.

3/ You submit that Article 1(A) of the Practice Direction refers to documents filed in accordance with the Rules of Procedure and Evidence, thereby excluding applications "filed" (sic) before the President in his administrative capacity. You add that this argument is further buttressed by Article 3 of the Practice Direction which deals with opening and numbering of case files.

4/ You submit that Article 17(2) of the Statute is inapplicable in the matter.

5/ You submit that the application made before me in my administrative capacity does not preclude the Defence Office from filing a Motion before the Trial Chamber if it deems it necessary.

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6/ You submit that Rule 24 of the Rules of Detention, which makes reference to video surveillance in the cells of the detainees, provides a right to appeal the decision of the Registrar to the President in his administrative capacity and that the Practice Direction cannot apply therefore.

7/ You submit that it would require an amendment of the Practice Direction and all applicable Rules to allow for the filing of applications to the President in his administrative capacity through Court Management.

I will answer your submissions by the following remarks:

With reference to Point 1/, my letter did not challenge that the Memorandum was an application. The reason why I could not consider your application was indeed because it was not properly filed.

With reference to Point 2/, I am afraid that you may have been misled by Court Management, as it was wrong for them to consider that this application was of an administrative nature. Your application was indeed filed on the basis of my "inherent jurisdiction", which falls obviously in the province of my judiciary power. Your initial analysis was correct on that point and you should have insisted to file your application through Court Management.

With reference to Point 3/, Article 1(A) of the Practice Direction which refers to "*documents filed before the Special Court in accordance with the Rules*" shall not be read as limitative. Filing through Court Management is the only way to guarantee the publicity of documents in accordance to Article 4(B) of the Practice Direction, which provides that public documents filed through Court Management "*may be used in press releases and be posted on the official website of the Special Court*". A limitative interpretation of article 1(A) would therefore violate Article 17(2) of the Statute, which is impossible since the Practice Direction was issued pursuant to Rule 33(D) of the Rules of Procedure of Evidence which is applicable by virtue of Article 14 of the Statute. Article 3 of the Practice Direction relates to the opening and numbering of case files and is irrelevant to the present matter. Since the application concerned all the detainees, it should have been filed under the three case numbers under which the detainees are currently on trial.

With reference to Point 4/, you are seeking a judicial review of an administrative decision. The intervention that is requested from me is not "administrative" but judicial: indeed, the procedure followed (Application, Response, Reply) is judicial and my intervention in these administrative matters is not of an administrative nature, but of a judicial one. The application itself was referring to my "inherent jurisdiction", which relates to my judicial capacity. Therefore, Article 17(2) and the Accused's right to a fair and public trial fully applies in this matter.

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With reference to Point 5/, if you indeed consider that the matter falls within the jurisdiction of the Trial Chamber, then there is no point in making an application before me on the basis of my "inherent jurisdiction", which is residual by nature.

With reference to Point 6/, Rule 24 of the Rules of Detention is not applicable to the current matter: this Rule concerns cameras in the cells, whilst your letter referred to cameras in the visitation areas.

With reference to Point 7/, it is precisely on the basis of the Practice Direction and Rules as they stand currently that I rendered my decision. There is therefore no need for further amendment.

For the foregoing reasons, I affirm the decision I made in my letter of 1st December 2005.

Yours sincerely,

Fernando

Hon. Justice Raja Fernando,
President of the Special court for Sierra Leone

CC: The Registrar

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UNITED NATIONS NATIONS UNIES

INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991

Detention Unit

TRIBUNAL INTERNATIONAL CHARGÉ DE POURSUIVRE LES PERSONNES PRÉSUMÉES RESPONSABLES DE VIOLATIONS GRAVES DU DROIT INTERNATIONAL HUMANITAIRE COMMISES SUR LE TERRITOIRE DE L'EX-YOUGOSLAVIE DEPUIS 1991

Quartier Pénitentiaire

TO: Elizabeth NAHAMYA Deputy Principal Defender Special Court for Sierra Leone	FROM: Fraser GILMOUR Deputy Chief UN Detention Unit
FAX NO.: +39 0831 257299	FAX NO.: +31 (0)70 358 5375
TEL. NO.: +39 0831 257210	TEL. NO.: +31 (0)70 358 8677
DATE: 13 October 2005	PAGES: 2 including this

SUBJECT: Video Surveillance Equipment

13/10/05

Ms Nahamya,

Please find following my reply regarding your *Request for Information regarding Surveillance Cameras in the Detention Facility.*

Regards,

Fraser Gilmour
Deputy Chief
UN Detention Unit
ICTY

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia
Detention Unit

Tribunal Pénal International pour l'ex-Yougoslavie
Quartier Pénitentiaire

13 October 2005

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Dear Ms Nahamya,

With reference to your query regarding the use of video surveillance equipment at the ICTY Detention Unit, I can confirm that video surveillance equipment is in use within the Unit and is administered in accordance with the *Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal* ("Rules of Detention").

Primarily, the Rules of Detention were established to protect the rights of detainees and to ensure their safe and secure custody in order that they may appear before the Tribunal in a good physical and mental state to defend themselves. Rule 11 establishes the basic tenet for data: "All information concerning detainees shall be treated as confidential . . .[1]" no matter which medium. Coupled to this premise are the technical capabilities and the choice of how the "video surveillance equipment" is used. At the ICTY Detention Unit, we have a number of real-time closed circuit television cameras throughout the facility. The purpose of those cameras is to assist the management and staff in administering the Unit and to ensure the good order and security in real-time, not for recorded analysis.

With specific reference to the visiting area of the Detention Unit, whilst cameras are located in visiting areas there are none in the actual visiting rooms. Although the Rules of Detention give the management the right to monitor all visits visually and all with the exception of visits from counsel "within the hearing[2]" "in the interests of justice or the security and good order of the host prison and the Detention Unit[3]" this requirement is normally managed in the flesh. This approach has been preferred to make the detainee aware when monitoring is taking place and to avoid the paranoia caused by over use of remote monitoring.

Monitoring of a detainee's cell by video surveillance equipment is only permissible "to protect the health or the safety of the detainee[4]", therefore the interests of the wellbeing of the detainee outweigh the concerns for privacy.

I hope that this information is of some use to you in your deliberations.

Regards,

Fraser Gilmour
Deputy Chief
UN Detention Unit
ICTY

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[1] From Rule 11
[2] From Rule 67 (D)
[3] From Rule 63 (A)
[4] From Rule 36 *ter* (A)

ICTY, Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands
UN Detention Unit, Pompstationsweg 32, 2597 JW The Hague. P.O. Box 87810, 2508 DE The Hague. Netherlands
TPIY, Churchillplein 1, 2517 JW La Haye. B.P. 13888, 2501 EW La Haye. Pays-Bas
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Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

SCOPE OF THE BODY OF PRINCIPLES

These principles apply for the protection of all persons under any form of detention or imprisonment.

USE OF TERMS

For the purposes of the Body of Principles:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

(f) The words "a judicial or other authority" means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons

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under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case

shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

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Principle 10

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

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

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Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

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4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

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A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

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Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

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Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

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 that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

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footnotes

* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

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DOMBO BEHEER B.V. v. THE NETHERLANDS - 14448/88 [1993] ECHR 49 (27 October 1993)

In the case of Dombo Beheer B.V. v. the Netherlands*,

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 R. Ryssdal, President,

Mr R. Bernhardt,

Mr L.-E. Pettiti,

Mr B. Walsh,

Mr S.K. Martens,

Mr I. Foighel,

Mr R. Pekkanen,

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Mr M.A. Lopes Rocha,

Mr G. Mifsud Bonnici,

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

Registrar,

Having deliberated in private on 23 April and

22 September 1993,

Delivers the following judgment, which was adopted on the

last-mentioned date:

Notes by the Registrar

* The case is numbered 37/1992/382/460. The first number is the

case's position on the list of cases referred to the Court in the

relevant year (second number). The last two numbers indicate the

case's position on the list of cases referred to the Court since

its creation and on the list of the corresponding originating

applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came

into force on 1 January 1990.

PROCEDURE

1. The case was referred to the Court by the European

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Commission of Human Rights ("the Commission") on 26 October 1992,

within the three-month period laid down by Article 32 para. 1 and

Article 47 (art. 32-1, art. 47) of the Convention. It originated

in an application (no. 14448/88) against the Kingdom of the

Netherlands lodged with the Commission under Article 25 (art. 25)

on 15 August 1988 by a limited liability company possessing legal

personality under Netherlands law (besloten vennootschap),

Dombo Beheer B.V.

