921)

SCSL-04-15-T
(32279 — 32506)

SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE

32279

APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, Presiding
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando
Hon. Justice Jon Kamanda

Registrar: Mr. Herman von Hebel

Date filed: 13 December 2007

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR **v.** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

LIST OF AUTHORITIES

GBAO NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION BY THE TRIAL CHAMBER ON THE MOTION FOR VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF JUSTICE BANKOLE THOMPSON FROM THE RUF CASE

Office of the Prosecutor
Mr. Peter Harrison
Mr. Vincent Wagona

Defence Counsel for Issa Hassan Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon
Mr. Shekou Touray
Mr. Charles Taku
Mr. Kennedy Ogetto
Mr. Lansana Dumbuya

Defence Counsel for Augustine Gbao
Mr. John Cammegh
Ms. Prudence Acirokop

1. In accordance with Article 7 (D) of the Practice Direction on Filings Documents before the Special Court for Sierra Leone, Defence Counsel for the Third Accused herewith files the table of authorities and copies of authorities referred to in its 'Gbao Notice of Appeal and Submissions Regarding the Decision by the Trial Chamber on the Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case' filed on 12 December 2007.[1]

Filed in Freetown, 13 December 2007

For the Third Accused Augustine Gbao

PP John Cammegh

[1] *Prosecutor v. Sesay et al,* SCSL-04-15-T-919, Gbao Notice of Appeal and Submissions Regarding the Decision by the Trial Chamber on the Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 12 December 2007.

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A. Basic Documents

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Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended at the Tenth Plenary on 19 November 2007.

B. RUF Case (*Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Case No. SCSL -2004-15-T*)

SCSL-2004-15-PT-58, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Appeals Chamber, 13 March 2004. Paragraph 15.

SCSL-04-15-T-880, Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 November 2007. Paragraphs 3, 6, 10, 11, 12, 18, 19 and 20.

SCSL-04-15-T-881, Order for Expedited Filing, 16 November 2007. Orders N.1 and 2.

RUF Transcripts of 20 November 2007, p.3. (Oral statement of Morris Kallon).

SCSL-04-15-T-885, Kallon Defence Statement in Support of the Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case Filed on the 14th Day of November 2007, 20 November 2007.

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SCSL-04-15-T-887, Sesay and Gbao Joint Reply to Prosecution Response to the Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 21 November 2007. Paragraphs 6, 7, 8, 10, 11, 12, 14, 15, 16 and 17.

RUF Transcripts of 22 November 2007. Pages 2, 4, 12, 14, 15, 16.

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SCSL-04-15-T-891, Prosecution Submission on Rule 16 of the Rules of Procedure and Evidence, 23 November 2007. Paragraphs 9 and 17(g).

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SCSL-04-15-T-893, Sesay Defence Submissions on the Interpretation of Rule 16, 23 November 2007. Paragraphs 2, 5, 6 and7.

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C. CDF case (*Prosecutor v Sam Hinga Norman, Moinana Fofana, Allieu Kondewa*, Case No. SCSL-04-14-T)

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SCSL-04-14-T-785, Judgement, Trial Chamber I, 2 August 2007.

Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-T-785, Judgement, Trial Chamber I, 2 August 2007, Annex C: Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute. Paragraph 90.

II. <u>International Criminal Tribunal for Rwanda</u>

Prosecutor v Akayesu, Case No. ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001.

Paragraphs 92, 95, 100 and 101.

Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003. Paragraph 43.

Prosecutor v Seromba, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, Bureau, 25 April 2006. Paragraph 12.

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III. International Criminal Tribunal for the Former Yugoslavia

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Available in French at
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ROJAS%20%7C%2039676/98&sessionid=3977605&skin=hudoc-en

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International Criminal Tribunal for Rwanda

The present authority exceeds 30 p. In accordance with the Practice Direction on Filing Documents before the Special Court for Sierra Leone, article 7 (E), a copy of the first page of the authority as well as a copy of the relevant section are filed.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

ENGLISH
Original : ENGLISH/ FRENCH

Before Judges:
Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgement of: 1 June 2001

THE PROSECUTOR
v.
JEAN-PAUL AKAYESU

JUDGEMENT

Office of the Prosecutor:
Carla Del Ponte
Solomon Loh
Wen-qu Zhu
Mathias Marcussen
Sonja Boelaert-Suominen
Morris Anyah

Counsel for the Defence:
John Philpot
André Tremblay

C. Third Ground of Appeal : Biased and Partisan Tribunal[162]

85. Akayesu alleges that the Tribunal before which he was tried was neither impartial nor independent and that, he was not afforded a fair trial and that as a result, the guilty verdicts should be "quashed, with prejudice to the Prosecution."[163]

86. This ground of appeal was originally raised in Akayesu's second Notice of Appeal.[164] By a motion dated 7 December 1999,[165] Akayesu requested leave to amend this ground of appeal to include several more paragraphs and to present twenty-four documents as additional evidence. In its Decision of 22 August 2000 the Appeals Chamber rejected both requests.

87. The Prosecution submits that as Akayesu based this ground of appeal on the 24 documents which had been rejected "there is no support for the Appellant's allegations in the Record on appeal. As there is no factual basis for the Appellant's allegations and arguments in [*Akayesu's Brief*], it is the Prosecution's submission that they should be dismissed without further consideration."[166] Consequently, the Prosecution puts forward no arguments in response.

88. The Appeals Chamber notes that Akayesu did not respond to the submissions by the Prosecution in his Reply and that, although he did refer to the said ground of appeal briefly during the Hearing on Appeal,[167] he failed to clarify his position nor did he argue the matter further. Although, as recalled by the Prosecutor, all the evidence adduced by Akayesu in support of his arguments were rejected by the Appeals Chamber on 22 August 2000, nevertheless the Appeals Chamber agree that it is properly seized of this ground of appeal, which was not excluded by the Decision of 22 August 2000 and of which it is validly seized. Therefore, the Appeals Chamber cannot accept the argument put forward by the Prosecution that this ground of appeal should be rejected on that basis. Thus, the Appeals Chamber intends to consider the arguments put forth in support of such grounds, if being understood that only those arguments put forward in Akayesu's Brief and those which are not based exclusively on the evidence rejected by the Appeals Chamber will be taken into consideration. In this regard, the Appeals Chamber recalls that the onus is on the Appellant to provide the Appeals Chamber with enough evidence to prove either an error of fact or an error of law, such as may occasion a miscarriage of justice or invalidate the decision.

89. As matters stand, Akayesu's arguments may be summarized as follows:[168]

(a) The Trial Chamber was neither impartial nor independent

(i) Akayesu's submissions

90. Firstly, Akayesu submits that remarks made by the judges both in public and in private suggest a lack of impartiality on their part and constitute a violation of their duty to be independent and impartial.[169] He further alleges the existence of "pressure and special arrangements" that tended to undermine the independence of the Tribunal.

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Akayesu cites in support of that assertion the Judgment of 31 March 2000 rendered by the Appeals Chamber in the *Barayagwiza* case, which he claims "does not provide a remedy for the interference, pressure and arrangements that prevailed in the past [...]"[170] Finally, Akayesu points out the "defamatory and false statements made by the Registrar [which] constitute a serious violation of his obligation to exercise "judicial restraint"; they undermine the neutrality, impartiality and independence of the Tribunal".[171]

(ii) Discussion

91. As held by ICTY Appeals Chamber, there is a presumption of impartiality that attaches to a Judge or a Tribunal and, consequently, partiality must be established on the basis of adequate and reliable evidence. On this point, the Appeals Chamber endorses the standards of admissibility of an allegation of partiality as set out by ICTY Appeals Chamber in *Furundzija*, whereby:

"[...] there is a presumption of impartiality which attaches to a Judge. This presumption has been recognized in municipal law."[172]

[...] in the absence of evidence to the contrary, it must be assumed that the judges of the International Tribunal can disabuse their minds of any irrelevant personal beliefs or predispositions. It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that [the Judge in question] was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality."[173]

92. In the instant case, the arguments put forward by Akayesu are too general and abstract to rebut the presumption of impartiality. The arguments relating to biased statements allegedly made by certain Judges of the Tribunal are neither substantiated nor detailed. Similarly, there is no evidence that the Tribunal entered into "special arrangements", or that there was "influence" or "pressure" brought to bear by some authorities. Consequently, the Appeals Chamber rejects this patently unfounded allegation.

(b) Selective Prosecution

(i) Akayesu's submissions

93. Akayesu submits that the Tribunal is prosecuting only the "losers" in the Rwandan conflict by failing to prosecute the perpetrators of "crimes of extermination of the Hutu" who enjoy "complete immunity" from prosecution.[174] He submits that such failure exhibits partiality in the punishment of crimes committed in Rwanda during the relevant period. He compares this to the contrary situation before ICTY where persons from "both camps", including Croat leaders, have been prosecuted.

(ii) Discussion

94. The Appeals Chamber cannot admit Akayesu's argument that failure to prosecute persons possible perpetrators of crimes against the Hutu population is an indication of the Tribunal's partiality. On this point, the Appeals Chamber wishes to recall that "investigation and prosecution" of persons responsible for serious violations within the jurisdiction of the Tribunal fall to the Prosecutor[175] and that it is her responsibility to "assess the information received or obtained and decide whether there is sufficient basis to proceed."[176] On this point, the Appeals Chamber agrees with the analysis made by ICTY Appeals Chamber in *Celebici*, where it held that:

> "In the present context, indeed, in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation in indictments. [...]"[177]

95. The allegation that the failure to prosecute possible perpetrators of crimes against the Hutu population is an indication of the Tribunal's partiality cannot properly be sustained since Akayesu advanced no evidence in support thereof.

96. Assuming that the Prosecutor pursues a discriminatory prosecutorial policy, Akayesu has failed to show any causal relationship between such a policy and the alleged partiality of the Tribunal. Furthermore, Akayesu has failed to show how such a general allegation relates to his case, that is how the alleged discriminatory prosecution on policy pursued by the Prosecutor was so prejudicial to him as to put in issue the lawfulness of the proceedings instituted against him. Akayesu has not indicated to the Appeals Chamber whether he had raised the issue at trial, the most appropriate stage to do so. Nor did he show how the alleged prosecutorial policy has or had affected the arrest of other individuals. The Appeals Chamber recalls in this context the statements made by ICTY Appeals Chamber in *Celebici*:

> "[...] the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds were not prosecuted. [...]"[178]

97. For all the foregoing reasons, the Appeals Chamber rejects this argument.

(c) Functioning of the Tribunal and approach to the conflict in Rwanda

(i) Akayesu's arguments

98. Akayesu argues that the very functioning of the Tribunal suggests that he could not have had a fair trial. The difficulties encountered in conducting investigations were even recognized by the Prosecution during the trial[179] and the specific example of the problems concerning Witness DAAX, show that it was impossible for Akayesu to have a fair trial since the Witness himself was arrested and imprisoned in Rwanda after his testimony.[180] In addition, Akayesu submits that the Tribunal cannot properly function when it does not have the power to issue subpoenas and compel witnesses to appear before it.[181]

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99. Akayesu further submits that the Trial Chamber's approach to the Rwandan conflict is erroneous. The Appeals Chamber notes, however, that most of the arguments put forward in support of such an allegation were not reiterated by Akayesu in his Brief. [182] Therefore, the Appeals Chamber will not consider the said arguments. Akayesu's Brief containg only the argument that the Tribunal made erroneous findings concerning the incident that sparked off the conflict in April 1994, to wit the crash of the presidential plane. Indeed, Akayesu submits that the Tribunal erred in its Judgment by "referring on nine occasions, without exception, to the missile attack on the Presidential plane which took place on 6 April 1994, as a "crash", [whereas] it was not a crash, but a ground to air missile attack. That attack, which sparked off the political and interethnic conflict which began in April 1994, was wrongly characterized thereby affecting the overall assessment of the evidence.[183]

(ii) Discussion

100. With respect to this argument, the Appeals Chamber finds that, here again, Akayesu failed to show the prejudice suffered by him in his own case. The allegations are too sweeping to be rightly considered by the Appeals Chamber. With respect, firstly, to the Prosecutor's statements on travel within Rwanda and the difficulties encountered in conducting investigations, Akayesu has failed to show the relevance of that example. Similarly, he failed to explain why the episode of the testimony of Witness DAAX illustrates the impossibility of having a fair trial. Lastly, the issue of erroneous findings regarding the "crash" of the presidential plane was not elaborated on and, therefore, cannot be duly considered by the Appeals Chamber. Therefore, the Appeals Chamber rejects this last argument.

101. Consequently, and given the inadequacy of the arguments put forward, the Appeals Chamber rejects all the grounds of appeal relating to the impartiality of the Tribunal.

[162] The breakdown of the grounds of appeal appear in Annex B.

[163] Akayesu's Brief, Chapter 6, para. 22.

[164] The Appeals Chamber notes that certain grounds of appeal set out in the first Notice of Appeal and which, in the Chamber's opinion, emanate from the general issue of the independence and impartiality of the Tribunal are not cited in the Akayesu's Brief (particularly in the Annex to Chapter 6). Therefore, grounds 9, 29 and 34 can be cited.