The Commission's request referred to Articles 44 and 48

(art. 44, art. 48) and to the declaration whereby the Netherlands

recognised the compulsory jurisdiction of the Court (Article 46)

(art. 46). The object of the request was to obtain a decision

as to whether 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 enquiry made in accordance with

Rule 33 para. 3 (d) of the Rules of Court, the applicant company

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stated that it wished to take part in the proceedings and

designated the lawyer who would represent it (Rule 30). On

1 March 1993 the President gave him leave to use the Dutch

language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio

Mr S.K. Martens, the elected judge of Netherlands nationality

(Article 43 of the Convention) (art. 43), and Mr R. Ryssdal,

the President of the Court (Rule 21 para. 3 (b)). On

30 October 1992, in the presence of the Registrar, the President

drew by lot the names of the other seven members, namely

Mr L.-E. Pettiti, Mr B. Walsh, Mr I. Foighel, Mr R. Pekkanen,

Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici and Mr B. Repik

(Article 43 in fine of the Convention and Rule 21 para. 4)

(art. 43). With effect from 1 January 1993 Mr R. Bernhardt,

substitute judge, replaced Mr Repik, whose term of office had

come to an end owing to the dissolution of the Czech and Slovak

Federal Republic (Articles 38 and 65 para. 3 of the Convention

and Rules 22 para. 1 and 24 para. 1) (art. 38, art. 65-3).

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Agent,

Mr J.L. de Wijkerslooth de Weerdesteijn,

landsadvocaat, Counsel,

Mr P.A.M. Meijknecht, Ministry of Justice, Adviser;

(b) for the Commission

Mrs J. Liddy, Delegate;

(c) for the applicant

Mr D.W. Byvanck, advocaat en procureur, Counsel.

The Court heard addresses by Mr de Wijkerslooth de Weerdesteijn for the Government, Mrs Liddy for the Commission and

Mr Byvanck for the applicant, and also replies to a question put

by one of its members.

AS TO THE FACTS

I. The particular circumstances of the case

7. The applicant (hereinafter "Dombo") is a limited

liability company under Netherlands law; it is the continuation

of a public limited company (naamloze vennootschap) originally

founded in 1958. It has its registered office in Nijmegen. At

the material time, its business included holding shares in

several other companies, for which it provided management; these

subsidiary companies engaged in commercial activities.

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4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the applicant's memorial on 1 March 1993 and the Government's memorial on 4 March 1993. The Secretary to the Commission informed the Registrar that the Delegate would submit her observations at the hearing.

5. On 1 March 1993 the Commission produced certain documents from its file which the Registrar had sought from it at the applicant company's request.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 April 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr K. de Vey Mestdagh, Ministry of Foreign Affairs,

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The

shares in Dombo were held by a foundation (stichting) which

issued certificates of shares; these were apparently all held by

a Mr H.C. van Reijendam.

The company's management also included Mr van Reijendam;

he was the sole managing director from 1963 until his dismissal

(see paragraph 15 below), except for a short period between

4 February 1981 and 23 March 1981 during which he was suspended

as managing director and temporarily replaced by a Mr C.U. and

a Mrs van L.

8. At the material time, Dombo banked with the Nederlandsche

Middenstandsbank N.V. (hereinafter "the Bank") through its branch

office in Nijmegen. The manager of that office was a Mr van W.;

under the Bank's company statutes his position was not that of

managing director of the Bank itself and his powers to represent

the Bank, which included allowing credit up to a certain maximum,

were strictly circumscribed.

An agreement existed between Dombo and the Bank under

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which Dombo and its subsidiaries enjoyed credit in current

account, i.e. the possibility of overdrawing on accounts held

with the Bank. In August 1980 this credit facility amounted to

500,000 Netherlands guilders (NLG), with an additional temporary

overdraft facility of up to NLG 250,000. This agreement had been

formalised in a written confirmation of an oral agreement to that

effect and in a contract dated 11 August 1980 under which the

Bank opened a joint account (compte-jointovereenkomst) in the

name of Dombo and its subsidiaries, who assumed responsibility

jointly and severally for meeting their obligations to the Bank.

9. A dispute arose between Dombo and the Bank concerning the

development of their financial relationship during the period

between December 1980 and February 1981. In the ensuing civil

proceedings both parties gave renderings of the facts which

differed materially on significant points.

10. Dombo's account may be summarised as follows.

(a) In early December 1980 the Bank, through the manager

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of

its Nijmegen branch, Mr van W., agreed orally to raise the

maximum of the credit available to Dombo by NLG 1,600,000 to a

total of NLG 2,100,000. As Mr van Reijendam had explained to

Mr van W., Dombo required this extension to take over the

commercial operations of a certain limited liability company, O.,

which had gone bankrupt; action was needed urgently. This oral

agreement was to be formalised later; at this point, however,

Mr van Reijendam did agree in writing to stand surety himself for

Dombo and its subsidiaries to the amount of NLG 350,000.

Following this alteration of the agreement of 11 August 1980

Dombo opened an account with the Bank earmarked for its

activities in connection with the O. takeover and the Bank

provided letters of credit on a number of occasions.

(b) In early January 1981 Dombo was offered the opportunity

to take over two other limited liability companies, T. and D.,

which had run into financial difficulties. To finance these

takeovers Dombo required another extension of the credit

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limit;

this was discussed between Mr van Reijendam and Mr van W.

Following these discussions the Bank made Dombo an offer in

writing dated 22 January 1981 to raise the maximum credit to

NLG 5,000,000. In anticipation of this extension, the Bank paid

out NLG 350,000 in connection with the takeover of T. and D. and

subsequently agreed to a withdrawal by Mr van Reijendam of

another NLG 100,000 for the same purpose. Mr van W. required

security for these sums in the form of a mortgage and made

Mr van Reijendam sign a blank power of attorney. The Bank made

use of that document to have a deed drawn up by a notary

mortgaging all immovable property belonging to Dombo, its

subsidiaries and Mr van Reijendam personally. This mortgage was

surety for a credit of NLG 1,600,000, i.e. it further secured the

extension of the credit referred to in sub-paragraph (a) above.

(c) On 28 January 1981 the Bank, through Mr van W.,

unexpectedly and inexplicably withdrew its confidence in

Mr van Reijendam, called on him to resign and froze all Dombo's

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accounts without warning, this in spite of the fact that its

total debit balance was then NLG 783,436.06 and therefore well

within the agreed limit of NLG 2,100,000.

11. The Bank's rendering of the facts may be summarised as

follows.

(a) The Bank acknowledged that Dombo had asked for a higher

credit limit in connection with the takeover of the commercial

activities of the company O. It had agreed in principle but had

required certain additional information to be provided by Dombo,

including its annual statement for the previous year (1979);

these had never been received and an agreement to raise the

existing credit facilities as claimed by Dombo had therefore

never been reached. However, in connection with the takeover of

the activities of the O. company (which it approved of in

principle) and the urgent need for funds, the Bank had been

prepared to enable Dombo to act in anticipation of the extension

of the credit facilities by providing letters of credit on a

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number of occasions. Mr van Reijendam had been asked to stand

surety for these himself to the amount of NLG 350,000. By the

end of January 1981 the sum for which the Bank had bound itself

amounted to NLG 848,000. The Bank pointed out that there was a

difference between a letter of credit and a credit under a

current account agreement; the former implied only occasional and

short-term risk, whereas the latter involved more permanent,

long-term risk.

(b) The Bank acknowledged also the second request for an

extension of the credit facilities for the takeover of the

companies T. and D. In this connection, Mr van Reijendam had

indicated that others would stand surety for at least

NLG 2,000,000. Relying on that statement, the Bank had written

to Dombo on 22 January 1981 that it agreed in principle to an

extension of the credit facilities to NLG 5,000,000, subject

however to certain conditions regarding annual statements and

securities. No annual statements had been forthcoming, nor any

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securities either, and so the Bank had written to Dombo on

19 March 1981 withdrawing the offer.

The Bank acknowledged the transfer of NLG 350,000 but

denied having been aware of the purpose for which that sum was

intended. It claimed that Mr van Reijendam had misled it in this

regard. This also applied to the withdrawal of the NLG 100,000.

The Bank had referred to this deception in its letter of

19 March 1981 and stated that in consequence it would annul the

credit agreement (which it had nevertheless continued to honour)

if Mr van Reijendam were to take up his position as manager of

Dombo again (see sub-paragraph (c) below).

The Bank claimed that it had required the mortgages as

surety for the letters of credit referred to in sub-paragraph (a)

above and the withdrawal of the above-mentioned sums of

NLG 350,000 and 100,000. The mortgages had been established

under a power of attorney drawn up by a notary who - as the

document itself showed - had read it aloud before Mr van

Reijendam signed it. The Bank denied that there had been a blank

power of attorney.

(c) The Bank denied categorically that it had frozen Dombo's 14794

accounts on 28 January 1981. In any case, withdrawals from these

accounts had by then exceeded the agreed maximum of NLG 750,000,

the balance being NLG 784,657.75 in debit. It had, however, made

it clear that it no longer had confidence in Mr van Reijendam

after the above-mentioned deception had come to light. The

Bank's doubts concerning his suitability to continue managing

Dombo were later confirmed when Mr van Reijendam was suspended

as managing director with effect from 4 February 1981 and shortly

afterwards committed to a mental institution under a court order.