[165] "Motion to Amend Notice of Appeal relating to the Impartiality and Independence of the Tribunal and to Add New Grounds of Appeal."

[166] Prosecution's Response, paras. 7.3 to 7.4.

[167] Indeed, during the hearing on appeal Akayesu submitted: "So it will be, myself, who will present the majority of the grounds, and we may come back at points three and five and we may wish to have a

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discussion between ourselves on points three and five, given your Judgment on the 22nd of August which has left us in a state of not being perfectly sure how it will be presented...", See Transcript, 1 November 2000 p. 28.

[168] The Appeals Chamber notes that Akayesu did not wish to pursue the argument regarding the establishment of the Tribunal advanced in his First Notice of Appeal. Indeed, he submits in his Brief that "He does not intend to proceed with this argument in greater detail because the 2 October 1995 Decision of ICTY Appeals Chamber in *The Prosecutor v. Tadic,* seems to settle the matter. He therefore prefers to focus on another central aspect of his arguments, namely that the Tribunal fails to comply with fundamental guarantee of impartiality and independence." See Akayesu's Brief, Chapter 6, para. 2.

[169] Akayesu's Brief, Ch. 6, para. 4. The Appeals Chamber notes that Akayesu left out of his Brief, a ground of appeal that he had raised in his second Notice of Appeal. The said ground of appeal was formulated as follows: "Judge Laïti Kama has systematically violated the presumption of innocence of the Appellant. When several witnesses, alleged to be victims of sexual violence, finished testifying, he expressed sympathy for their suffering even before the defence had began He decided they were telling the truth in advance.. By deciding in advance that the witnesses were telling the truth, the judge violated the presumption of innocence invalidating the entire Judgment." Therefore, the Appeals Chamber will not consider the said ground of appeal but will rather remark on its similarity with another argument raised in the third and fourth grounds of appeal to which the Appeals Chamber has responded. See arguments advanced under the ground of appeal relating to paragraphs 12A and 12 B of the Indictment (charges of sexual violence).

[170] Akayesu's Brief, Chapter 6, para 12.

[171] Akayesu's Brief, Chapter 6, para. 13.

[172] *Furundzija* Judgment on appeal, para. 196.

[173] *Furundzija* Judgment on appeal, para. 197.

[174] See Annex B. Akayesu's Brief, Chapter 6, paras. 5 to 8.

[175] Article 15 of the Statute.

[176] Article 17 (1) of the Statute.

[177] *Celebici* Judgment on appeal, para. 602.

[178] *Celebici* Judgment on appeal , para. 613.

[179] Akayesu refers to the hearing of 17 June 1997 during which the Prosecutor, in a bid to justify the belated amendment of the initial indictment, explained the difficulties encountered in conducting investigations. Indeed, the Prosecutor asserted that "We began our investigation but it was difficult. I have to say at that time back in March and April and even May. It was difficult because the majority of Rwanda was categorized as what is known as Phase 4. A phase 4 means that our investigators cannot travel into the field without armed escort [...]" See in connection with this point the issues grouped under this ground of appeal in relation to amendment of unlawful initial indictment (First sub-ground of the fourth ground of appeal).

[180] Akayesu's Brief, Chapter 6, paras. 9 to 10.

[181] Akayesu submits that "The Tribunal is not functional, because it lacks the power to subpoena, to order witnesses to appear before it. The only power of constraint held by the Tribunal is its power – legally dubious at that - to order the arrest of a suspect in a third country and his/her transfer – also probably illegal – to the seat of the Tribunal in Arusha. This disequilibrium between the power to arrest an accused person wherever he/she may be, and the absence of power to arrest an accused to appear before the Tribunal causes an incurable prejudice to the defence." See Annex B.

[182] The arguments concerned are the following: (set forth in the second Notice of Appeal): The Tribunal erred in fact and in law by characterising the conflict in Rwanda in 1994 as an internal conflict [para n]; The Tribunal made a crucial error by concluding that it was necessary to clearly distinguish the military conflict between the Rwandan Patriotic Front (RPF) and the Rwandan Armed Forces (RAF) from the civil conflict between those who were ostensibly non-combatants. [para. o]; The Tribunal ruled *ultra petita* that there was genocide in Rwanda between April and July 1994 [para p.]; The Tribunal erred in concluding that there had been a planned genocide against the Tutsi in Rwanda between April and July 1994 [para. q] See Annex B.

[183] See Annex B

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The present authority exceeds 30 p. In accordance with the Practice Direction on Filing Documents before the Special Court for Sierra Leone, article 7 (E), a copy of the first page of the authority as well as a copy of the relevant section are filed.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

IN THE APPEALS CHAMBER

Original: FRENCH

Before:
Judge Theodor Meron, presiding
Judge Fausto Pocar
Judge Claude Jorda
Judge Mohamed Shahabuddeen
Judge Mehmet Güney

Registrar: Adama Dieng

Judgement of: 26 May 2003

GEORGES ANDERSON NDERUBUMWE RUTAGANDA
v.
THE PROSECUTOR
Case No. ICTR-96-3-A

JUDGEMENT

Office of the Prosecutor:
Norman Farrell
Mathias Marcussen
Norul Rashid
Helen Brady

Counsel for the Appellant:
David Jacobs
David Paciocco

III. RIGHT TO A FAIR TRIAL

36.In this ground of appeal, the Appellant alleges that the Trial Chamber violated his right to a fair trial during the examination and cross-examination of witnesses, on the one hand, and, on the other hand, in the manner in which the Chamber treated him at his hearing when he took the witness stand.1 [67]

37.The Appeals Chamber points out that the Appellant's allegations relate mainly to the issue of bias on the part of the Trial Chamber, which allegedly assisted the Prosecution during its examination-in-chief and cross-examination of witnesses, including the Appellant himself, and treated Prosecution as well as Defence witnesses in a biased manner. For the Appellant, the Trial Judges were in breach of their duty to be impartial, which duty is provided for in Articles 12 and 20 of the Statute, Rule 85(B) of the Rules, as well as in the general principles of international law. The Appellant alleges that since the Trial Chamber was not seen to be impartial, as required by the above-mentioned provisions, his trial cannot be valid. According to him, the errors referred to *supra* invalidate all the convictions entered against him. The Appeals Chamber notes that the issue of a possible denial of the principle of equality of arms between the Appellant and the Prosecution is obliquely referred to in some of the allegations.

38.Before examining the allegations of violation of the Appellant's right to a fair hearing, the Appeals Chamber deems it necessary to review the attendant principles that are directly at issue in this ground of appeal.

39.The Appeals Chamber recalls that impartiality is one of the duties that judges pledge themselves to uphold at the time they take up their duties;2 [68] and this applies throughout the judge's term of office in the Tribunal.3 [69] This is a component of the right to a fair trial that is recognized in Articles 19 and 20 of the Statute.4 [70] The Appeals Chamber in the *Akayesu* Appeal Judgement endorsed the standards applicable to impartiality embodied in the Statute and the Rules,5 [71] as previously defined by the

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1[67] Supplemental Defence Document, para. 20; Defence Appeal Brief, Parts XI and XII.

2[68] Rule 14(A) of the Rules relating to solemn declaration provides as follows: "Before taking up his duties each Judge shall make the following solemn declaration: 'I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, honourably, faithfully, impartially and conscientiously.'"

3[69] *Čelebići* Appeal Judgement, para. 655.

4[70] *Kayishema and Ruzindana* Appeal Judgement, para. 51. See also *Furundžija* Appeal Judgement, para. 177.

5[71] Article 12 of the Statute provides that "The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications

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Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY),6 [72] which pointed out:

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

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

B. There is an unacceptable appearance of bias if:

(i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

(ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."

40. With regard to the test of the "reasonable observer", the ICTY Appeals Chamber held that:7 [73]

"[...] the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."

41. The very Appeals Chamber pointed out that the Judge should rule on cases according to what he deems to be the correct interpretation of the law, by ensuring that

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required in their respective countries for appointment to the highest judicial offices..." Rule 15(A) of the Rules adds that: "A Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place."

6[72] *Furundžija* Appeal Judgement, para. 189. This definition was repeated in the *Čelebići* and *Akayesu* Appeal Judgements.

7[73] *Furundžija* Appeal Judgement, para. 190. See also *Čelebići* Appeal Judgement, para. 683. On the oath: see also *Kayishema/Ruzindana* Appeal Judgement, para. 55.

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his behaviour does not give the impression to an unbiased and knowledgeable observer that he is not impartial.8 [74] Lastly, the ICTY Appeals Chamber held that:9 [75]

"The relevant question to be determined by the Appeals Chamber is whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that [a] Judge [...] might not bring an impartial and unprejudiced mind to the issues arising in the case."

42. The Appeals Chambers of ICTY and ICTR emphasized in *Akayesu* and *Furundžija* respectively that Judges of the International Tribunal must be presumed to be impartial, and, in the instant case, the Chamber endorses the test for admissibility of an allegation of partiality set forth in the *Akayesu* Appeal Judgement, wherein it was held that:

"[...] There is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal, and has also been recognised in municipal law.

In the absence of evidence to the contrary, it must be assumed that the judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that the Judge in question was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality."10 [76]

"The Judges of this Tribunal and those of ICTY often try more than one case at the same time, which cases, given their very nature, concern issues which necessarily overlap. It is assumed, in the absence of evidence to the contrary, that by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case."11 [77]

43.The Appeals Chamber also recalls that the Appellant must set forth the arguments in support of his allegation of bias in a precise manner, and that the Appeals Chamber cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality.12 [78]

8[74] *Kayishema/Ruzindana* Appeal Judgement, para. 55. The same Chamber also affirmed that a Judge is bound only by his "conscience and the law", and that impartiality is a subjective test that relates to "the judge's personal qualities, his intellectual and moral integrity." (*Ibid*)

9[75] *Čelebići* Appeal Judgement, para. 683 citing *Furundžija* Appeal Judgement, para. 189.

10[76] *Akayesu* Appeal Judgement, para. 91 citing *Furundžija* Appeal Judgement, para. 197.

11[77] *Akayesu* Appeal Judgement, para. 269.

12[78] *Ibid.*, paras. 92 and 100.

44.With regard to the principle of equality of arms between the Accused and the Prosecution, which is another component of the right to a fair trial in criminal law, it is stated, *inter alia*, in Article 20(4)(e) of the Statute that in the determination of any charge against the accused pursuant to the Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

"To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

45.Lastly, the Appeals Chamber recalls that the Presiding Trial Judge is presumed to have been performing, on behalf of the Trial Chamber, his duty to exercise sufficient control over the process of examination and cross-examination of witnesses, and that in this respect, it is the duty of the Trial Chamber and of the Presiding Judge, in particular, to ensure that cross-examination is not impeded by useless and irrelevant questions.13 [79]

46.The Appeals Chamber will now consider the Appellant's ground of appeal arising from a violation of his right to a fair trial, and notes that the Appellant has not indicated whether in the instant case, his allegations of bias pertain to the first or the second component of the requirement of impartiality (i.e. whether there is actual or apparent bias). Although the Appellant reproaches Judges Kama, Pillay and Aspegren for having "prejudged" the case before the beginning of proceedings, his contention does not seem to be based on actual bias. In fact, his allegations are not based on financial interests or on interests that will lead to the promotion of the cause14 [80] (i.e. the first part of the second component of the requirement of impartiality). Consequently, after examining the Appellant's arguments, it appears that the allegations of bias made by the Appellant have to do with an appearance of bias and are relevant to the test of the "reasonable observer" (i.e. the second part of the second component of the requirement of impartiality).15 [81]

47.The Appeals Chamber emphasizes that although the arguments put forward by the Appellant to support his allegation of bias are more numerous in the instant case than in *Akayesu*, the two cases have many key similarities in this respect, considering the nature of the allegation and the fact that the composition of the Trial Chamber was the same in both cases. That being the case, it is proper to apply to the instant case the same approach adopted in *Akayesu*, namely, placing the cases of allegation of bias identified by the Appellant in their proper context as appears from the trial record, so that the intent of the

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13[79] *Akayesu* Appeal Judgement, para. 318.
14[80] Although the Appellant reproaches the Trial Chamber for having "assisted the Prosecution".
15[81] In fact, the Appellant speaks generally of "apprehension of bias" or of what a "reasonable observer" attending his trial would have thought.

persons who made the impugned remarks may be understood,16 [82] and examining them in the light of the test of a reasonable observer.

48.Three of the 42 allegations of bias raised in Part XI of the Defence Appeal Brief have, however, not been considered, in accordance with the standards for appellate review,17 [83] either because the Appellant has not specifically referred the Appeals Chamber to the parts of the trial record which, in his view, support his claim,18 [84] or because the Defence Appeal Brief19 [85] simply repeats the ground of appeal on this issue without stating reasons therefor.20 [86]

49. For the sake of clarity, the allegations of bias raised by the Appellant with regard to the examination-in-chief and cross-examination of witnesses other than the Appellant have been grouped together according to the witnesses to whom they refer, beginning with Prosecution witnesses, then Defence witnesses. Each allegation was considered separately.21 [87] A comparative analysis was made of the Judges' attitude during the examination of a Prosecution witness or a Defence witness, when the context so required.

A. Treatment of witnesses other than the Appellant

1. Prosecution witnesses

(a) Witness CC

50.The Appellant contends that one of the most disturbing interruptions by the Trial Chamber took place during the cross-examination of Witness CC. The Appellant points out that Witness CC, during his testimony before the Tribunal, radically departed from the account he gave in his prior statement to investigators, which account contained allegations of murder against Rutaganda. According to the Appellant, the witness, who was trying to reconcile his previous accounts, gave a third account of events to the Trial Chamber during cross-examination. The witness claimed that he had given the said third account to both investigators and the Prosecution, but this was categorically denied by the

16[82] *Akayesu* Appeal Judgement, para. 316.
17[83] See in particular: *Kunarac* Appeal Judgement, paras. 43 to 48.
18[84] Defence Appeal Brief, paras. 506, 507, 519 and 520.
19[85] Defence Appeal Brief, para. 587.
20[86] Decision (Motion to have the Prosecution's Notice of Appeal declared inadmissible), *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, 26 October 2001, Appeals Chamber, p. 4; Judgement (Reasons); *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, 1 June 2001, Appeals Chamber, para. 46: "An appeal, which consists of a Notice of Appeal that lists the grounds of Appeal but is not supported by an Appellant's brief, is rendered devoid of all of the arguments and authorities." This principle was repeated to the Appellant in the Scheduling Order and clarification rendered in the instant case on 26 June 2002.
21[87] With the exception of the three allegationsthat do not meet the standards for appellate review.

Prosecution. It was then, according to the Appellant, that Judge Kama, instead of commending the Prosecution's honesty regarding the witness's lack of credibility, admonished him for revealing his weapons to the opposing party, stressing that if that was the practice elsewhere, he, for his part, did not consider it appropriate, and hoped that the Prosecution had learned its lesson from the incident. The Appellant submits that Judge Kama also incomprehensibly attempted to find possible excuses for the witness by concluding:

"He is asked to say the truth because he has made several statements. He made a statement to the prosecutor, he made another statement today. We would have liked that the two statements be in agreement. Unfortunately there are contradictions. Is this his error or an error of interpretation? In any case, we realize that there are contradictions."22 [88]

51. The Appeals Chamber recalls that it is necessary to situate Judge Kama's remarks in their proper context. The purpose of the incident at the hearing brought about by Prosecuting Counsel was to inform the Trial Chamber that the witness had maintained, in a discussion with Counsel, and contrary to his testimony before the Tribunal, his initial account of events. It is also necessary to look at the entire exchange between the Judge and Counsel for the parties, instead of the extracts alone referred to by the Appellant. This is the approach to be expected of a reasonable observer. In this regard, the following extracts of the transcripts preceding the statements highlighted by the Appellant shed light on the allegation of bias made by him:

"[...] We're not going to get into the discussion about the truth or not. [...] The Tribunal will decide whether he lied, partially lied, or whatever."23 [89]

"Please allow the Tribunal to determine whether or not there was probative value of this testimony."

"The witness made a solemn declaration according to which he promised to say the truth and only the truth, nothing but the truth. This declaration was made yesterday. We understand that with time and some trauma one may make errors, but we don't understand why he should contradict himself or why he should not say the truth."

"Counsel, once again, you are pleading now. I only want to discuss the incident."24 [90]

"The witness has an obligation to tell the truth with the consequences that flow from false testimony. [There follows a quotation from Rule 91 of the Rules]. [...] Considering the

22[88] Defence Appeal Brief, paras. 533 to 536. See also Prosecution's Response Brief, paras. 10.49 to 10.52.
23[89] T, 8 October 1997, p. 27.
24[90] T, 8 October 1997, p. 28.

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complexity of the procedure, I think you may have to submit a motion for the Chamber to rule on that."25 [91]

52. Having thus been placed in their context, the Judge's remarks indeed reflect the Judge's wish to be enlightened by Counsel for the parties on the nature of the incident occasioned by the Prosecution. The Judge did not evade the issue of credibility of the witness, but rather pieced together the information necessary to address the issue at the appropriate time, deferring consideration of the merits of this issue to a later stage in the proceedings, either during the deliberations after closing arguments have been made, or in the event that the Defence filed a motion founded on Rule 91(B) of the Rules. This approach translates the Trial Chamber's concern to discover the truth, and it is obviously in this context that Judge Kama's previously mentioned comment could be placed:

"Unfortunately, we realize that there are contradictions. Is that his error or the error of interpretation? In any case, we realize that there are contradictions."

53. The Appeals Chamber is convinced that a reasonable and informed observer would examine the impugned remarks by Judge Kama while bearing in mind the above remarks made some seconds earlier, which remarks explicitly raise the issue of Witness CC's credibility together with the attendant consequences of false testimony. With regard to the impugned remarks proper, the Appeals Chamber turned to the French version of the trial record, which is significantly different from the English version,26 [92] insofar as Judge Kama made the remarks in French. The remarks read as follows:

En revanche, je ne suis pas sûr que ce soit de la loyauté que le Parquet puisse livrer à l'autre partie ses armes. Dans mon système juridique, cela ne se fait pas. Si cela se fait ailleurs, c'est possible. Je ne pense pas que ce soit de la loyauté. Que moi le Parquet, je divulgue à l'adversaire une partie de mes armes, de mes entretiens! Si c'est une pratique ailleurs, nous l'acceptons. Je le signalais au passage.

54. The Judge's remarks clearly show that, although he is surprised by the Prosecution's attitude, he admits the validity of a practice that is different from that with which he is familiar. Of course, a well-informed observer could infer from the above remarks that Judge Kama misapprehended the content and scope of the Prosecution's duties under the Statute and the Rules. On the other hand, the Appeals Chamber considers that such an observer cannot reasonably conclude that the Judge's remarks reveal any bias whatsoever.

55.The same applies to the expression "*on aurait souhaité que les déclarations concordent*" (we would have liked that the two statements be in agreement), which, taken

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25[91] T, 8 October 1997, pp. 30 and 31.

26[92] Which shows that the Judge "*did not think that the Prosecution should reveal his weapons to the other party. That would not be part of my strategy. Maybe that is a practice elsewhere, but in passing I would like to mention that I do not consider it proper for the prosecution to reveal his (sic) weapons to the other party*".

in isolation, would be confusing, but which, when placed in its context, shows further that the Judge was irritated at the witness's attitude, rather than that he sided with the Prosecution.

(b) Witness AA

56. The Appellant's allegations of bias with regard to Witness AA's testimony are mainly directed at Judge Kama. It seems proper to point out that AA testified in respect of the charges under paragraphs 17 to 19 of the Indictment, and that his testimony was deemed credible by the Trial Chamber.

57. On examination, some of the said allegations of bias are clearly based on an erroneous presentation by the Appellant of Judge Kama's attitude during the examination of the witness. This is the case with the allegations set out in paragraphs 524 to 530 of the Defence Appeal Brief.

58. The Appellant in the first place characterizes Judge Kama's attitude towards Witness AA as protective. He refers in particular to the fact that the Judge made sure that the trial record did not reflect the rude and uncooperative attitude of the witness, when he accused Counsel for the Appellant of lying. The Judge also apologized for the witness's attitude, blaming it on his lack of education.27 [93] The trial record shows28 [94] that the above allegation is clearly unfounded. In fact, not only did the Judge underscore the discourteous attitude of the witness, and did not excuse him, he also did not condone it. Rather, he presented the Tribunal's excuses to the Defence on behalf of the witness, and issued a warning to the witness. In so doing, Judge Kama did not give preferential treatment to the witness, nor did he in any way show bias.

59. The Appellant next submits that Judge Kama interrupted his Counsel as she was about to start her cross-examination of Witness AA on the discrepancies between his written statement to investigators and his oral testimony in relation to the circumstances surrounding the death of Emmanuel Kayitare, that is, to know whether the victim had been struck on the head or on the neck.29 [95] According to the Appellant, the Judge himself proceeded to examine the witness until he received an answer that appeared to restore the credibility of the witness, namely that his statement may have been wrongly interpreted. Hence, the Judge allegedly remarked as follows: "Okay, that's what I wanted to hear, that perhaps it is badly interpreted."

60. The Appeals Chamber notes that in light of the trial record,30 [96] Judge Kama intervened in the cross-examination, thus assisting Counsel for the Appellant who was

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27[93] Defence Appeal Brief, para. 524. See also Prosecution's Response Brief, para. 10.39.
28[94] T, 7 October 1997, pp. 9 to 12.
29[95] Defence Appeal Brief, paras. 525 and 526. See also Prosecution's Response Brief, para. 10.40.
30[96] T, 7 October 1997, pp. 43 to 47.

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trying unsuccessfully to elicit a response from the witness. In this connection, Judge Kama's question made it possible for a clear answer to come out. It also appears that the witness, of his own volition, alluded to the fact that his statements may have been poorly interpreted. Indeed, the Judge's remark, taken in isolation, could be confusing. However, insofar as the justification in question comes straight from the witness himself and was not suggested to him by the Judge, the Appeals Chamber considers that the Judge's remark, situated in its proper context, would not lead a reasonable observer to conclude that its author was biased. In any event, from the relevant passage of the trial judgement which reads: "[...] the Chamber is of the opinion that Witness AA's inability to indicate whether the blow unleashed by the Accused cut off the head or neck of the victim cannot call into question the reliability of his testimony since it is difficult for a lay person to ascertain the respective limits of the head and the neck,"31 [97] the Appeals Chamber notes that the inconsistency raised by Counsel for the Appellant was duly taken into consideration by the Trial Chamber, and that the issue as to whether the Trial Chamber committed an error in finding this witness credible is distinct from the issue of bias.

61. The Appeals Chamber considers, in the light of the trial record,32 [98] that the Appellant's assertion that the Judge subsequently attempted to lead Witness AA to state that he had mentioned to the investigators that Emmanuel Kayitare had been struck on the nape of the neck, and that the Trial Chamber was satisfied with a confused answer from the witness, namely that he was talking about the "head" rather than the "neck" or the "skull", was even more unfounded.33 [99] In fact, the Judge merely asked the witness once more, in a reasonable manner, what he had told the investigators about the part of the body on which Emmanuel Kayitare had been struck, without suggesting an answer to the witness. The fact that AA's answer in this regard was confused is irrelevant to the allegation of bias. The same applies to the allegation of bias raised in paragraph 528 of the Defence Appeal Brief, since Judge Kama in the instant case had reasonably sought to have clarification, without suggesting any answer whatsoever to the witness; or again in paragraph 529 of the Defence Appeal Brief, since the Judge clearly made a relevant interpretation of Witness AA's testimony describing the population protecting Cyahafi as "*splitting into two groups*" to mean "*antagonistic groups*". Indeed, it was necessary to come out of the impasse resulting from the fact that the witness was not answering the question from Counsel for the Appellant that was repeated four times, and aimed unsuccessfully at eliciting a clarification.34 [100] The Appellant's description of Judge Kama's attitude during the cross-examination of Witness AA as to the distance between his house and the persons he described as having been killed at Kimisagara35 [101] cannot stand up to scrutiny in light of the trial record.36 [102] In this instance, the Judge

31[97] Trial Judgement, para. 335.

32[98] T, 7 October 1997, pp. 27 to 30.

33[99] Defence Appeal Brief, para. 527. See also Prosecution's Response Brief, para. 10.42.

34[100] T, 7 October 1997, p. 67.

35[101] Defence Appeal Brief, para. 530. See also Prosecution's Response Brief, para. 10.46.

36[102] T, 7 October 1997, pp. 69 and 70.

interrupted Counsel for Appellant's belaboured intervention intended to clarify the point at issue, with a view to testing the credibility of the witness, by linking the information given by the witness the previous day with that given a few moments before Counsel's intervention, and from which it is clear that the witness had observed the events from a distance of about 800 metres from his house situated on higher ground in Cyahafi, which gave him a better view of Kimisagara.

62. The Appellant also submits that Judge Kama intervened during the cross-examination of Witness AA, which intervention affected the strategy adopted by Counsel for the Appellant who was trying to point out a contradiction between AA's testimony and his written statement regarding the number of weapons in his possession at the time of the killing of Emmanuel Kayitare. The Appellant contends that the Judge intervened to ask the witness to state the number of weapons in question, and suggested to him that he had several weapons, including grenades, whereas these had not been mentioned previously by the witness.37 [103] The trial record 38[104] shows that Judge Kama intervened in order to re-phrase a question that Witness AA did not seem to understand. It is true that the witness, who had not voluntarily mentioned that the Appellant had grenades hanging from his belt, only did so in response to Judge Kama's question. There is no provision in the Rules that prohibits Judges from asking questions in order to contribute to discovering the truth or to try to corroborate or contradict the facts in issue. In the instant case, the existence of grenades was specifically referred to in paragraph 14 of the Indictment, and had been mentioned by Witnesses BB, Q and T. A reasonable observer should have been informed of this aspect of the proceedings before the Tribunal.