During the period from 4 February 1981 until 23 March 1981 the

Bank continued its dealings with Dombo under different

management, consisting of Mr C.U. and Mrs van L. It continued

to allow credit to finance the activities taken over from

the O. company. After Mr van Reijendam's return the Bank had

allowed Dombo every opportunity to reduce its debt; when it

became clear that Mr van Reijendam was not prepared to do

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so, it

had annulled the credit agreement with effect from

30 October 1981. Only then had it frozen the accounts.

II. Proceedings in domestic courts

12. On 11 March 1983, pursuant to a court order which it had

obtained for that purpose, Dombo seized certain moneys which it

still owed to the Bank and summoned the Bank before the Arnhem

Regional Court (arrondissementsrechtbank), claiming financial

compensation for the damage caused by the Bank's alleged failure

to honour its commitments.

13. After extensive argument in writing - in which each party

presented written pleadings three times and produced a

considerable number of documents and Dombo offered to produce

witnesses (in particular the managing directors, Mr C.U. and

Mrs van L., who had temporarily replaced Mr van Reijendam, to

prove that there had been negotiations at that time to raise the

credit limit from NLG 2,100,000 to NLG 2,600,000) - the Regional

Court delivered an interlocutory judgment on 2 February 1984

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allowing Dombo to call witnesses to prove, firstly, that the Bank

had frozen Dombo's accounts on 28 January 1981 and, secondly,

that the existing credit arrangements had been extended by

NLG 1,600,000 in December 1980. In addition, it ordered the

appearance in person (comparitie) before one of its judges of

representatives of Dombo and the Bank able to give information

and empowered to agree to a friendly settlement.

14. The Bank appealed against this interlocutory judgment to

the Arnhem Court of Appeal (gerechtshof), arguing that Dombo's

claim should have been dismissed out of hand. According to the

Bank, Dombo had abandoned the original basis of its claim, and

the basis which it had in the meanwhile adopted for it obviously

could not support it. Besides, Dombo had no interest in the

claim and the Regional Court's requirement of evidence was in any

case too vague and one-sided.

After both parties had submitted a written statement and

produced new documents and, through their lawyers, pleaded their

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cases orally (Dombo repeating its offer to provide evidence), the

Court of Appeal, in a judgment of 8 January 1985, refused to

accept the Bank's arguments and confirmed the judgment of the

Regional Court.

At the request of both parties, the Court of Appeal did

not refer the case back to the Regional Court but proceeded to

deal with the case itself. Accordingly, it ordered the hearing

of witnesses to go ahead on 13 February 1985 before one of its

own judges, Mr van E., but reserved the decision on the date of

the personal appearance of the parties' representatives until the

witnesses had been heard.

15. Dombo called a number of witnesses, including

Mr van Reijendam. Producing the minutes of a shareholders'

meeting dated 29 June 1984, it claimed that Mr van Reijendam had

been dismissed as managing director for reason of "lack of

funds". It further produced a document from which it appeared

that Mr van Reijendam had been registered as an unemployed person

seeking employment on 27 November 1984 and an extract from the

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commercial register from which it appeared that another person

had been appointed managing director of Dombo on

10 December 1984.

16. The Bank objected to Mr van Reijendam being heard. It

based this objection on the rule that a party to the proceedings

could not himself be heard as a witness (see paragraphs 23 and

25-26 below). It claimed that Mr van Reijendam's dismissal did

not reflect the true state of affairs but had been effected only

to enable him to testify.

In a judgment of 12 February 1985 Judge Van E. upheld

this objection and refused to hear Mr van Reijendam. He had

become convinced that both Mr van Reijendam's dismissal as

managing director of Dombo and the appointment in his place of

another person were shams (schijnhandelingen) which served no

other purpose than to enable Mr van Reijendam to testify in the

instant proceedings. He pointed out that Mr van Reijendam had

been present at the oral pleadings before the Court of

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Appeal on

30 October 1984 and had not protested when Dombo's lawyer

referred to him as Dombo's managing director. He added that in

his view the motives alleged for the dismissal were implausible.

The other six witnesses produced by Dombo were heard on

13 and 20 February 1985. One of them, Mr C.U., was heard on both

dates. This witness had been Dombo's financial affairs manager

from the middle of 1977 until May 1980 and had since retained

links with Dombo as an external adviser. During November and

December 1980 he had "been very closely involved" with the

running of Dombo and this had led to his appointment as statutory

managing director after the suspension of Mr van Reijendam on

4 February 1981 (see paragraph 11, sub-paragraph (c), above).

On 13 February Mr C.U. stated, inter alia, that he had been

present at several meetings of the parties between November 1980

and 28 January 1981 and that, although he could not recall the

exact words used, he had heard Mr van W. say something like,

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"Then for the time being we will take a credit of NLG 1,600,000

as a starting-point". When examined for the second time at

Dombo's request, he corrected his statement to the extent that

besides the original credit facility of NLG 500,000 a new

facility had been agreed to the amount of NLG 1,600,000 in

connection with takeovers (mainly of the activities of the

O. company, a small part being intended for the takeover of the

T. company). There had been several discussions, in which this

witness had taken part, about the amount to which the credit was

to be extended.

17. In the exercise of its right to have its own witnesses

heard in reply (contra-enquête), the Bank called two of its

employees, one of whom was the manager of its Nijmegen branch

office, Mr van W.

Dombo objected to the hearing of Mr van W., stating the

view that at all stages of the credit relationship, and also in

the instant proceedings, he had been and remained the formal

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representative of the Bank; to hear him as a witness at this

point, when Mr van Reijendam had not been so heard, would upset

the fair balance that should exist between parties in civil

proceedings.

18. By a decision delivered orally on 13 March 1985

Judge Van E. dismissed Dombo's objection. He considered first

and foremost that Mr van W. was a competent witness in the

instant case since he was not a party to the proceedings either

formally or in fact and went on to state that it could not follow

from the fact that Dombo was put at a disadvantage because

Mr van Reijendam was not heard as a witness while Mr van W. was

so heard that Mr van W. was no longer a competent witness.

The Court of Appeal judge proceeded to hear the Bank's

witnesses immediately.

After the witnesses had been examined, both parties

submitted extensive written pleadings in which they analysed the

witnesses' statements. Dombo submitted a large number of

additional documents, including written statements by persons not

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heard as witnesses; the Bank also submitted further documents.

Dombo then submitted pleadings in response to those of the Bank.

19. The Court of Appeal delivered its final judgment on

11 March 1986. It first examined the witnesses' statements in

detail. As far as the statements of the witness Mr C.U. were

concerned (see paragraph 16 above), it observed that these

contradicted each other on a significant point, namely the figure

to which it had been agreed to extend the credit facility, and

added that this discrepancy, for which no explanation had been

given, adversely affected the convincingness of the statements

of this witness. The Court of Appeal then examined a number of

written depositions submitted by Dombo. Two of these were

rejected because they were not signed. With regard to a

deposition signed by Mr van Reijendam, the Court attributed the

same value to it as to a statement made by Dombo itself.

The Court of Appeal went on to hold:

"The Court of Appeal is of the opinion that the evidence

required from Dombo has not been provided. The

statements of the witnesses [D., H. and O.] are not

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definite enough for this purpose and the statement of [C.U.] and the notarial statement made by [S.] - whose experience, as considered, dates only from after 12 May 1981 - are contradicted by those of the witnesses [Van W. and K.]. The fact that no written evidence is available of such an important agreement as that referred to by Dombo, as would normally be expected, compels the Court of Appeal to take a strict view of the evidence, and this should also be taken into account.

It was established during the proceedings that between December 1980 and January 1981 the [Bank] in effect consented to extend the credit facilities to Dombo in various forms in larger amounts than Dombo was entitled to by virtue of any written agreement, but this does not necessarily mean that Dombo was entitled to the credit facilities for that reason alone, in the sense that the [Bank] would not be justified in applying a kind of temporary embargo on the facilities for reasons of its own. Although the ease with which the [Bank] allowed [Dombo] to exceed considerably the credit limit officially in force provides food for thought, it can be explained by the negotiations between the parties, which came to light during the proceedings, concerning the establishment of a substantially higher credit limit, in

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which - as was also common ground between the parties - the sum of NLG 2,600,000 was mentioned.

It is clear from the statement of the witness [Van W.] - and Dombo did not contest this again after the examination of that witness - that at the end of January 1981 the then managing director of Dombo, by misleading the witness, twice succeeded in drawing considerable sums over and above what was already to be regarded as officially a substantial overdraft on Dombo's consolidated accounts. This amount could reasonably provide the [Bank] with grounds for temporarily 'shutting off the flow of credit' to Dombo."

The Court of Appeal further held that since the agreement had not been proved, it was not necessary to examine the question whether the Bank had in fact frozen Dombo's accounts in breach of it and it went on to dismiss Dombo's claim.

20. In June 1986 Dombo filed an appeal on points of law (cassatie) to the Supreme Court (Hoge Raad). Paragraph 2 of its (quite extensive) statement of grounds of appeal (middel van cassatie) was particularly directed against Judge Van E.'s decisions to uphold the objections to hearing Mr van Reijendam

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as a witness for Dombo and reject those against hearing Mr van W. as a witness for the Bank. This paragraph argued, inter alia:

"Furthermore, the decisions of the Court of Appeal, (also) if considered in relation to one another, are incorrect in view of Article 6 (art. 6) of the [Convention], which guarantees everyone a fair hearing of his case in the determination of his civil rights and obligations. After all, this provision implies (inter alia) that the parties should be able to fight each other with equal means ('equality of arms') and that every party to civil proceedings should have the opportunity to present his case to the court in circumstances which do not place him at a substantial disadvantage vis-à-vis the opposing party."