63. The Appellant also contends that Judge Kama cast aside his role as Judge and donned the cap of the prosecution in order to have Witness AA make a statement about the status and role of the Appellant within the *Interahamwe* Movement in the course of his cross-examination. He also reproaches the Judge for informing the witness about the statements of other witnesses on this subject.39 [105] The trial record shows40 [106] that the witness had already mentioned that he knew the position occupied by Rutaganda in the hierarchy. On this point, Judge Kama merely repeated the witness's remarks. It is true that Judge Kama sought more than Counsel to determine precisely what the witness knew about the position occupied by Rutaganda. As has already been recalled, the Rules allow Judges to ask questions, and Judges have a wide discretion to contribute to the discovery of the truth, including the power to confront one witness with the testimony of another. In the case at bar, the position of Rutaganda on the ladder of authority was a fundamental aspect of the facts in issue. It seems normal that the Judges should give their full attention to this issue. Once situated in its context, Judge Kama's question appears legitimate to a reasonable observer.

37[103] Defence Appeal Brief, para.523. See also Prosecution's Response Brief, para. 10.38.
38[104] T, 7 October 1997, pp. 34 to 36.
39[105] Defence Appeal Brief, paras. 531 and 532. See also Prosecution's Response Brief, para. 10.47.
40[106] T, 6 October 1997, pp. 115 to 117.

64.Lastly, the Appellant submits that during the cross-examination of Witness AA, his Counsel was prevented from continuing with her attempt to explore the contradictions between several statements by the witness.41 [107] The trial record42 [108] shows that the witness had, on the one hand, testified that Emmanuel Kayitare had tried unsuccessfully to run away, and, on the other hand, that he had been caught at the end of a race of which he indicated the starting and finishing points. The Appeals Chamber notes that the witness actually contradicted himself at this point, whereupon Judge Kama's intervention may be said to have been excessive. Nevertheless, when it is situated in the right context, his attitude seems to result more from an imprecise recollection of the content of the testimony in question than from a deliberate attitude on the part of the Judge. The Appeals Chamber considers that an erroneous interruption is quite distinct from a biased attitude.43 [109] The Appeals Chamber notes in the instant case that the interruption, which is rather unfortunate, is not biased. Moreover, the Appellant has failed to show that Judge Kama's interruption would have led a reasonable observer to have serious doubt about the impartiality of its author.

(c) Witness H

65. The Appeals Chamber fails to see in what way Judge Kama's remarks that the scar, which the witness showed the Chamber at the request of Counsel for the Appellant, is situated in the heart area would be such as to show a biased attitude on the part of the Judge.44 [110] Furthermore, the Appellant does not show that he had been prevented, as he alleged, from pursuing his cross-examination of Witness H on the issue of his wound. Nor is the Appellant's assertion 45[111] that Judge Kama interrupted the cross-examination of Witness H on the events that took place at ETO and Nyanza founded. In fact, the trial record establishes that the Judge waited for the witness to finish answering the question from Counsel for the Appellant before trying to clarify, without putting *pressure* on the witness, the issue as to whether the *Interahamwe* launched the attacks before or after the departure of UNAMIR soldiers.

(d) Witness A

66. The allegation that Judge Kama tried to link the Appellant via the *Interahamwe* Movement to the events at Nyanza, thus buttressing the Prosecution's argument during

41[107] Defence Appeal Brief, paras. 521 and 522.

42[108] T, 6 October 1997, pp. 52, 124, 132 and 133.

43[109] In this regard, see in particular the findings of the Appeals Chamber in the *Akayesu* Appeal Judgement, paras. 323 to 325: error invalidating a Judgement may not be shown by pointing to an anecdotal breach of the Rules by the Trial Chamber. It must be shown on an overall assessment of the trial that the Trial Chamber failed to render justice. The Appellant must show a prejudice such as would invalidate the Judgement.

44[110] Defence Appeal Brief, para. 540. See also Prosecution's Response Brief, para. 10.56.

45[111] Defence Appeal Brief, paras. 538 and 539.

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the examination of Witness A, does not seem to be founded.46 [112] Indeed, the trial record47 [113] shows that Counsel for the Appellant, of her own volition, used the term "*Interahamwe*". In this instance, a reasonable observer would not have concluded that Judge Kama's intervention was unwarranted or biased in favour of the Prosecution.

67. The Appeals Chamber considers as equally unfounded the Appellant's assertion that Judge Kama bolsters the Prosecution case by having Witness A state that his definition of the war corresponds with the crimes perpetrated by Hutu militia, whereas Counsel for the Appellant was referring to the war between RPF invaders and Rwanda.48 [114] The trial record shows 49[115] that the witness, of his own volition, in answering Counsel for the Appellant's questions, situates the start of the "war" at 6 April 1994. Furthermore, while it is correct to state that Witness A's definition was given by him in response to Judge Kama's questions, it does not appear, in any event, that the Judge's questions would have led a reasonable observer to conclude that his interruption was biased.

68.The Appellant also reproaches Judge Kama for intervening to prevent Counsel for the Appellant from challenging the credibility of Witness A as well as the inconsistency of his testimony. Thus, when Counsel for the Appellant was asking the witness whether UNAMIR soldiers were at the roadblock erected at the ETO school, she was interrupted by Judge Kama who took off on a different tangent, and suggested to the witness that something must have prevented him from leaving the school.50 [116]

B. <u>Treatment of the Appellant's testimony</u>

95. For the sake of clarity, the Appeals Chamber has grouped the arguments put forward by the Appellant under this ground as follows: first, that the Presiding Judge apparently manifested his mistrust of the Appellant even before he took the stand as a witness; second, that the Trial Chamber imposed a time limit on the parties that was too strict, and that reminding them incessantly about this created a hostile atmosphere for the Appellant; third, that the Trial Chamber intervened during the examination-in-chief of the Appellant as well as during his cross-examination, thus giving the impression that it was "aligning itself with the Prosecution"; fourth, that the Trial Chamber intervened to cut off the Appellant's testimony.51 [165]

46[112] Defence Appeal Brief, para. 515. See also Prosecution's Response Brief, para. 10.28.

47[113] T, 25 March 1997, pp. 22 and 23.

48[114] Defence Appeal Brief, paras. 508 and 509.

49[115] T, 20 March 1997, pp. 95 and 96; T, 24 March 1997, pp. 26 to 30

50[116] Defence Appeal Brief, paras. 511 to 514. See also Prosecution's Response Brief, paras. 10.24 to 10.27.

51[165] Supplemental Defence Document, para. 20 (3). In so doing, according to the Appellant, the Trial Chamber breached the requirement of impartiality as well as the principle of equality of arms guaranteed under Articles 12 and 20 of the Statute, and Rules 85(B) and 89(B). In support of his argument, the Appellant cites several excerpts

1. **Warning by the Presiding Judge**

96.The Appellant submits52 [166] that the Presiding Judge showed mistrust towards him even before he began his testimony, by making the following remarks about his duty to tell the truth:

Je ne vous ferais pas les recommandations que d'usage (sic), que vous connaissez bien. Vous avez juré de dire la vérité, *essayez autant que faire se peut de dire la vérité*, puisque c'est le règlement du Tribunal qui veut qu'un accusé prête serment, ce n'est pas la même chose dans d'autres systèmes.53 [167] (Emphasis added). *("I am not going to make the usual recommendations that the Tribunal makes because you know them very well. You have stated that you will speak the truth and we expect that you are going to speak the truth. It is the requirement of the Tribunal for the witness to make the solemn declaration which you have made and this is our tradition and I do not know what it is in other places.")* (Transcript, 8 April 1999, p. 6)

The Appeals Chamber does not share the Prosecution's view 54[168] that the impugned remark is a standard warning given to all witnesses by the Trial Chamber prior to their testimony. Even then, the Appeals Chamber is convinced that this remark would not reasonably lead an informed observer to conclude that the Judge was not impartial. Indeed, the above sentence that follows Judge Kama's remark clearly shows that the remark is not made out of preconceived suspicion in respect of the Appellant, but because the Judge comes from a legal system where a witness is not required to make a solemn declaration to tell the truth before he is examined.55 [169]

2.**Limits to the duration of testimony**

97. The Appellant submits56 [170] first that the unacceptable limits imposed by the Trial Chamber on the duration of his testimony not only undermined his ability to make his defence effectively, but also revealed an appearance of bias on the part of the Judges. He points out that his testimony opened on the seventy-eighth day of the trial, whereas only a quarter of the hearing days were allotted to the presentation of the Defence case (fourteen days as against forty-three days for the presentation of the Prosecution case).

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from Canadian jurisprudence relating to interruptions by the Judge that are considered to be contrary to the right to a fair trial, which the Prosecution believes are not binding on the Tribunal, and that they are not common to the majority of legal systems and practice in the "civil law" systems.

52[166] Defence Appeal Brief, para. 595.

53[167] T, 8 April 1999, p. 6.

54[168] Prosecution Brief in Reply, para. 11.14.

55[169] It should be noted that, following the criminal law applicable in Senegal, an examination of the accused on issues of fact and of personality comes right after the indictment is read, and it is not left to the choice of the accused to be heard as a witness, save where the person concerned exercises his right to keep silent.

56[170] Defence Appeal Brief, paras. 596 to 618.

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Even then, the Trial Chamber is alleged to have immediately subjected his testimony to pressing and repeated time constraints,57 [171] which in the end limited it to a little over three days only 58[172] instead of the five days requested by the Defence, and created a tense and hostile atmosphere throughout the testimony.

98. In this regard, the Appeals Chamber points out first of all, as does the Prosecution,59 [173] that the examination of the Appellant took place after additional time was granted him from 19 March to 5 April 1999 for the preparation of his defence, followed by an additional day on 7 April for him to consult with his Counsel. With regard to the examination proper, the Appeals Chamber recalls that the Appellant's examination-in-chief by his Counsel commenced on 8 April 199960 [174] and continued on 961 [175] , 2162 [176] and 22 April 1999.63 [177] Cross-examination of the Appellant by the Prosecution opened on 2264 [178] and closed on 23 April 1999.65 [179]

99.From a reading of the trial record,66 [180] there is no denying that the Presiding Judge restricted the Appellant's testimony all too often to strict and repeated time limits, indicating that he expected Counsel for the parties to be brief and to the point when asking their questions, and that he expected similar stringency in the Appellant's answers. Nevertheless, the trial record also shows that the Presiding Trial Judge, in his successive remarks concerning the duration and method of examination, actually applied both stringency and flexibility, and the choice of Appellant's Counsel to conduct the examination as she thought fit was not affected in substance. The Appellant in fact had considerable latitude to say what he had to say.

100.An examination of one of the examples cited by the Appellant, which includes a reminder by the Presiding Judge about the Trial Chamber's wish regarding the duration of his testimony, and a request to his Counsel to ask questions connected with the

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57[171] Defence Appeal Brief, paras. 600, 601, 602, 605, 611, 613, and 614.

58[172] Half days on 8, 9 and full days on 21, 22 and 23 April 1999. It should be noted that although the Appellant's filings show that he was also heard on 12 April 1999 (starting at 3.20 p.m.), the Transcript of 12 April 1999 shows that the hearing was adjourned because of the Appellant's state of health.

59[173] Prosecution's Response Brief, para. 11.18.

60[174] From 9.40 a.m. to 6.07 p.m.

61[175] From 11 a.m. to 12.50 p.m.

62[176] From 9.40 a.m. to 5.30 p.m. (the first 24 pp. of the Transcript being considered as introductory to the case.)

63[177] From 10 a.m. to12.55 p.m. (first 118 pp. of the Transcript).

64[178] From 3.30 p.m. to 5.30 p.m.

65[179] Of the four hours of hearing, 155 pp. of the Transcript are taken up by the Appellant's cross-examination by the Prosecution, followed by additional questions from the Defence (pp. 155 to 159), Judge Pillay (pp. 160 to 170) and the Presiding Judge (pp. 171 to 176).

66[180] T, 8 April 1999 p. 6; T, 9 April 1999 pp. 95 to 96; T, 21 April 1999, pp. 3 to 8 and 95; T, 22 April 1999 pp. 30 to 32 and 96.

Indictment,67 [181] perfectly illustrates the foregoing. The impugned remark by Judge Kama should first be placed in its context as appears from the trial record, namely, that it

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67[181] Defence Appeal Brief, paras. 601 to 605 *In extenso*, the dialogue in question reads as follows:

> *"MR. PRESIDENT: /.../ The Judges have just consulted and we would like to have the testimony of Mr. Rutaganda to come to an end tomorrow at 12:30, that will make four days and the prosecutor should start tomorrow afternoon and possibly Friday. That's the first statement. Secondly, we have received a lot of general information. I would like to have a greater precision and we would like to go directly into the indictment itself so that we can gain time. We have -- we are going to finish with the family and his business. Now, let us go into the indictment parse. I give you the floor.*
>
> *MS. DICKSON: Mr. President, we have gone too far into this matter for me to be quiet. There is no, there are no polemics whatsoever. We have lost a great deal of time in this trial this last week because Mr. Rutaganda was ill. This is already a prejudice that he has suffered to his health. The questions that I put to him were in our -- to our mind, relevant. We have listened to a lot of witnesses brought by the prosecutor to talk about the Interahamwe, to talk about the nature of their organisation, to talk about the role of Mr. Rutaganda in the organisation and this is a very important aspect. In so far as we had five days, the day, the day that we devoted to the beginning of the examination was supposed of (sic) have been provided for as a function of the remaining three days. Therefore, just -- if only for the record, I would like to point out this that we would have liked to and I consider -- we would have liked to have our complete five days for the examination in chief. This is what Mr. Rutaganda wishes. We submit this wish to you, Mr. President. This means that the days we lost were not our fault.*
>
> *MR. PRESIDENT: Ms. Dickson, as you've said you are loosing -- we are loosing time uselessly. You asked for five days, that is one thing. It is the Chamber that will decide how much time will be granted you or the prosecutor, that is another thing. You asked for five days and I told you in the beginning we are going see. In light of the circumstances, as you've said, we've lost a lost of time because of the illness of your client which we are sorry about but believe me we would like for you to finish tomorrow at 12:30, but if his state -- the condition of his health would not allow it we could go much further than that. In any case, this is just a wish expressed by the Chamber. It is also important the matters that have been raised with regard to the Interahamwe, the role that he played, we have finished with that aspect and I would like that now we delve in more directly into the indictment parse. Please you have the floor to do so and we are going to see -- to examine matters as we progress.*

was made on the third day of the examination-in-chief of the Appellant by his Counsel. The Appellant's testimony opened on 8 April 1999 and focused on his family, his father's important role,68 [182] relations between the different ethnic groups in Rwanda,69 [183] the Appellant's educational background,70 [184] his professional life,71 [185] his marriage and details relating to his family life,72 [186] a description of his company head office and details on the Amgar *secteur*,73 [187] political parties in Rwanda,74 [188] the Appellant's material situation and his contacts with the entire Rwandan society,75 [189] his life in associations,76 [190] the RPF attack in October 1990 and its repercussions on Rwandan society,77 [191] political life, multiparty politics, the regional implantation of parties, the place of MRND and the Appellant's membership of this party,78 [192] the *Interahamwe za MRND* Movement.*79* ***[193]*** The examination of the Appellant by his Counsel about the *Interahamwe za MRND* Movement continued on 9 April and 21 April, including the period after the intervention mentioned above.80 [194]

101.The Appeals Chamber recalls first of all that the Trial Chamber only intervened to seek further details in the Appellant's answers after the Appellant had spoken for long on issues of a general nature, without directly addressing the acts for which he was indicted. In that context, the request by the Presiding Judge of the Trial Chamber aimed at steering the examination closest to the acts for which he was indicted seems to be warranted. The Appeals Chamber also notes that the attitude of Appellant's Counsel, when the Presiding

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MS. DICKSON: I hope I have understood you well, Mr. President. Are you saying that we have finished with the Interahamwe because I did not think that I had finished?

MR. PRESIDENT: We thought we -- that we knew the structure, the role that he had played but if you want to continue with the Interahamwe –

MS. DICKSON: With your leave, Mr. President –

MR. PRESIDENT: There is no problem, continue but we hope that tomorrow at 12:30, we will finish." T, 21 April 1999, pp. 3 to 6.

68[182] T, 8 April 1999, pp. 9 to 12.
69[183] *Ibid.*, pp. 14 to 18.
70[184] *Ibid.*, pp. 18 to 24.
71[185] *Ibid.*, pp. 25 to 34.
72[186] *Ibid.*, pp. 34 to 43.
73[187] *Ibid.*, pp. 43 to 52.
74[188] *Ibid.*, pp. 53 to 54.
75[189] *Ibid.*, pp. 52 to 69.
76[190] *Ibid.*, pp. 70 to 75.
77[191] *Ibid.*, pp. 76 to 81.
78[192] *Ibid.*, pp. 81 to 120.
79[193] *Ibid.*, pp. 120 to 193.
80[194] T, 21 April 1999, up to p. 72, after which the questions are directed at the Appellant's holdings in other commercial companies, as well as his relations with RTLM.

Judge expressed his opinion that the part of the examination relating to the *Interahamwe za MRND* Movement was closed and asked her to continue with the rest, reveals that she did not feel bound by that appraisal, given that she continued the examination of the Appellant on the same subject as she had planned, without attracting any hostile reaction from the Trial Chamber. Furthermore, it should be pointed out, as does the Prosecution,81 [195] that the interruption in no way prevented the Appellant from continuing his testimony for as long as he wanted on general issues before going to the details of his activities on the days referred to in the Indictment.

102. The second passage cited by the Appellant 82[196] also offers the opportunity to assess the true extent of the reminder by the Presiding Judge of the time allotted for his testimony.83 [197] The impugned remarks by the Presiding Judge clearly show that the wish expressed by the Trial Chamber concerning the limitation on the duration of the Appellant's testimony was not inflexible. With regard to the swift reaction by the Presiding Judge to the reminder by Counsel for the Appellant about her client's right to an effective defence, the Appeals Chamber considers that it is definitely excessive in this instance, but this alone would not lead a reasonable observer to doubt the impartiality of the Presiding Judge. Upon examination, the Appeals Chamber considers that the other arguments raised by the Appellant on this point, when placed within their context, are equally unfounded.84 [198] The Appeals Chamber is of the opinion that, despite the insistent nature of the calls to order by the Presiding Judge of the Trial Chamber regarding the duration of the Appellant's examination, the Appellant does not demonstrate that he was actually obstructed from presenting his defence, and he was able to speak as he wished.

81[195] Prosecution Brief in Reply, para. 11.25.

82[196] Defence Appeal Brief, para. 614.

83[197] *"Mr. President: The session is called to order. Ms. Dickson, it is 11:15, we are coming to end I believe and do you think you will be able to finish by 12:30 with the questions that you still have you ask?*
Ms. Dickson: Mr. President, as I said at the beginning, I'll do my best. We do not have—we have not had as much time as provided—as has been hoped for. This morning we started a little late and break has been a little longer than has been envisaged. I would do what I can. We have not yet finish. We would like Mr. Rutaganda to have a full, complete and effect (sic) defence.
Mr. President: We understand the interest. This is a lesson that the court cannot accept, we have been here for two years, we are doing it, we are trying to ensure that he has a full—a complete and effective defence. You should not, you should stop giving the Tribunal that lesson. All I asked you is this, we have gone through the various length of questioning, we have gone as far as his departure to Zaire, we've come back to the roadblocks and we are following. We are asking would you be able to finish by 12:30? If you can, well and good, if you cannot then we'll see." T, 22 April 1999, pp. 30 to 32.

84[198] Defence Appeal Brief, paras. 600, 601, 602, 606, and 611 to 613.

103. Second, the Appellant submits that, in addition to the time constraints referred to above, there were repeated interventions by the Presiding Judge intended to shorten the testimony of the Appellant on points considered to be crucial to the Appellant's defence.

104. With regard to the conditions and formalities fulfilled by the Appellant for acquiring a firearm for his father, who, like him, was a victim of threats,85 [199] the trial record clearly shows 86[200] that the Appellant was able to express himself in detail on the various points. The first intervention by Judge Kama, which came after a considerable period of time (to wit, no less than four pages of transcript recording the Appellant's spontaneous testimony), clearly falls under the ambit of the Presiding Judge's duty to steer testimony that is getting lost in non-essential detail. The second intervention was aimed at interrupting repetitive questions from the Defence. In that context, the interventions in question cannot be considered as denoting a biased attitude on the part of Judge Kama, or as having thwarted the Defence on a crucial point.

105. With regard to Judge Kama's intervention aimed at focusing the Appellant's testimony concerning his schedule on 6 April 1994, the Appellant considers as biased the fact that the Presiding Judge reminds him that he had pledged to summarize his testimony.87 [201] Once more, it is necessary to put this intervention in context, namely, that the Appellant had just finished testifying at length and in detail about his schedule on 688 [202] , 789 [203] , 890 [204] and 991 [205] April 1994, and that he had just testified, without being interrupted by the Trial Chamber, about 10 April 199492 [206] when the Presiding Judge asked him not to dwell on details and to summarize his remarks. The Appellant's testimony pertaining to 10 April actually went ahead without incident after this justified interruption by the Presiding Judge, which is proof that it was not perturbed by the said interruption.93 [207]

85[199] The Appellant wishes to show that he would not have used this method if he had access, as the Prosecution submitted, to truckloads of weapons. See the Prosecution's Response Brief, paras. 11.22 and 11.27 to 11.30 considering the contention unfounded.
86[200] Nearly 9 pages of Transcript are taken up by this subject.
87[201] The Appellant submits that he has suffered a particular prejudice because of this interruption, given that the judgement convicting him contains the assessment by the Trial Chamber in which the Appellant's activities on the days in question, including those acknowledged by him, could not have stopped him from participating in the acts with which he is charged. See also the Defence Reply Brief, paras. 11.32 to 11.34. stressing the ample explanations given by the Appellant without interruption on his schedule from 6 to 10 April.
88[202] *Ibid.*, pp. 104 to 113.
89[203] *Ibid.*, pp. 113 to 114.
90[204] *Ibid.*, pp. 115 to 143.
91[205] *Ibid.*, pp. 134 to 137.
92[206] *Ibid.*, pp. 137 to 139.
93[207] *Ibid.*, pp. 139 to 142.

106.With regard to the contention that the Appellant had not proved that he did not participate in the meetings at Masango, whereas the Trial Chamber finally concluded that he had,94 [208] the Appeals Chamber points out that the Appellant's presentation is biased and cannot stand up to scrutiny. Indeed, the impugned remark by Judge Kama 95[209] was aimed at obtaining a precise answer from the Appellant to the question put to him by his Counsel to know whether he had heard anything about meetings when he was at Masango. This remark seems warranted in the sense that the Appellant began his answer to this specific question with an evasive statement, namely: "*First, normally for any meeting to take place, if it is a communal meeting, it is the communal official who should ask for authorization.*" It is then that the Presiding Judge intervened: "*The question is, did (sic) talk about meetings at Masango?*" to which the Appellant replied: "*No*", and the Presiding Judge added "*Let's go more quickly now and lose less time. So is no. Next question.*" The Appellant confirmed: "*no*" and the Presiding Judge added "*So is no.*" To which the Appellant replied "*no*" once more. It is only at this point that the Presiding Judge requested Appellant's Counsel to move on to the next question: "*Did you participate in any other meeting at Masango, Mr. Rutaganda?*" to which the Appellant replied "*Never.*" The next exchange between the Appellant and his Counsel remains within the context of Masango, namely, possible participation by the Appellant in the killings of Tutsis at Masango. Under these conditions, it appears clearly that the Presiding Judge's remarks did not prevent the Appellant from expressing himself as he thought fit and from putting forward his argument on the issue.

107.Concerning the allegation that the Presiding Judge considered the Trial Chamber as having sufficiently understood the material assistance the Appellant gave to Tutsis, and the fact that the assistance in question was given for nothing in return, and that he thus refused to hear the details of the assistance the Appellant gave to a Tutsi named Rutuku,96 [210] it should be pointed out that this remark was made after the Appellant had previously given a long explanation on the issue.97 [211] In that context, the Appeals Chamber is of the opinion that Judge Kama's remark, in which he considered that a sufficient number of examples had been given by the Appellant on this subject, does not seem to exceed his role as Presiding Judge.

108. On all these different points, the Appeals Chamber considers that the way in which the Appellant depicts the attitude of the Trial Chamber does not reflect the general attitude resulting from a complete reading of the relevant parts of the trial record, namely, that the Applicant was completely at liberty to express himself, and that the Trial

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94[208] The Appellant indicates that he was prevented from demonstrating that, contrary to the allegations in para. 17 of the Indictment, neither he nor the other persons cited had the necessary authority to organize the holding of the said meetings during which they are alleged to have incited the population to throw Tutsis into the river (Defence Appeal Brief, para. 615).
95[209] Defence Appeal Brief, para. 615 and T, 22 April 1999, p. 81.
96[210] Defence Appeal Brief, para. 616.
97[211] T, 22 April 1999, pp. 83 to 85.

Chamber intervened only to cut short long digressions in response to questions, or to ask for clarification.

3. <u>Remarks which give the impression that the Trial Chamber sided with the Prosecution</u>

109.The Appellant illustrates this allegation with examples of "*cross-examination*" by the Trial Chamber which occurred during his examination-in-chief by Counsel for the Appellant as well as during cross-examination by the Prosecution.