21. The Advocate-General (advocaat-generaal), in her advisory opinion (conclusie) of 8 January 1988, formulated the opinion that Dombo was right to argue that "according to current legal opinion" a person who "could be identified with a party" should be allowed to testify. In support of this view she referred to the new law of evidence in civil procedure, which had by then

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been accepted by Parliament (see paragraph 27 below). As an

additional argument in favour of this proposition she pointed to

Article 6 para. 1 (art. 6-1) of the Convention, on which Dombo

could in her view properly rely. In this connection she argued,

inter alia:

"In the present case the point was that [Mr van W.] was

able to present his view of what was (or was not, as the

case may be) agreed or discussed between himself and

Mr van Reijendam in December 1980 to the court

extensively (his statement comprises four pages in the

official record and two pages in the judgment of the

Court of Appeal), while Mr van Reijendam was not allowed

to give his version of the events himself. Yet the

success of Dombo's action depended on that."

She went on to advise allowing Dombo's appeal.

22. The Supreme Court dismissed the appeal on

19 February 1988. It rejected Dombo's arguments based on

"current legal opinion", considering that the law of evidence in

force was based on the exclusion of parties as witnesses in their

own case so that it was not possible to anticipate the entry into

force of the new law, which had an entirely different

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structure.

It likewise rejected the complaint based on Article 6 para. 1

(art. 6-1) of the Convention; this was based, according to the

Supreme Court, on the argument that the Court of Appeal had

violated the principle that "the procedural rights of both

parties should be equivalent". This line of argument, in the

opinion of the Supreme Court,

"... fails to recognise that in assessing the

convincingness of the content of witnesses' statements,

the judge with competence to determine questions of fact

is free to consider the nature and degree of involvement

of a witness with a party in proceedings and that he must

also judge a witness's statement in the light of what the

opposing party has put forward in its written pleadings

or when appearing before the court in person".

III. Relevant domestic law and practice

A. Parties as witnesses, in general: the former law

23. Prior to the entry into force of the new rules of

evidence in civil cases on 1 April 1988 (see paragraph 27 below)

evidence in civil procedure was governed by the Civil Code

(Burgerlijk Wetboek - CC) and the Code of Civil Procedure

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(Wetboek van Burgerlijke Rechtsvordering - CCP), both of which

dated from 1838 and were largely based on the corresponding

French codes.

The former law, which applied at the time of the

proceedings in issue, did not lay down in so many words that a

person was not allowed to testify in a case to which he was a

party. It was nevertheless generally accepted that, in the words

of the Supreme Court, "one of the principles of the Netherlands

law of civil procedure is that a person who is formally or

substantively a party to litigation cannot be heard as a witness

in his own case" (judgment of 1 February 1963, NJ (Nederlandse

Jurisprudentie, Netherlands Law Reports) 1964, 157). This view

was based on, inter alia, Article 1947 para. 1 CC, according to

which relatives by blood or by marriage in a direct line, spouses

and former spouses of parties to proceedings were disqualified

from being witnesses.

The rule that an actual party was not allowed to give

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evidence himself was repeatedly confirmed and strictly applied

by the Supreme Court, as reflected by, inter alia, its judgments

of 22 May 1953, NJ 1953, 647; 1 February 1963, NJ 1964, 157;

5 January 1973, NJ 1973, 106, and the judgments referred to below

in paragraph 25.

24. However, it did not follow that it was impossible for the

courts to hear parties in person. The courts had the following

possibilities at their disposal:

(a) The "decisive oath" and the "supplementary oath" involved

hearing a party to proceedings on oath.

(i) One party might call upon the other to confirm on

oath the truth of a certain disputed fact. If

the other party took the oath, then proof to the

contrary was no longer admissible; if he refused,

then the contrary statement was accepted as the

truth. This was the "decisive oath" (beslissende

eed) (Articles 1967-1976 CC).

(ii) The court also had the possibility of ordering,

of its own motion or at the request of a party,

that one or other of the parties should take the

"supplementary oath" (aanvullende eed). It could

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impose such an oath on the party which was, in its view, the most appropriate for the purpose, provided that the statements to which the oath was to relate were neither proved nor entirely unsubstantiated (Articles 1977 and 1978 CC).

It was in particular the supplementary oath on which parties not infrequently relied when there was a possibility that their evidence would be insufficient; they would ask the court for permission to supplement their evidence in this way if the court were to hold it to be insufficient on its own.

(b) The courts also had three possible ways of hearing parties which did not involve putting them on oath:

(i) By means of an "examination on points in issue" (verhoor op vraagpunten) of one party at the request of the other (Articles 234-247 CCP). The party requesting such an examination had to file his questions beforehand; however, the court was entitled to ask additional questions occasioned by the examination, as was the party who had requested it.

(ii) By ordering, of its own motion or at the request of either party, the personal appearance of the parties for the purpose of obtaining information

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(comparitie tot het geven van inlichtingen)

(Article 19a CCP). In principle, such an order was for the appearance of both parties.

(iii) In the event of oral pleadings (pleidooien). Article 20 CCP allowed parties to present their cases themselves, but this was very rare; however, parties were frequently present at the oral pleadings and the court could make use of the opportunity to question them (Article 144 para. 2 CCP).

It was commonly assumed that statements made in these three instances did not constitute evidence in support of the position of the party that made them.

B. Legal persons

25. If a party to proceedings was a legal person, then the rule disqualifying a party as a witness applied to any natural person who was to be identified with the legal person concerned.

A natural person was identified with a legal person if he had acted in the proceedings as its representative (as appears from, inter alia, the Supreme Court's judgments of 27 June 1913, NJ 1913, p. 865; 28 April 1916, NJ 1916, p. 786; 19 January 1922,

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NJ 1922, p. 319; 17 January 1969, NJ 1969, 251), or if he was

empowered by law or by its statutes to act as its legal

representative (see, inter alia, the Supreme Court's judgments

of 9 January 1942, NJ 1942, 302; 12 January 1973, NJ 1973, 104;

26 October 1979, NJ 1980, 486; 18 November 1984, NJ 1984, 256).

26. Whether or not a person was qualified to be a witness had

to be determined in the light of the situation obtaining when he

was to make his statement. Under this general rule it was

usually assumed that a former director of a legal person, who

would have been prevented from giving evidence while he retained

his position, qualified as a witness following his dismissal

(see, inter alia, the Supreme Court's judgment of 28 June 1985,

NJ 1985, 888). However, this was not the case if the person

concerned had not genuinely lost his position within the legal

person and where his dismissal had to be construed as a sham

(schijnhandeling) (see, inter alia, the Supreme Court's judgment

of 18 November 1983, NJ 1984, 256, and its judgment in

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the

present case of 19 February 1988, published with an annotation

in NJ 1988, 725).

C. Parties as witnesses: the new law

27. The law of evidence in civil proceedings was extensively

amended by the Act of 3 December 1987, Staatsblad (Official

Gazette) 590, which entered into force on 1 April 1988.

The Bill on which the new law is based dates from as long

ago as 1969. One of the reasons why it took so long for this

Bill to become law was the controversy surrounding the question

whether the above principle - i.e. that parties should not be

allowed to testify -should be abandoned or whether,

alternatively, it should be accepted that parties might be heard

as witnesses. During the parliamentary proceedings this remained

the subject of heated debate both in Parliament and outside it,

but it was eventually decided to abandon the old practice.

Article 190 CCP now allows parties to give evidence as witnesses

in their own case. Accordingly, the decisive and supplementary

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oaths referred to in paragraph 24, sub-paragraph (a), above have

ceased to exist.

It appears from the drafting history of this legislation

that those cases "in which insufficiency of evidence on the part

of one party leads to legal inequality" especially led to the

conclusion that "the arguments in favour of allowing parties to

testify should be given more weight than the fear of bias and

problems of assessment, which incidentally are just as likely to

occur in the case of other statements by witnesses". As an

example of such legal inequality it was mentioned "that a party

who is a natural person who is disqualified as a witness may be

confronted with (for instance) a party who is a legal person,

which is in a position to bring forward 'third parties', although

the credibility of these witnesses is just as doubtful in view

of their close connections with that party or the proceedings.

... [I]t is difficult to see why one individual should be allowed

to make a statement under oath in court about matters in

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which

he had a part while the other person involved should not. This

even applies regardless of any insufficiency of evidence in the

sense that no other evidence is
available ..." (Parlementaire

Geschiedenis Nieuw Bewijsrecht, Parliamentary Drafting History

of the New Law of Evidence, pp. 189-90)

It should be observed that differences continue to exist

between a witness who is a party to the proceedings in question

and a witness who is not. For present purposes, it is sufficient

to note that pursuant to Article 213 para. 1 CCP the statement

of a witness who is party to the proceedings "concerning the

facts to be proved by him cannot provide evidence to his

advantage, unless the statement supplements incomplete evidence".