(a) Examination-in-chief

110. First, with regard to the structure of the *Interahamwe za MRND* Movement, the Appellant criticizes the questioning to which he was subjected by Judge Kama and Judge Aspegren. The questioning, comprising 50 questions, is alleged to have taken place after his Counsel had asked him only three questions on this central point in his defence. The Appellant contends that the Judges' questions denote scepticism on their part in relation to his answers on the following points: there was no budget, therefore there was no function for the treasurer; the fact that the *Interahamwe za MRND* Movement was incapable of growing into anything more than an embryo in a few years; his description of the nature of meetings held by the Movement; the fact of the Movement evolving into a youth wing without being orchestrated by the five members of the think-tank; questions aimed at having him admit that he had functions that empowered him to chair meetings in the absence of the president; that there must have been written documents defining the powers of each person; that the Movement was, *de facto*, able to act outside the party, and was engaged in Kuhahooza-type actions, which involved violence and/or threats aimed at forcing new members to join the Movement.98 [212]

111. In this instance, the Appeals Chamber notes that the Appellant's testimony about the *Interahamwe za MRND* Movement took up nearly thirty pages of the trial record, before the start of the series of questions and answers objected to by the Appellant. The Appeals Chamber recalls that it is up to the Judges to ask any questions that they deem necessary for the clarification of testimonies and for the discovery of the truth. A reading of the relevant section of the trial record would not warrant an assertion, as that made by the Appellant, that the Trial Chamber exceeded its role. Many as the questions put by Judge Kama and Judge Aspegren may be, they do not denote bias or any special scepticism, but are rather aimed at eliciting clarifications following the Appellant's lengthy testimony on the subject. The same applies to the alleged expression of scepticism by the Presiding Judge about the Appellant's participation in the activities of the Movement,99 [213] and to the questions that followed. Concerning the repetition of certain questions by Judge Aspegren, the Appeals Chamber is of the opinion that this would have been necessitated by the often evasive or irrelevant answers given by the Appellant. Lastly, the Appeals

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98[212] Defence Appeal Brief, paras. 640 to 642.
99[213] *Ibid.*, paras. 643 to 644.

Chamber notes that Counsel for the Appellant herself admitted the legitimate nature of the said questions that she had intended to address.100 [214]

112.Second, with regard to Judge Kama's reaction to the question as to whether the Appellant was "okay",101 [215] which question was put to him by his Counsel after the series of questions referred to above, and interpreted by the Trial Chamber as a criticism on the part of Counsel, the Appeals Chamber considers that this reflects the irritation of the Presiding Trial Judge caused by the Defence question, but does not denote bias against the Appellant. Moreover, it finally proved to be without consequence.

113. Third, with regard to the Presiding Judge's remark to the Appellant, in which he allegedly mentioned the premises occupied by MRND in Kigali as one of the meeting places of the National Committee of the *Interahamwe za MRND* Movement, since he had just admitted that this was the case, the Appeals Chamber is of the opinion that this remark was not particularly judicious, but that it does not illustrate, contrary to the Appellant's assertions, a biased attitude on the part of Judge Kama.

114.Fourth, with regard to the Appellant's assertion that Judge Kama did his best to buttress the Prosecution's argument by having him admit that he had chosen to join MNRD because this was the ruling party, the Appeals Chamber considers that this contention is unfounded. Indeed, inasmuch as the long passage cited by the Appellant102 [216] follows the assertion by the Appellant himself that he was not ready to be a militant in the opposition, and that he joined the National Committee of the *Interahamwe za MRND* Movement in order to find protection against diverse pressures, the conclusion reached by Judge Kama as to the Appellant's motives seems logical and unbiased. In any event, the Appeals Chamber notes that the long exchange in question and the insistence by the Judge in this instance were favourable to the Appellant, and permitted him to qualify and clarify his testimony on the proposal of his Counsel, as shown by the part of the trial record not cited by the Appellant.103 [217]

100[214] T, 8 April 1999, p. 163.

101[215] Defence Appeal Brief, para. 641.

102[216] *Ibid.*, paras. 647 to 648.

103[217] T, 8 April 1999, pp. 96 to 97: "I said that the MRND, was (*sic*) power because the president of the republic was at the same time, in the years prior to 1993, also chairman of the party. To say that the MRND was in power whereas the prime minister was of the MDR, the person who was supposed to be the chief or head of government, I do not know. I do not know how to explain it but in my understanding, there were ministers of the MRND, there were ministers of the MDR, there were ministers from the PSD, and ministers from the PL and even from the PDC, a minister of the-- from the PDC. The ruling party, by this I understood, a party that won elections, that had won elections, a party that had organised and formed a government that was responsible for the activity for government, for the running of the government, a party that had set up a system that controlled the entire activity throughout the nation. That is what I understood by a ruling party but it was not the MRND."

115.Fifth, with regard to the request by the Presiding Judge aimed at obtaining from the Appellant an indication of the ethnic group to which the persons arrested in 1990 for their alleged complicity with RPF belonged, the Appeals Chamber considers the question relevant in the context of the trial. With regard to Judge Kama's comment, namely, "*That's the answer I was seeking*", which follows the Appellant's answer that there were both Tutsis and Hutus among those arrested, but that, according to him, the majority were Tutsis, the Appeals Chamber considers that, although the expression used is unfortunate in that it could lead to confusion, a reasonable observer who had followed the hearings and especially the Judge's efforts to obtain clear and concise answers would conclude that, in the instant case, this was the manner in which the Presiding Judge expressed his satisfaction in obtaining a precise answer to his question.

116. With regard to all the remarks of this nature, the Appellant has failed to demonstrate that there is an ulterior motive or bias in favour of the Prosecution's argument on the part of Judge Kama when he questions the Appellant on his material situation, and the Appeals Chamber notes that these are not borne out by the remarks in question.104 [218]

(b)Cross-examination by the Prosecution105 [219]

117.First, with regard to the examination of the Appellant on the issue as to whether the *Interahamwe za MRND* Movement was prepared to use force to protect MRND militants, it is clear from a reading of the relevant passage of the trial record that Judge Kama did no more than re-phrase the Prosecution's question, thus eliciting a more precise answer from the Appellant on the situation on the ground. The Appellant also criticizes the Judge's remarks, namely, "that is what we wanted to hear", commenting on the Appellant's answer which confirmed that members were able to react locally when they were attacked. On this point, the Appeals Chamber notes, as does the Prosecution, that it is typical of Judge Kama to make this type of remark which translates his satisfaction upon obtaining a precise answer to any question, whether from the Appellant or from any other witness, and considers that the interruption would not lead a reasonable observer who had followed the hearings to conclude that the Judge was biased.

118.Second, with regard to the examination of the Appellant on the subject of the letter in which the *Interahamwe za MRND Movement* denounced the partiality of UNAMIR, the Appellant reproaches Judge Kama and Judge Aspegren for asking a series of questions showing, according to him, their bias in favour of the Prosecution's argument. After considering the relevant passages of the trial record, the Appeals Chamber considers that the questions fall entirely within the ambit of the Judge's duty to contribute to the discovery of the truth, which implies, especially at the cross-examination phase, the possibility of testing witness credibility. The Appeals Chamber notes in passing that the said questions in no way unsettled the Appellant, as can be seen from his answers.

104[218] Defence Appeal Brief, paras. 651 and 652.

105[219] These interventions, according to the Appellant, are such as would lead a reasonable observer to think that the Trial Chamber was on the side of the Prosecution. *Ibid* paras. 623 to 636.

119. Third, with regard to the Prosecution's examination of the Appellant on MNRD, which the Prosecution presented as the Party of the President (Habyarimana), the Appeals Chamber points out that when placed in context,106 [220] Judge Kama's questions are once more aimed at obtaining greater clarification from the Appellant, who, at this point, gave the impression of playing with words. Concerning, in particular, the remark contested by the Appellant, the Appeals Chamber notes that in the French version, it is ascribed to the Prosecution and not to Judge Kama:

"Me Stewart: Je pense que la question était claire, et Monsieur Rutaganda ne veut pas reconnaître que c'était son parti, il n'y a pas de problème. C'est pas là (sic) où je veux aller."

["Mr. Stewart: I think that the question was clear and Mr. Rutaganda does not want to take cognisance of his party. Mr. President: No problem. That is not where I am heading." (T, 22 April 1999, p. 113)]

120. Fourth, with regard to the examination of the Appellant on whether or not the *Interahamwe* had a uniform, part of the trial record cited107 [221] shows clearly that the persistent questions put by Judge Aspegren are aimed at obtaining a comment from the Appellant, not on his own assessment as to whether the *Interahamwe* had a uniform, taking into account the inside knowledge he has of the Movement, but on the impression created on each and everyone by the photographs presented as exhibits by the Prosecution in which members could be seen wearing similar uniforms. In the context of the trial, namely, the evidence of prosecution witnesses that made reference to the existence of uniforms, the Appeals Chamber considers that the question does not seem to be unwarranted, especially after the Appellant has had the time to testify in detail on this issue.

121. Fifth, with regard to the closing questions put by the Presiding Judge to the Appellant, the Appellant does not demonstrate that they had no other purpose than to "lay a trap" for him to incriminate himself. With respect to an accusation of this nature, the Appeals Chamber cannot content itself with hasty allegations not supported by the passage cited by the Appellant.108 [222]

4. Interventions aimed at cutting off the Appellant's testimony

122. According to the Appellant, these interventions by the Trial Chamber were made during his examination-in-chief and cross-examination. The contention by the Appellant that, in this way, he was treated in a discriminatory manner does not stand up to scrutiny in light of the examples presented to the Appeals Chamber.109 [223]

106[220] T, 22 April 1999, pp. 110 to 113.
107[221] Defence Appeal Brief, para. 634.
108[222] *Ibid.*, para. 636.
109[223] *Ibid.*, paras 653 to 658.

123. First, the Appellant reproaches Judge Kama for his intervention asking him not to embark on interpretations about the origin of the "*réseau Zéro*" (the "Zero Network"). Although it is irrefutable that in the course of the trial certain questions put to other witnesses and to the Appellant himself may have led them to speculate or to hypothesize, the same is not true in this instance, given that the Appellant had just answered the Prosecution's question concerning his knowledge of the network, which he had read about in the newspapers. The Judge's intervention in this case seems justified and reveals no discriminatory character.

124. Second, the Appellant contests Judge Kama's intervention during his cross-examination on the issue of RTLM Radio. On the one hand, the Presiding Judge allegedly had doubts about the origin of the Appellant's knowledge that RPF gave an interview on this radio station, whereas the Trial Chamber did not subject Prosecution witnesses to this kind of credibility test.110 [224] The Appeals Chamber considers, upon reading the questions put by the Presiding Judge, that the questions were simply aimed at clarifying whether the Appellant had heard the interview in question, or whether it had been reported to him. The question was all the more warranted because the beginning of the Appellant's answer on the subject denoted uncertainty on his part. Furthermore, the Trial Chamber in no way prevented the Appellant from answering. On the other hand, the Appellant contends that the Presiding Judge interrupted him during his cross-examination by the Prosecution on the issue of Félicien Kabuga's holdings in the RTLM Project.111 [225] Upon scrutiny, Judge Kama's intervention seems to indicate his impatience vis-à-vis the cautious approach taken by the Appellant who had previously given details during the examination-in-chief on the subject in question. Obviously, the Judge's intervention does not seem to be judicious in the circumstances, given that the Appellant was apparently preparing to state that he had no personal knowledge of the point at issue and that the Judge had just enjoined him a few moments before not to go into conjectures. Much as such signs of impatience are regrettable, to which should be added another sign shown by Judge Kama during the Appellant's testimony on the impact of the war on MRND,112 [226] they do not denote hostility towards the Appellant, but rather irritation due to the length of the trial and the difficulty in bringing it to an end within a reasonable time. These signs cannot as such establish a biased or discriminatory attitude on the part of the Presiding Trial Judge.

5. Conclusion

125. In view of the foregoing, the Appeals Chamber considers that the arguments put forward by the Appellant in support of his submission of biased and discriminatory treatment of his testimony by the Trial Chamber are unfounded. Concerning especially the allegations about the attitude of the Presiding Trial Judge, these should be interpreted within the context of the national legal system to which he belongs. Even if, after these reserves, some attitudes may be considered as regrettable, the Appellant has not

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110[224] *Ibid.*, paras. 656 and 657.
111[225] *Ibid.*, paras. 658 and 659.
112[226] *Ibid.*, para. 660.

established that they would lead a reasonable and informed observer to doubt the impartiality of the Presiding Judge of the Trial Chamber. This ground of appeal is accordingly dismissed.

113[117] T, 24 March 1997, pp. 77 to 79; T, 24 March 1997, pp. 117 and 118 and T, (French), p. 132.
114[118] Defence Appeal Brief, para. 516. See also Prosecution's Response Brief, para. 10.29.
115[119] T, 25 March 1997, p. 6.
116[120] T, 24 March 1997, p. 79.
117[121] Defence Appeal Brief, para.517. See also Prosecution's Response Brief, para. 10.60.
118[122] T, 25 March 1997, p. 69.
119[123] Defence Appeal Brief, para. 518.
120[124] T, 25 March 1997, pp. 69 to 74.
121[125] Trial Judgement, paras. 280 to 282, 300, 361.
122[126] Defence Appeal Brief, para. 2. See also Prosecution's Response Brief, para. 10.59.
123[127] Trial Judgement, paras. 284 to 286 and 292.
124[128] Defence Appeal Brief, para. 545. See also Prosecution's Response Brief, para. 10.63.
125[129] T, 29 May 1997, p. 21.
126[130] Defence Appeal Brief, paras. 546 to 548. See also Prosecution's Response Brief, paras. 10.65 to 10.67.
127[131] Trial Judgement, para. 231.
128[132] T, 29 May 1998, p. 27.