PROCEEDINGS BEFORE THE COMMISSION

28. Dombo applied to the Commission on 15 August 1988. It

alleged that the refusal of the courts to hear its director (or

former director) as a witness while the manager of the branch

office of its opponent was so heard placed it at a disadvantage

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vis-à-vis its opponent and so constituted a breach of the principle of "equality of arms" enshrined in Article 6 para. 1 (art. 6-1) of the Convention.

29. On 3 September 1991 the Commission declared the application (no. 14448/88) admissible. In its report of 9 September 1992 (made under Article 31) (art. 31), it expressed the opinion, by fourteen votes to five, that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 274 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

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

30. The applicant company complained about the refusal by the national courts to allow its former managing director,

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Mr van Reijendam, to give evidence, whereas the branch manager

of the Bank, Mr van W., who had been the only other person

present when the oral agreement was entered into, had been able

to testify. In its contention, the national courts had thereby

failed to observe the principle of "equality of arms", in breach

of its right to a "fair hearing" as guaranteed by

Article 6 para. 1 (art. 6-1), which reads:

"In the determination of his civil rights and obligations

..., everyone is entitled to a fair ... hearing ..."

This view was subscribed to by the Commission but

contested by the Government.

31. The Court notes at the outset that it is not called upon

to rule in general whether it is permissible to exclude the

evidence of a person in civil proceedings to which he is a party.

Nor is it called upon to examine the Netherlands law of

evidence in civil procedure in abstracto. The applicant company

does not claim that the law itself was in violation of the

Convention; besides, the law under which the decisions complained

of were given has since been replaced. In any event, the

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competence of witnesses is primarily governed by national law

(see, as recent authorities and mutatis mutandis, the Lüdi v.

Switzerland judgment of 15 June 1992, Series A no. 238, p. 20,

para. 43, and the Schuler-Zgraggen v. Switzerland judgment

of 24 June 1993, Series A no. 263, p. 21, para. 66).

It is not within the province of the Court to substitute

its own assessment of the facts for that of the national courts.

The Court's task is to ascertain whether the proceedings in their

entirety, including the way in which evidence was permitted, were

"fair" within the meaning of Article 6 para. 1 (art. 6-1) (see,

inter alia and mutatis mutandis, the judgments referred to above,

loc. cit.).

32. The requirements inherent in the concept of "fair

hearing" are not necessarily the same in cases concerning the

determination of civil rights and obligations as they are in

cases concerning the determination of a criminal charge. This

is borne out by the absence of detailed provisions such as

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paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3) applying to

cases of the former category. Thus, although these provisions

have a certain relevance outside the strict confines of criminal

law (see, mutatis mutandis, the Albert and Le Compte v. Belgium

judgment of 10 February 1983, Series A no. 58, p. 20, para. 39),

the Contracting States have greater latitude when dealing with

civil cases concerning civil rights and obligations than they

have when dealing with criminal cases.

33. Nevertheless, certain principles concerning the notion of

a "fair hearing" in cases concerning civil rights and obligations

emerge from the Court's case-law. Most significantly for the

present case, it is clear that the requirement of "equality of

arms", in the sense of a "fair balance" between the parties,

applies in principle to such cases as well as to criminal cases

(see the Feldbrugge v. the Netherlands judgment of 26 May 1986,

Series A no. 99, p. 17, para. 44).

The Court agrees with the Commission that as regards

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litigation involving opposing private interests, "equality of

arms" implies that each party must be afforded a reasonable

opportunity to present his case - including his evidence - under

conditions that do not place him at a substantial disadvantage

vis-à-vis his opponent.

It is left to the national authorities to ensure in each

individual case that the requirements of a "fair hearing" are

met.

34. In the instant case, it was incumbent upon the applicant

company to prove that there was an oral agreement between it and

the Bank to extend certain credit facilities. Only two persons

had been present at the meeting at which this agreement had

allegedly been reached, namely Mr van Reijendam representing the

applicant company and Mr van W. representing the Bank. Yet only

one of these two key persons was permitted to be heard, namely

the person who had represented the Bank. The applicant company

was denied the possibility of calling the person who had

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represented it, because the Court of Appeal identified him with

the applicant company itself.

35. During the relevant negotiations Mr van Reijendam and

Mr van W. acted on an equal footing, both being empowered to

negotiate on behalf of their respective parties. It is therefore

difficult to see why they should not both have been allowed to

give evidence.

The applicant company was thus placed at a substantial

disadvantage vis-à-vis the Bank and there has accordingly been

a violation of Article 6 para. 1 (art. 6-1).

II. APPLICATION OF ARTICLE 50 (art. 50)

36. According to Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by

a legal authority or any other authority of a High

Contracting Party is completely or partially in conflict

with the obligations arising from the ... Convention, and

if the internal law of the said Party allows only partial

reparation to be made for the consequences of this

decision or measure, the decision of the Court shall, if

necessary, afford just satisfaction to the injured

party."

A. Pecuniary and non-pecuniary damage

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37. In its memorial the applicant company sought compensation

for pecuniary and non-pecuniary damage without specifying exact

amounts. In subsequent documents setting out its claims in

greater detail, Dombo stated that it did not consider them to be

ready for decision. In its view, it was necessary for the

pecuniary damage suffered as a result of the Bank's actions

complained of and the damage resulting from the dismissal of its

claims by the national courts to be assessed by accountants; such

an assessment would also provide an indication of the extent of

the non-pecuniary damage suffered.

38. The applicant company requested the Court primarily to

award a sum by way of an advance on the amount to be paid

eventually by the Government, sufficient for financial experts

to be commissioned to carry out the above-mentioned assessment

of losses. In the alternative, it requested the award of a sum

by way of special legal assistance, sufficient for the same

purpose. In the further alternative, it requested the Court to

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defer consideration of its Article 50 (art. 50) claim so as to

give it the opportunity to obtain the required funds elsewhere.

39. The Government commented, firstly, that it was by no

means certain that the national courts would have found for the

applicant company if Mr van Reijendam had been heard and,

secondly, that it would be incorrect to hold the Government

responsible for the prejudice suffered by the applicant company,

which was in any case primarily the consequence of the Bank's

actions.

The Delegate of the Commission suggested that the Court

take into account some loss of opportunities by way of pecuniary

damage and the feeling of unequal treatment by way of

non-pecuniary damage and award a sum on an equitable basis.

40. The Court considers that the question of these claims is

ready for decision.

The applicant company's various claims for compensation

for pecuniary and non-pecuniary damage - which have to be decided

under a single head - are based on the assumption that it would

have won its case if the national courts had allowed

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Mr van Reijendam to testify. The Court could not accept this

assumption without itself assessing the evidence. The testimony

of Mr van Reijendam before the Arnhem Court of Appeal could have

resulted in the existence of two opposing statements, one of

which would have to be accepted against the other on the basis

of supporting evidence. It is not for the European Court of

Human Rights to say which should be accepted. This part of the

claim for just satisfaction must accordingly be dismissed.

B. Costs and expenses

41. The applicant company claimed reimbursement of NLG 12,948

for lawyers' fees and expenses in the proceedings before the

Arnhem Court of Appeal. The applicant company further claimed

a total of NLG 48,244.51 less the amounts paid and payable in

legal aid for legal assistance before the Strasbourg

institutions.

The Delegate of the Commission did not comment. The

Government expressed no opinion other than to remark that they

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found the amount of time spent on the case by the applicant

company's lawyer - 133 hours - "somewhat staggering".

42. The Court notes that like the claim for compensation, the

claim for reimbursement of costs and expenses incurred in the

proceedings before the Arnhem Court of Appeal is based on the

assumption that the applicant company would have won its case if

Mr van Reijendam had been heard (see paragraph 40 above). This

claim must therefore be dismissed for the same reasons.

43. As for costs and expenses incurred in the proceedings

before the Strasbourg institutions, the Court considers it

reasonable, making an assessment on an equitable basis, to award

the applicant company NLG 40,000 under this head less

16,185 French francs paid in legal aid.

However, the Court does not consider it appropriate to

require the payment of interest as the applicant company

requested.

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been a

violation of Article 6 para. 1 (art. 6-1);

2. Holds unanimously that the respondent State is to pay to

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the applicant company, within three months, 40,000 (forty thousand) Netherlands guilders for costs and expenses incurred in the Strasbourg proceedings, less 16,185 (sixteen thousand one hundred and eighty-five) French francs to be converted into Netherlands currency at the rate of exchange applicable on the date of delivery of this judgment;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 October 1993.

Signed: Rolv RYSSDAL

President

Signed: Marc-André Eissen

Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Martens, joined by Mr Pettiti, and the joint dissenting opinion of Mr Bernhardt and Mr Pekkanen are annexed to this judgment.

Initialled: R. R.

Initialled: M.-A. E.

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DISSENTING OPINION OF JUDGE MARTENS,

JOINED BY JUDGE PETTITI

1. There are two reasons why I find myself unable to agree

with the Court's judgment.

What Dombo is complaining of is the application by the

Netherlands courts of a rule under the domestic law of evidence

in civil proceedings whereby "a person who is formally or

substantively a party to litigation cannot be heard as a witness

in his own case"1.

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1. As to this rule, see paragraph 23 of the Court's judgment.

In my opinion, (A) this rule is not as such incompatible

with the Convention, in particular with the concept of fair

trial, and (B) neither does its application in concreto violate

the principle of equality of arms.

A.

2. The Court starts its reasoning by noting that it "is not

called upon to rule in general whether it is permissible to

exclude the evidence of a person in civil proceedings to which

he is a party" (paragraph 31 of the judgment), and it therefore 14928

declines to examine in abstracto whether the above rule of the

Netherlands law of evidence in civil proceedings is compatible

with the Convention. However, the Court could not avoid

addressing these questions, because the Netherlands courts'

refusal to hear Mr van Reijendam's testimony was the inevitable

result of applying the relevant rule of evidence2.

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2. Although in proceedings originating in an individual

application the Court generally considers itself precluded from

reviewing in abstracto whether the law of the State Party

concerned is in conformity with the Convention, it has recognised

that there are exceptions to this rule. One such exception is

where it is not really possible to distinguish between the rule

and its application or, as the Court usually puts it, where the

decision or measure complained of "was in fact the

result of" the rule's application. See, as the most recent

authority, the Philis v. Greece judgment of 27 August 1991,

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Series A no. 209, p. 21, para. 61.

The Court restricts itself to ascertaining whether the proceedings between Dombo and the Bank "in their entirety, including the way in which evidence was permitted, were 'fair' within the meaning of Article 6 para. 1 (art. 6-1)". Its decisive argument for answering this question in the negative is that since "[d]uring the relevant negotiations Mr van Reijendam and Mr van W. acted on an equal footing, both being empowered to negotiate on behalf of their respective parties, [i]t is ... difficult to see why they should not both have been allowed to give evidence." (see paragraph 35 of the judgment)

However, under a law of evidence such as that in force in the Netherlands at the relevant time it cannot be maintained that Mr van Reijendam and Mr van W. acted "on an equal footing".

Mr van W. was merely an employee representing his employer, whereas Mr van Reijendam was to be identified with Dombo, being at the material time not only its sole managing director but also

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- indirectly - its only shareholder3. Since the above rule is

based on the irrefutable presumption that testimony given by "a

witness in his own case" is not to be trusted, the difference in

the roles of Mr van W. and Mr van Reijendam provided a decisive

and sufficient explanation "why they should not both have been

allowed to give evidence".

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3. See paragraph 7 of the Court's judgment.

In other words, in all situations in which a party to

civil proceedings has to rely mainly if not exclusively on his

own declarations to refute assertions made by his opponent and

corroborated by witnesses, the aforementioned rule of the

Netherlands law of evidence in civil proceedings necessarily

places that party at a disadvantage vis-à-vis his opponent; and

it is this consequence which, in the Court's opinion, justifies

the conclusion that the principle of equality of arms has been

violated. This means that the Court does not condemn the rule's

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application in concreto but the rule itself.

3. I very much doubt, however, whether that condemnation is

justified. The rule that a person who is a party to civil

proceedings cannot be heard as a witness in his own case is

evidently based on the view that such testimony is intrinsically

untrustworthy. Moreover, it apparently dates from an era when

the oath to be sworn by witnesses was seen as having so great a

(religious) significance that it was deemed imperative to protect

a party to civil litigation from perjury and the other party from

the possibility that the judge might feel compelled to give

credit to the declarations of his opponent because they were made

under oath. For a long time the rule that nemo in propria causa

testis esse debet was generally accepted and formed part of the

law of evidence in civil procedure in all European States4.

Since the second half of the last century it has been set aside

in a number of countries5. Considerations of procedural

expediency may no doubt be advanced to justify such a reform, but

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the rule still applies in a good number of European States - such

as Belgium, France, Italy, Switzerland, Spain and Turkey - which

apparently prefer to maintain the traditional distrust of

allowing a litigant to testify in his own case.

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4. See H. Nagel, 'Die Grundzüge des Beweisrechts im europäischen

Zivilprozess' (Baden-Baden, 1967), pp. 86 et seq.

5. See Nagel, op. cit., and in Festschrift für Walther J.

Habscheid (1989), pp. 195 et seq.

Against this background I think that it is very difficult

to condemn the rule as being incompatible with the basic

principles of fair procedure. In any event one should not do so

without taking into account the other opportunities afforded by

the national law of evidence for hearing a party to civil

proceedings in person and without any argument other than that

it is "difficult to see why" a party should not be allowed to

give evidence on his own behalf.

B.

4. As I have already noted, the Court sets out to determine

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whether the proceedings between Dombo and the Bank "in their

entirety, including the way in which evidence was permitted, were

'fair' within the meaning of Article 6 para. 1 (art. 6-1)". The

Court then suggests that among the "principles concerning the

notion of a 'fair hearing' in cases concerning civil rights and

obligations" "the requirement of 'equality of arms'" is the most

significant one as regards the present case. The Court goes on

to say that in such proceedings "equality of arms" implies "that

each party must be afforded a reasonable opportunity to present

his case - including his evidence - under conditions that do not

place him at a substantial disadvantage vis-à-vis his opponent".

The latter choice of words is not particularly fortunate,

since it might be understood as indicating that the concept of

"equality of arms" has substantive implications, in that it

should also entail adapting substantive rules of procedure, such

as the rules of evidence, in order to guarantee both parties

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substantively equal chances of success; whereas in relation to

litigation concerning civil rights and obligations, the concept

of "equality of arms" can only have a formal meaning: both

parties should have an equal opportunity to bring their case

before the court and to present their arguments and their

evidence6.

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6. See, most recently, G. Baumgärtel, 'Ausprägung der

prozessualen Grundprincipien der Waffengleichheit und der fairen

Prozessführung im zivilprozessualen Beweisrecht', Festschrift

Franz Matscher, Vienna, 1993, pp. 29 et seq., with further

references.

I take it, however, that the Court is of the same view

and has only introduced this form of words as a test for

determining when both parties cannot be said to have had equal

opportunities to present their arguments and their evidence.

In my opinion Dombo was indeed afforded such an

opportunity.

5. Both parties had ample - and equal - opportunities to

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present their case in writing and both parties had ample - and

equal - opportunities to present their evidence. Both sides

submitted documents and called witnesses7.

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7. See paragraphs 12-18 of the Court's judgment.

It is true that the Bank was able to bring as a witness

its negotiator (Mr van W.), whilst Dombo did not have the

opportunity to call its negotiator, Mr van Reijendam. There are,

however, good grounds for holding that this did not place Dombo

"at a substantial disadvantage vis-à-vis" the Bank.

Firstly, under Netherlands law the courts are completely

free in their assessment of the evidence of witnesses. Thus, the

domestic courts were free to take into account the fact that

Mr van W. was professionally involved with the Bank and therefore

had a certain interest in the outcome of the proceedings8.

Similarly they would have been free to ignore statements made by

Mr van Reijendam had he been permitted to testify. Consequently,

the mere fact that Mr van W. was able to testify, whilst

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Mr van Reijendam was not cannot be said to have resulted in a

substantial disadvantage for Dombo9.

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8. This argument was stressed by the Netherlands Supreme Court:

see paragraph 21 of the Court's judgment.

9. Analysis of the judgment of the Arnhem Court of Appeal (see

paragraph 19 of the Court's judgment) reveals that this court

carefully weighed the evidence on both sides and that it was

mainly persuaded to find against Dombo not because of the

testimony of Mr van W. but by "the fact that no written evidence

[was] available of such an important agreement" as one that

raised a credit facility from NLG 500,000 to NLG 2,100,000.

Moreover, had the Arnhem Court of Appeal found that

Dombo's version of the facts, although not completely proved by

the evidence submitted, was the more probable of the two, it

could have decided in favour of Dombo subject to Mr van

Reijendam's confirming Dombo's version of the facts on oath10.

It is true that courts only ordered a "supplementary

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oath" if

they regarded the person who was to take it as trustworthy; and

it is also true that because of Mr van Reijendam's manoeuvring

in order to be allowed to give evidence as a witness, the Arnhem

Court of Appeal would not have been likely to regard him as

possessing that quality. But that is immaterial, not only in

view of the maxim "nemo auditur..." but also because the present

argument only concerns Dombo's opportunities as a matter of law.

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10. Mr van Reijendam, being identified with Dombo, could swear

a "supplementary oath" on its behalf - see paragraphs 24 (a) (ii)

and 25 of the Court's judgment.

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6. For these reasons I have voted that there has been no

violation.

JOINT DISSENTING OPINION OF JUDGES BERNHARDT AND PEKKANEN

We have voted against the violation of Article 6 para. 1

(art. 6-1) in the present case. In our opinion, equality of arms

in civil proceedings requires the equality of chances and

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possibilities to submit the relevant material to the court

concerned. In proceedings with a legal person as a party, any

individual representing that person may be identified under

national procedural law with the legal person and therefore

excluded from the formal status of a witness. In our opinion,

what is decisive is that the parties enjoy in fact and in law

equality of arms before the national court. We are convinced

that Dombo Beheer, the applicant in this case, enjoyed this

equality of arms. In this respect we refer to paragraph 5 of the

dissenting opinion of Judge Martens.