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129[133] T, 29 May 1998, p. 29.
130[134] See *infra* para. 31.
131[135] Trial Judgement, paras. 194 to 195, 235 to 238, 243 to 248, 253, 256, 259 *et seq.*
132[136] Defence Appeal Brief, para. 549.
133[137] It should be noted that the credibility of Witness Q is amply dealt with under the ground of appeal pertaining to weapons distribution (Part VI of this Appeal Judgement).
134[138] T, 9 October 1997, pp. 134 to 136.
135[139] Defence Appeal Brief, para. 551. See also Prosecution's Response Brief, para. 10.69.
136[140] T, 9 October 1997, pp. 132 to 134.
137[141] Defence Appeal Brief, paras. 554 to 555. See also Prosecution's Response Brief, para. 10.72.
138[142] See Exhibits 143, 168 and 169.
139[143] Defence Appeal Brief, paras. 556 to 559. See also Prosecution's Response Brief, paras. 10.73 to 10.77.
140[144] T, 25 May 1998, pp. 48, 77 and 82.
141[145] Defence Appeal Brief, para. 562.
142[146] T, 10 February 1999, p. 130 [DZZ]; 15 February 1999, p. 4 [DDD]; 16 February 1999, p. 58 [DNN]; 6 April 1999, pp. 21 and 22 [DPP]; 6 March [sic] 1999, p. 102 [Mbonimpa].
143[147] *Ibid.*
144[148] T, 25 March 1997,p. 69 [A]; 10 October 1997, p. 81 [U]; 8 October 1997, pp. 69 to 71 [CC]; 9 October 1997, p. 136 [Q]; 13 June 1997, p. 18 [J]; 11 March 1998, p. 118 [T].
145[149] Defence Appeal Brief, para. 584. See also Prosecution's Response Brief, paras. 10.97 to 10.99.
146[150] T, 10 February 1999, pp. 512 and 513.

147[151] T, 9 March 1999, p. 123.
148[152] Defence Appeal Brief, para. 584. See also Prosecution's Response Brief, para. 10.109.
149[153] Defence Appeal Brief, para. 563.
150[154] T, 15 February 1999, p. 86.
151[155] T, 15 February 1999, pp. 99 to 102.
152[156] T, 16 February 1999, pp. 25 to 35.
153[157] Defence Appeal Brief, paras. 570 to 571 and 572 to 576. See also Prosecution's Response Brief, paras. 10.94 and 10.95.
154[158] Defence Appeal Brief, paras. 579 to 580. See also Prosecution's Response Brief, para. 10.102.
155[159] T, 11 February 1999, pp. 48 to 50.
156[160] *Akayesu* Appeal Judgement, para. 269 citing *Čelebići* Appeal Judgement, para. 700.
157[161] Defence Appeal Brief, paras. 581 to 583. See also Prosecution's Response Brief, para. 10.107.
158[162] T, 9 February 1999, pp. 101 to 106.
159[163] Defence Appeal Brief, para. 586.
160[164] Rule 73*ter* of the Rules (Pre-Defence Conference) was adopted on 8 June 1998 and stipulated as at that date as follows:

> "(A) The Trial Chamber may hold a Conference prior to the commencement by the Defence of its case.
> (B) At that Conference, the Trial Chamber or a Judge, designated from among its members, may order that the Defence, before the commencement of its case but after the close of the case for the prosecution, file the following:
> (i) Admissions by the parties and a statement of other matters which are not in dispute;
> (ii) A statement of contested matters of fact and law;
> (iii) A list of witnesses the defence intends to call with:
> (a) The name or pseudonym of each witness;

(b) A summary of the facts on which each witness will testify;

(c) The points on the indictment as to which each witness will testify; and

(d) The estimated length of time required for each witness;

(iv) A list of exhibits the defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity.

(C) The Trial Chamber or the designated Judge may order the defence to shorten the estimated length of the examination-in-chief for some witnesses.

(D) The Trial Chamber or the designated Judge may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

(E) After the commencement of the defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called."

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

THE BUREAU

Before:
Judge Erik Møse
Judge Arlette Ramaroson
Judge William H. Sekule
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 25 April 2006

THE PROSECUTOR
v.
ATHANASE SEROMBA

Case No.: ICTR-2001-66-T

DECISION ON MOTION FOR DISQUALIFICATION OF JUDGES

The Office of the Prosecutor
Silvana Arbia, Senior Trial Attorney
Jonathan Moses, Senior Trial Attorney
Gregory Townsend, Trial Attorney
Althea Alexis-Windsor, Trial Attorney
Tolulope Olowoye, Case Manager

Counsel for Seromba
Patrice Monthé, Lead Counsel
Barnabé Nekuie, Co-Counsel
Sarah Ngo Bihegue, Legal Assistant

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as the Bureau, composed of Judge Erik Møse, President of the Tribunal; Judge Arlette Ramaroson, Vice-President of the Tribunal; Judge William H. Sekule, Presiding Judge of Trial Chamber II; and Judge Khalida Rachid Khan, Presiding Judge of Trial Chamber III, in accordance with Rule 23 (A) of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the "Requête en Extreme Urgence de la Defence aux fins de Recusation des Juges Andresia Vaz, Gustave Kam, et Karin Hokborg", filed by the Defence for Athanase Seromba on 24 April 2006 and the "Acte Rectificatif de la Requête en Extreme Urgence de la Defense", filed by the Defence on 25 April 2006[1];

CONSIDERING the "Prosecutor's Response to Seromba's Motion to Disqualify All Three Judges of the Trial Chamber for Alleged Bias", filed on 24 April 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Seromba Defence requests the disqualification of all three judges hearing the trial, Judges Andrésia Vaz, presiding, Gustave Gberdao Kam and Karin Hökborg, pursuant to Rule 15.

2. On Friday 21 April 2006, the Trial Chamber had directed that the Prosecution complete cross-examination of Witness PA1 on that same day, and that the Accused, if he wished to testify, should begin his testimony on Monday 24 April 2006.[2] The Chamber also noted that the only other remaining Defence witness – PS2 – would be heard by video-link on Wednesday 26 April 2006, having granted the Defence motion for such purposes.[3] The Defence did not immediately object to this ruling. The Chamber noted that scheduling of the hearing of the testimony of the Accused on 24 and 25 April 2006 (in the absence of other available Defence witnesses) was necessary to ensure the completion of the trial by the previously-agreed date of 27 April 2006.[4]

3. On 24 April 2006, the morning scheduled for the Accused's testimony, the Defence filed a written motion for reconsideration of the Chamber's oral decision of 21 April 2006 to the effect that if Seromba wished to testify, he should begin his testimony on 24 April 2006.[5] On 24 April 2006, the Chamber heard oral arguments on this motion from both parties and, in an oral decision, denied the motion for reconsideration.[6] In its submissions, the Defence stated that if the Chamber denied its motion for reconsideration, the Defence requested certification for appeal.[7] In its oral ruling, the Trial Chamber also denied certification for appeal of its oral decision denying the motion for reconsideration.[8]

4. On 24 April 2006, after the above rulings, the Defence sought a recess until 2.30 p.m., which the Chamber granted. At that time, the Defence filed the present motion. The Chamber adjourned the proceedings *sine die*.[9]

SUBMISSIONS

5. In its motion, the Defence requests the Bureau to disqualify Judges Vaz, Hökborg and Kam for their clear "hostility, their partiality, and their personal interest in convicting Athanase Seromba without any regard for the modalities of defence which the latter would or could have presented".[10]

6. The Prosecution opposes the motion for disqualification on the basis that the impugned decisions of the Chamber do not demonstrate bias and as the jurisprudence of the Tribunal recognises no right of an Accused to testify last.[11]

DELIBERATIONS

1. Rule 15 (A) provides that a judge may not "sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality". This provision has been interpreted broadly to permit any ground of impartiality to be raised before the Bureau as a basis for disqualification.[12] The Appeals Chamber in *Furundžija* has found that the requirement of impartiality is violated not only where the decision-maker is actually biased, but also where there is an appearance of bias.[13] An appearance of bias is established if (a) a judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[14]

9. The apprehension of bias test reflects the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[15] Although the standpoint of the Accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.[16] Thus, a mere feeling or suspicion of bias by the Accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.[17] Judges of this Tribunal enjoy a presumption of impartiality, based on their oath of office and the qualifications for their selection in Article 12 of the Statute. The moving party bears the burden of displacing that presumption.[18]

10. The motion alleges that the Judges have a "personal interest" in convicting the Accused.[19] In substance, however, the Defence cites as the basis of its motion several decisions rendered in the course of the trial itself which the Defence allege to be erroneous.[20]

11. In *Karemera,* the Bureau considered the issue of judicial impartiality as evidenced through a Chamber's decisions.[21] It relied on the reasoning of the Bureau of

the International Criminal Tribunal for the Former Yugoslavia in *Blagojević*, where that Bureau, although not entirely ruling out the possibility that decisions rendered by a Judge or Chamber in the course of trial could by themselves suffice to establish actual bias, observed that they would only serve to do so in the most exceptional of cases.[22]

12. Where such allegations are made, the Bureau has a duty to examine the content of the judicial decisions cited as evidence of bias. The purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias based on the objective test described above. Error, if any, on a point of law is insufficient: what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law (on which there may be more than one possible interpretation) or to the assessment of the relevant facts.[23]

13. The motion alleges, firstly, that the Judges of the Trial Chamber are biased because they ordered the Accused to testify, or otherwise wrongly compelled his testimony.[24] By not allowing him to testify last, they are alleged to have violated his rights under the Statute and Rules.[25]

14. The Bureau observes that the Defence had previously indicated that the Accused wished to testify on his own behalf.[26] No reasonable allegation of coercion is supported by the record. Further, the Bureau has already determined that no mention of the timing of an appearance of the Accused is to be found in Articles 19 or 20 of the Statute whereas, under Rule 90 (F), the Chamber has the obligation and authority to "exercise control over the mode and order of interrogating witnesses."[27] The consistent jurisprudence of the Tribunal demonstrates that there is no right, as such, for an accused to testify last.[28] The Chamber specifically considered judicial economy and the interests of justice in rendering its decisions of 21 April 2006 and 24 April 2006.[29] Further, the Defence has neither alleged nor demonstrated any prejudice to the Accused from this ruling. The Chamber's direction on 21 April 2006 that the Accused testify from 24 April 2006 onwards is therefore consistent with the Tribunal case law and cannot be said to demonstrate bias on the part of the Chamber.

15. The Defence further submits that disqualification of the bench is warranted due to a series of decisions with which the Accused disagrees.[30] It appears to argue that the Chamber is biased because it has denied some Defence motions whilst granting other Prosecution ones.[31] The Bureau recalls that such decisions are rendered on a case by case basis and form part of the inherent discretion and duty of the Chamber to control the proceedings in order to ensure an expeditious and fair trial.[32] Further, and as the Bureau has previously held: "Error, if any, on a point of law is insufficient [to disqualify]."[33]

16. The Defence alleges that the Chamber showed partiality in dealing with Witnesses FE6 and FE35, who complained of being unwell.[34] On 27 March 2006, the Chamber heard from Witness FE6 and the Witnesses and Victims Support Section ("the

WVSS"), and requested medical information concerning the condition of FE6. On 27 March 2006, the Chamber was advised by the WVSS that the medical tests for FE6 were negative.[35] Acting in its discretion and in view of the condition of the witness before it, the Chamber decided to continue.[36] Its consideration of the state of health of these witnesses appears proper and does not show bias.[37]

17. The Accused further contends that the Chamber demonstrated bias by granting more favourable treatment to Prosecution witnesses than Defence ones.[38] However, the Chamber's overall treatment of Defence witnesses provides no basis for a finding of bias.[39] Nor is bias implied by the Chamber's alleged failure to consider whether or not the Defence intended to recall certain Prosecution witnesses when fixing a date for the conclusion of trial.[40] In the absence of any advance Defence indication of intent to recall any Prosecution witness, such a consideration is merely speculative.

18. The Chamber is further alleged to have shown bias in scheduling a hearing less than an hour after Defence counsel had flown into Arusha from Kigali on that day.[41] In fact, this hearing had been scheduled after conferring with the parties.[42] Despite this, counsel for the accused failed to appear, leaving the Accused unrepresented.[43] The Chamber, although requested to do so by the Prosecution, nevertheless declined to impose sanctions on counsel.[44] Such conduct by the Chamber does not demonstrate bias against the Defence.

19. The motion then impugns the Chamber for allegedly failing to render a decision regarding Defence witness FE36's retraction of his evidence.[45] In fact, the Chamber issued its decision on this issue on 20 April 2006.[46] Bias is also not evidenced by the Chamber's alleged failure to serve its decision of 24 April 2006 in writing.[47] There is no authority for the proposition that an oral decision of a Chamber must be served in writing on the parties in order for it to have effect.