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding Judge
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
8 November 2000

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIC

DECISION ON THIRD MOTION BY PROSECUTION FOR PROTECTIVE MEASURES

The Office of the Prosecutor:

Ms Joanna Korner
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. Rule 66(A)(ii) of the Tribunal's Rules of Procedure and Evidence ("Rules") requires the prosecution to disclose to the accused, within the time limit prescribed by the Trial Chamber or the Pre-Trial Judge, copies of

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the statements of all witnesses whom it intends to call to testify at the trial. This disclosure requirement is made subject to the provisions of Rules 53 and 69,[1] made in accordance with Article 22 of the Tribunal's Statute.[2] Such a time limit has been prescribed in the present case but, in lieu of disclosure of any particular statement, the prosecution was permitted to file a motion within that time seeking protective measures in relation to the identity of the proposed witness who gave that statement.[3]

2. The present application seeks certain protective measures in relation to the witnesses whom the prosecution intends to call to give evidence in the trial.[4] The measures sought would preclude the disclosure at this stage of the identity and current whereabouts of the prosecution's witnesses to the accused and their defence teams.[5] This application is *not* concerned with the protective measures more usually sought, which preclude the disclosure of that information to the public but permit it to the accused. The relief sought is twofold:

> 1. leave to redact from the statement of *all* witnesses whom the prosecution proposes to call any information concerning the current whereabouts of each witness, such information to be disclosed to the two accused and their defence teams "upon a reasonable showing";[6] and
>
> 2. leave to redact from the statements of *four* witnesses any information concerning the identity of those witnesses, such information to be disclosed to the two accused and their defence teams at a time "closer to trial".[7]

2 Non-disclosure of current whereabouts

3. The redactions sought relating to the current whereabouts of all the prosecution's witnesses are not opposed by the accused Momir Talic ("Talic").[8] The accused Radoslav Brdanin ("Brdanin") does not oppose that relief, provided that the information is disclosed to him no later than sixty days before trial.[9]

4. As the relief sought is not opposed, subject only to a determination of the accused's right to the eventual disclosure of the information redacted, an order will be made granting it. It is unnecessary at this stage to determine

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just when, if at all, those current whereabouts must be disclosed. In relation to that issue, however, it is pointed out once again that the onus lies upon the party seeking protective measures pursuant to Rule 69 to justify the redactions, not upon the other party to justify disclosure.[10] If there is a dispute concerning this issue, it will therefore be for the prosecution to justify the continued non-disclosure of the current whereabouts of these witnesses.

3 Delayed disclosure of identity

5. The delayed disclosure sought of the identity of the four witnesses in question is completely opposed by Talic, and partly so by Brdanin.

Ex parte basis

6. In relation to two of the witnesses (identified as witnesses 7.74 and 7.75),[11] the prosecution has tendered all of the material upon which it relies on an *ex parte* basis only. Talic objects to such use of *ex parte* communications, and he has submitted that the arguments advanced to justify the protective measures sought should be set out in such a way that the basis for the application is disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought.[12]

7. The use of *ex parte* communications in these circumstances was discussed recently by the Trial Chamber in relation to the prosecution's application pursuant to Rule 66(A)(i), which concerned the disclosure of the identity of those persons whose statements had been part of the supporting material accompanying the indictment when confirmation was sought.[13] It was determined that the procedure adopted by the prosecution there, and which has been repeated by the prosecution here, of producing *all* the material tendered as justifying the relief sought on an *ex parte* basis deprives the accused of any opportunity of deciding whether to oppose the application, and that the basis of the application must be disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought.[14] The party seeking relief on an *ex parte* basis must identify with some care for the Trial Chamber why the disclosure of the detail of the application to the other party to the proceedings would cause unfair prejudice to either the party making the application or some other person involved in or related to that application.[15]

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8. Because that decision of the Trial Chamber was based upon a statement of general principle – one which was not limited to issues relating to discovery[16] – the same procedure must be applicable to applications made pursuant to Rule 66(A)(ii) as well.

9. The extent to which the *ex parte* procedure was adopted by the prosecution in the present case was not warranted. It is difficult to see how the non-disclosure of *every* detail of the material supporting the application could ever be warranted. A hypothetical example may be given (which does not relate to either of the two *ex parte* applications made in the present case) to demonstrate how the salient details of an application for protective measures could be given on an *inter partes* basis without revealing the identity of the witness. The prosecution could state (on a confidential basis only):

> The witness, who is a Bosnian Muslim, currently resides outside the former Yugoslavia, but he proposes to return within a month to live in the Federation of Bosnia and Herzegovina in a municipality where the majority of persons are Bosnian Serbs and in relation to which the [XYZ Agency] has reported that there is presently a high risk of retaliation if it were known that a Bosnian Muslim was to give evidence against a Bosnian Serb.
>
> It is proposed that the witness will give evidence directly relating to the participation of the accused in planning certain incidents alleged in the indictment. He has expressed fears to an OTP investigator concerning his security, and the security of his family, should the accused learn of his identity, and he has stated as the objective basis for those fears that he has heard from other proposed witnesses for the prosecution that they have received anonymous telephone calls threatening them and their families with violence if they give evidence in this case. The persons making those threats claimed to be acting on behalf of the accused. Such threats had already been reported to the OTP by those other proposed witnesses. The OTP has formal, sworn, statements by the witness and by the other proposed witnesses verifying these facts. The OTP has been unable to verify that the persons making these threats were in fact acting on behalf of the accused.
>
> Any investigation on behalf of the accused would necessarily take

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place at least in part within the municipality where the witness will be living.

The details could then be completed on an *ex parte* basis, which would identify the municipality involved, the nature of the evidence to be given, and any relationship between the witness and the accused. The prosecution could also file on an *ex parte* basis the additional objective material (including the formal, sworn, statements) upon which it relies for its claim that, despite the obligations imposed upon the accused and their defence teams, there should be no disclosure even to them at this stage.[17]

10. Such an application by the prosecution for protective measures could not identify the witness, but it would provide the accused with sufficient information to decide whether to oppose the application.

11. The prosecution is directed to file, on a confidential basis only and without revealing the identity of the witnesses 7.74 and 7.75, its justification for the non-disclosure of their identity to the accused and their defence teams in such a way that the accused are given sufficient information to enable them to determine whether to oppose the relief sought. The prosecution may also, if it so desires, add to the material presently filed on *an ex parte* basis.

***Inter partes* basis**

12. In relation to the other two witnesses whose identity the prosecution seeks to disclose to the accused and their defence teams at a time closer to the trial (identified as witnesses 7.72 and 7.73), the material upon which the prosecution seeks has been disclosed on a confidential *inter partes* basis. The relief sought is opposed by Talic,[18] and the prosecution's entitlement to it is doubted by Brdanin, upon the basis that the application appears to be based solely upon the witnesses' expressions of concern.[19]

13. The following propositions may now be taken to have been established by the recent jurisprudence of this Trial Chamber:

(1) What must be shown by the prosecution, in support of an application for protective measures requiring the non-disclosure of the identity of a particular witness to the accused and the defence team until a later stage of the proceedings, is that such disclosure at this stage, despite the obligations imposed upon the

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accused and his defence team in relation to disclosure by them to the public ("save as is directly and specifically necessary for the preparation and presentation of this case") or to the media (non-disclosure in any circumstances),[20] may put the witness "in danger or at risk".[21]

(2) The fears of the potential witness himself that he may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that he may be in danger or at risk from such a disclosure to the defence, and something more than that must be demonstrated before an interference with the right of the accused to know that identity is warranted.[22] What is required is that there be some objective foundation for those fears.[23]

(3) The greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness, and, once the defence commences (quite properly) to investigate the background of the witness whose identity has been disclosed to them, there is a risk that those to whom the defence have spoken may reveal to others the identity of that witness, with the consequential risk that the witness will be interfered with.[24]

(4) Article 20.1 of the Tribunal's Statute makes the rights of the accused the first consideration, and the need to protect victims and witnesses the secondary consideration, an interpretation correctly accepted by the prosecution.[25] A balancing exercise is required in each case.[26]

Witness 7.72

14. Concerning witness 7.72, the prosecution says:

This witness was recently spoken to by an OTP investigator. This witness currently resides in a country outside the former Yugoslavia. The witness stated that he has concerns for his safety and security and that of his family. The witness stated that since December 1999 he has received three anonymous telephone calls from a male asking "... how much do you need to give up your

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> testimony ...". The witness did not recognise the caller, nor does he know who is responsible for these telephone calls. The witness has provided the ICTY with specific details about murders he witnessed (eg names and description of perpetrators and victims).

Talic has argued that, as the identity of the witness is already known to individuals other that the defence to be a witness, the defence must be entitled to know that identity as well. Moreover, he argues, as the witness is to testify in relation to specific events, it is "extremely important" for the defence to check on his reliability as a witness.[27]

15. The first argument does not logically lead to the conclusion that the further disclosure of the witness's identity to the defence may not put him further in danger or at risk. The second argument appears to place the witness in the wrong category. In the first of the Protective Measures Decisions, and in accordance with submissions then made by Talic, the Trial Chamber accepted that the disclosure of the identity of those witnesses who do not directly implicate the accused does little to assist the defence in its preparation for the trial in a case such as the present; the witnesses whose identity is of much greater importance to the accused in the preparation of the defence are those who do *directly* implicate the accused as having superior authority or as aiding and abetting.[28] There is nothing to suggest that witness 7.72 is in the second category. Indeed there is every indication that he falls within the first category. But none of this disposes of the application in favour of the prosecution, as the onus lies upon the party seeking protective measures pursuant to Rule 69 to justify the redactions, not upon the other party to justify disclosure.

16. There are a number of problems with the application so far as non-disclosure to the *defence* is concerned, whatever merit it may have had as an application for non-disclosure *to the public*. The statement alleged to have been made, "[...] how much do you need to give up your testimony [...]", suggests more the prelude to the offer of a bribe than a threat, although clearly a threat might be foreseeable if the bribe were refused. There is no suggestion that the OTP has sought to verify the circumstances in which the statement was made, or to elucidate the meaning attributed to it by the witness. There is nothing other than what was said in the telephone call to show that the witness may have believed on reasonable grounds that the caller was associated with the defence. An objectively founded fear of danger or risk from *any* source, in addition to exceptional circumstances, will usually be sufficient for the grant of protective measures involving

non-disclosure of the witness's identity to the public but, in order to justify non-disclosure of that identity to the accused and the defence team, it is vital for the prosecution to establish, in addition to exceptional circumstances, that such a disclosure may put the witness further in danger or at risk.

17. There is nothing to suggest that a disclosure of the identity of the witness to the accused and the defence teams may put the witness further in danger or at risk or which is of such an exceptional nature as to warrant the interference with the accused's rights. The prosecution has not suggested, for example, that the evidence of witness 7.72 will directly implicate the accused, or that the family of the witness lives in an area in which any investigation on behalf of the accused would necessarily have to take place. The clear implication is that the witness himself has been relocated in another country with a new identity.

18. The prosecution has failed to establish that an investigation by the defence teams into the evidence of this witness may put the witness further in danger or at risk, and this particular application is refused. A further application may be made for protective measures in relation to the disclosure of the identity of this witness to the public at the appropriate stage.

Witness 7.73

19. Concerning witness 7.73, the prosecution says:

> This witness was recently spoken to by an OTP investigator. The witness currently resides in a village in a municipality within the Federation. This witness is a widowed mother of a young child. She stated that, by the end of the year, she wishes to return to her former house, which is situated in a municipality within the Republika Srpska. She would reside with her young child. The witness has provided the ICTY with specific details about incidents she witnessed (eg names and description of perpetrators and victims).

Talic has argued that the mere fact that the witness intends to settle in Republika Srpska is insufficient reason for the non-disclosure of her identity. He also repeats his argument that the fact that the witness is to testify in relation to specific events is a valid reason for disclosure, so that the defence may check on her reliability as a witness.[29] The second

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argument again appears to place the witness in the wrong category.

20. As to the first argument, in the absence of any more direct evidence, the particular risk faced by a person testifying against a person of another ethnic group will depend on the particular municipality in which that witness is living (or to which he or she is returning) and the ethnicities of the witness and the accused.[30] It may be assumed that witness 7.73 is a Bosnian Muslim (although this should have been expressly stated by the prosecution). The accused in this case are Bosnian Serbs. Those facts do not *automatically* mean that she will be in danger or at risk from retaliation if she returns to live in Republika Srpska. The UNHCR reports and the other reports provided by the prosecution[31] would tend to suggest that there remains a considerable risk to Bosnian Muslims returning to live in Republika Srpska, although the problem does not exist uniformly throughout the entity. The prosecution has not identified for the Trial Chamber, even on an *ex parte* basis, just where the witness intends to live, so that it gains less assistance from these reports than it should.

21. It may also be assumed that, whatever risk does exist for this witness, it would be increased if it were known that the witness was to give evidence against Bosnian Serbs, and perhaps the more so because of the identity of these two accused. That would clearly entitle the witness to protective measures against the disclosure of her identity *to the public*. But, again, nothing has been demonstrated which suggests that the disclosure at this stage of her identity *to the accused and their defence teams* may put her in danger or at risk, or which is of such an exceptional nature as to warrant the interference with the rights of the accused which the non-disclosure produces. Again, the prosecution has not suggested, for example, that the evidence of witness 7.73 will directly implicate the accused, or that she will be living in an area in which any investigation on behalf of the accused would necessarily have to take place. This is not a matter which should be left for conjecture by the Trial Chamber.

22. The balancing operation which must be carried out in each case requires this particular application for protective measures for witness 7.73 to be refused, but a fresh application may be made if desired at the appropriate stage in relation to the disclosure of her identity to the public.

4 Disposition

23. For the foregoing reasons, the following orders are made:

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1. The prosecution is granted leave to redact from the statements of all witnesses whom it proposes to call to give evidence in this case any information concerning the current whereabouts of each witness.

2. In relation to the witnesses for whom protective measures have been sought on an *ex parte* basis, the prosecution is directed to file, on a confidential basis only and without revealing the identity of the witnesses, its justification for non-disclosure of their identity to the accused in such a way that the accused are given sufficient information to enable them to determine whether to oppose the relief sought.

3. The application for protective measures in relation to witnesses 7.72 and 7.73, by which their identity will not be disclosed to the accused or their defence teams at this stage, is refused.

Done in English and French, the English text being authoritative.

Dated this 8th day of November 2000,
At The Hague,
The Netherlands.

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Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

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1. *Rule 53* ("Non-disclosure"), so far as it is here relevant, provides: "(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order. [...] (C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice. [...]."
Rule 69 ("Protection of Victims and Witnesses"), so far as it is here relevant, provides:

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"(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. [...] (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence."
Rule 75 ("Measures for the Protection of Victims and Witnesses"), so far as it is here relevant, provides: "(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. [...]"
2. Article 22 ("Protection of victims and witnesses") provides: "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."
3. Status Conference, 20 July 2000, Transcript, p 189.
4. Prosecution's Third Motion for Protective Measures for Victims and Witnesses, 31 Aug 2000 ("Third Motion"). The Motion is marked "Confidential". This Decision does not refer to any material contained in the Third Motion which could reveal anything of a confidential nature.
5. Third Motion, par 4.
6. Third Motion, par 3.
7. *Ibid,* pars 4-5.
8. Response to the Prosecution's Third Motion for Protective Measures Dated 31 August 2000, 8 Sept 2000 ("Talic Response"), par 2.
9. Response to Prosecutor's Confidential Third Motion for Protective Measures and Request for Leave Not to Discuss the Identity of Certain Individuals, 6 Sept 2000 ("Brdanin Response"), par 4. The Request for Leave to which the Brdanin Response refers was disposed of by an Order dated 19 Sept 2000. This is discussed in the Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000 ("Second Protective Measures Decision"), par 24.
10. See Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Protective Measures Decision"), par 16.
11. Third Motion, Draft Order, p 2.
12. Talic Response, par 5.
13. Second Protective Measures Decision, pars 8-11, 14-16.
14. *Ibid,* par 14.
15. *Ibid,* par 11.
16. *Prosecutor v Simic,* Case IT-95-9-PT, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000, par 41.
17. See, in particular, the Second Protective Measures Decision, par 18.
18. Talic Response, par 4.
19. Brdanin Response par 1.
20. Protective Measures Decision, pars 65(3) and 65(4).
21. Rule 69(A).

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22. Protective Measures Decision, par 26; Second Protective Measures Decision, par 19. The prosecution has filed an application for leave to appeal from the Second Protective Measures Decision (Prosecution's Application for Leave to Appeal Against Trial Chamber Decision of 27 October 2000, 3 Nov 2000), but its complaint is directed to the application of the propositions stated in *both* the Second Protective Measures Decision and the first Protective Measures Decision (from which it did not seek to appeal), rather than to the propositions stated themselves.
23. Second Protective Measures Decision, par 19.
24. Protective Measures Decision, pars 24, 28; Second Protective Measures Decision, par 18.
25. Further and Better Particulars of "Motion for Protective Measures", 8 Feb 2000, par 4. During the oral argument on the Motion leading to the Protective Measures Decision, on 24 Feb 2000, counsel for the prosecution conceded that "[...] full regard to the rights of the accused is the first consideration, and the due regard to the rights of the victims is a second one.": Transcript, p 83; Protective Measures Decision, par 20; Second Protective Measures Decision, par 18.
Article 20.1 provides: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." The provisions of Article 22 ("Protection of victims and witnesses"), quoted in footnote 5, *supra*, do not qualify the proposition stated in the text of par 13(4) of this Decision. See also *Prosecutor v Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (1995) I JR ICTY 123, at 151 (par 30).
26. *Prosecutor v Tadic*, Case IT-94-1-T, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996, at 4; Protective Measures Decision, par 7; Second Protective Measures Decision, par 18.
27. Talic Response, par 4.1.
28. Protective Measures Decision, par 34.
29. Talic Response, par 4.2.
30. Second Protective Measures Decision, par 21.
31. See Second Protective Measures Decision, par 21.