20. Finally, the Defence alleges that the Chamber showed bias is denying certification to appeal the Chamber's oral ruling of 24 April 2006.[48] Prior to rendering its decision, the Chamber heard submissions from both parties, where the Prosecution contended that the conditions for appeal were not satisfied, and then adjourned to deliberate.[49] There is nothing to suggest that in rendering this decision, the Judges were animated by any concern other than the relevant legal issues.

21. The Chamber's fixing of a date by which the trial is to be concluded also does not demonstrate bias. Rather, this falls squarely within a Trial Chamber's discretion and authority to control proceedings.

22. The Bureau concludes that the motion has failed to establish that an objective observer, fully apprised of the relevant circumstances, could form a reasonable apprehension of bias on the basis of the arguments advanced by the Defence, whether viewed individually or cumulatively.

FOR THE ABOVE REASONS, THE BUREAU

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DENIES the motion.

Arusha, 25 April 2006

Erik Møse	Arlette Ramaroson	William H. Sekule	Khalida Rachid Khan
President	Vice-President	Presiding Judge of Trial Chamber II	Presiding Judge of Trial Chamber III

[Seal of the Tribunal]

[1] The latter appears to improve stylistically and typographically on the previous filing, but to be identical to it in substance.

THE BUREAU

Before: Judge Arlette Ramaroson
Judge William H. Sekule
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 28 May 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON MOTION FOR DISQUALIFICATION OF JUDGES

The Office of the Prosecutor

Barbara Mulvaney
Drew White
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Raphaël Constant
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as the Bureau, composed of Judge Arlette Ramaroson, Vice-President of the Tribunal, Judge William H. Sekule, Presiding Judge of Trial Chamber II and Judge Khalida Rachid Khan, Presiding Judge of Trial Chamber III, in accordance with Rule 23 (A) of the Rules of Procedure and Evidence (the "Rules");

NOTING the President's Memorandum ICTR/PRES/037/07 dated 23 May 2007 referring the Bagosora Defence Motion of 17 May 2007 for Disqualification of the Judges to the Bureau in accordance with Rule 15 of the Rules;

BEING SEIZED of "Bagosora Defence Motion to Disqualify Trial Chamber I", filed on 17 May 2007 (the "Motion");

CONSIDERING the "Prosecutor's Response to Bagosora Defence Motion filed 17 May 2007 Requesting Disqualification of Trial Chamber I", filed on 22 May 2007;

CONSIDERING the "Bagosora Defence Reply to Prosecution Response", filed on 24 May 2007;

HEREBY DECIDES the Motion.

INTRODUCTION

1. Théoneste Bagosora requests the disqualification of all three judges hearing his trial, Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov on the basis of actual bias, or, alternatively, a reasonable apprehension of bias pursuant to Rule 15 of the Rules.

2. Pursuant to Rule 23 (A), the Bureau is composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers. Judge Erik Møse, normally a member of the Bureau in his capacity as President of the Tribunal and Presiding Judge of Trial Chamber I, has recused himself from consideration of the current Motion. The Bureau is therefore presently composed of Judges Arlette Ramaroson, Vice-President of the Tribunal, William H. Sekule, Presiding Judge of Trial Chamber II, and Khalida Rachid Khan, Presiding Judge of Trial Chamber III.

SUBMISSIONS

3. The Accused submits that decisions issued within the past six months consistently and uniquely favour the Prosecution, refuse to consider his submissions, fail to provide a legal basis for their conclusions, and are timed to prejudice the Accused such that they show actual bias or give rise to a reasonable apprehension of bias on the part of the Chamber, which ought to result in disqualification.

4. In addition, the Accused submits that certain decisions expose the Trial Chamber's pre-disposition regarding the guilt of the Accused such that the only course of action to avoid mistrial is dismissal of the Bench.

5. The Prosecution opposes the Motion on the basis that the Accused's failure to persuade the Court is no evidence of bias. The Prosecution submits that the Accused has not demonstrated any actual or reasonably apprehended bias on the part of the Trial Chamber and has not pointed to any decision which was reached by anything other than a proper

process of legal reasoning. The Accused is simply dissatisfied with various rulings and asserts that the Trial Chamber's failure to rule in his favour amounts to judicial bias. Such an argument falls a long way short of displacing the presumption of judicial impartiality.

DELIBERATIONS

6. Rule 15 (A) provides that a Judge may not "sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality". This provision has been interpreted broadly to permit any ground of impartiality to be raised before the Bureau as a basis for disqualification.[1] The requirement of impartiality is violated not only where the decision-maker is actually biased, but also where there is an appearance of bias.[2] An appearance of bias is established if (a) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[3]

7. The apprehension of bias test reflects the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[4] Although the standpoint of the Accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.[5] A mere feeling or suspicion of bias by the accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.[6]

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[1] *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 8 (citing *Prosecutor v. Blagojević et al.*, Case No. IT-02-60, Decision on Blagojević's Application Pursuant to Rule 15 (B) (Bureau), 19 March 2003, para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-I, Determination of the Bureau Pursuant to Rule 15 (B) (Bureau), 20 February 2002, paras. 9-11; & *Prosecutor v. Nahimana et al.*, T. 19 September 2000 p. 6).

[2] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment (AC), 21 July 2000, paras. 181-88. *See also Prosecutor v. Brđanin and Talić*, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, paras. 9-14.

[3] *Furundžija*, Judgment (AC), 21 July 2000, para. 189.

[4] *Furundžija*, Judgment (AC), 21 July 2000, para. 195 (*quoting R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart)); *Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para. 9; *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Sierra Leone AC), 13 March 2004, para. 16; *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9.

[5] *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (*citing Furundžija*, Judgment (AC), 21 July 2000, para. 185). *See also Incal v. Turkey*, (2000) 29 E.H.R.R. 449 (E Ct HR), para. 71: "In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified".

[6] This "objective test" has, in substance, been adopted in a number of decisions before this Tribunal: *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 9; *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 9; *Prosecutor v. Nzirorera et al.*, Re. Application for the Disqualification of Judge Mehmet Güney (Bureau), 26 September 2000, paras. 8-9; *Prosecutor v. Nahimana et al.*, Oral Decision (TC), T. 19 September 2000, p. 10; *Nyiramasuhuko and Ntahobali*, Determination of the Bureau in Terms of Rule 15 (B) (Bureau), 7 June 2000, p. 5; *Prosecutor v. Kabiligi*, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction (TC), 4 November 1999, para. 8.

8. The Bureau recalls that Judges of this Tribunal enjoy a presumption of impartiality, based on their oath of office and the qualifications for their selection in Article 12 of the Statute, and that the moving party bears the burden of displacing this presumption.[7]

9. The Bureau notes that the Motion does not allege that any interest or association of the Judges gives rise to an apprehension of bias. Rather, it is argued that erroneous legal rulings rendered by the Chamber over the past six months reveal a pattern of bias, actual or reasonably apprehended, against the Accused.

10. With respect to the issue of bias as evidenced through Chamber's decisions, the Bureau held in *Blagojević* that although it "would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, it would be a truly extraordinary case in which they would."[8] Where such allegations are made, the Bureau has a duty to examine the content of the judicial decisions cited as evidence of bias. The purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias based on the objective test described above. Error, if any, on a point of law is insufficient; what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.[9]

11. The Bureau notes that the submissions of the Accused are, in large part, aimed at the merits of the challenged decisions. To the extent that the Accused appears to be seeking appellate review or reconsideration of the challenged decisions on the basis of alleged errors of law or abuse of discretion, the Bureau reiterates that this is inappropriate pursuant to the jurisprudence discussed above. The Bureau will now examine the challenged decisions in turn.

a) Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana pursuant to Rule 68

12. The Accused submits that the Trial Chamber's refusal to order the production of this evidence hindered his capacity to present his defence, and is evidence of the Trial Chamber's actual or "latent" bias against the Accused. The use of the term "latent" bias throughout the Motion suggests some confusion on behalf of the Accused. The Bureau stresses that the

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[7] *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (quoting *Prosecutor v. Delalić*, Judgment (AC), para. 707). The reason for this threshold is that while any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be equally a threat to the interests of the impartial and fair administration of justice were judges to be disqualified on the basis of unfounded and unsupported allegations of apparent bias. *See id.*: "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially and without prejudice, rather than that he will decide the case adversely to one party [...] Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

[8] *Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15(B) (Bureau), 19 March 2003, para. 14.

[9] *See e.g.*, *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant"); *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 12; *Karemera et al.*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 13.

objective test does not purport to detect any subjective "latent" bias, but rather to determine whether a reasonable person, properly informed, would reasonably apprehend bias.[10]

13. The Accused alleges that three recent decisions addressing disclosure and investigations concerning the assassination of President Habyarimana show bias or suggest a reasonable apprehension of bias.[11] The Accused argues that the assassination of President Habyarimana is the acknowledged trigger of the massacres and therefore essential to the Prosecution's conspiracy charge and, more generally, informs and underscores its entire case. Therefore, the Accused submits, evidence of the identity of the persons involved in shooting down the President's plane is potentially exculpatory pursuant to Rule 68 of the Rules and of direct relevance to his defence. The Accused argues that, in each of the decisions, the Trial Chamber failed to consider its submissions on the centrality of this event to the case.

14. The Bureau has reviewed the decisions and finds that the Trial Chamber addressed the Accused's submissions regarding the relevance of the identity of the President's assassins to the case. The Trial Chamber has consistently found that: (i) none of the Accused is charged with the assassination of President Habyarimana; (ii) the Prosecution led no direct evidence on this issue; (iii) the issue is collateral; and (iv) evidence of the identity of the President's assassins does not tend to make any of the allegations against the Accused more or less likely.[12] Indeed, the Trial Chamber also addressed these arguments in four decisions issued prior to those challenged here.[13] To the extent that the Accused submits that the sheer number of decisions rendered against his position on this issue somehow suggests bias, the Bureau notes that where a single issue has been the subject of multiple decisions, the consistency of the Trial Chamber's position cannot be the basis for a finding of bias or the appearance thereof.

15. The Accused submits that the timing of the 17 October 2006 "Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana" demonstrates actual bias against the Accused, or supports finding a reasonable apprehension of bias because it was not issued until almost one year after the Motion was filed. The Accused suggests that this shows bias because if the Trial Chamber had decided to grant his request, then the Prosecution would have had very little time to investigate and search for relevant documents before the end of the trial, which was coming to a close. The Bureau is not persuaded by this wholly speculative argument. The Accused suggests, but does not show, prejudice. Even a showing of actual prejudice, without more, would be insufficient to

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[10] *Furundžija*, Judgment (AC), 21 July 2000, para. 189.

[11] The three decisions are: *Bagosora et al.*, Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana (TC), 17 October 2006; *Bagosora et al.*, Decision on Request for Certification of Appeal on Disclosure and Investigations Concerning the Assassination of President Habyarimana, 12 December 2006; *Bagosora et al.*, Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests, 18 April 2007.

[12] *Bagosora et al.*, Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana (TC), 17 October 2006, para. 2 (referring to four prior decisions addressing the issue of the relevance of evidence concerning the assassination of President Habyarimana to this trial, and quoting its extensive discussion of this issue from its earlier "Decision on Request for Subpoenas of United Nations Officials (TC)", 6 October 2006, paras. 12-18, which lays out Trial Chamber I's consistent reasoning on this matter); *Bagosora et al.*, Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests (TC), 18 April 2007, para. 19.

[13] *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, paras. 12-18; *Bagosora et al.*, Decision on Ntabakuze Motion for Disclosure of Prosecution Files (TC), 6 October 2006, para. 5; *Bagosora et al.*, Decision on Request for Cooperation of the Government of France (TC), 6 October 2006, paras. 3-6; *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, paras. 6-7.

show bias.[14] The Bureau recalls that "many factors affect the timing of decisions" and, in the instant case, finds no evidence that the timing of the Decision demonstrates partiality on the part of the Trial Chamber.[15]

16. Finally, the Accused submits that the 12 December 2006 "Decision on Request for Certification of Appeal on Disclosure and Investigations Concerning the Assassination of President Habyarimana" contains evidence of actual bias by the use of language which suggests that a conviction and appeal are foregone conclusions. In denying the Accused's request for certification, Trial Chamber I stated:

> Certification of an interlocutory appeal on these matters would not materially advance the proceedings; on the contrary, it would draw the Appeals Chamber into an unwarranted and premature review of the evidence, which is best reserved for the appeal from the final judgment.[16]

17. The Bureau recognises that, taken in isolation, the phrasing of the final clause of the selected quotation is vague and open to misinterpretation, but does not accept that this proves or even suggests that the Trial Chamber is pre-disposed to believe that the Accused will be convicted. Despite the suggestion that there is more than one extract from these decisions showing evidence of actual bias, the above-quoted passage is the only extract the Accused brought to the Bureau's attention. This isolated remark found in a single decision does not show actual bias or give rise to a reasonable apprehension of bias. Moreover, the Bureau notes that the denial of the request for certification was based on application of the relevant law and assessment of the relevant facts and, thus, does not show bias or give rise to a reasonable apprehension of bias.

b) Request for Exclusion of Bagosora Agenda

18. The Accused submits that three recent decisions related to the admission of a set of photocopied pages alleged to contain his handwriting, known as the "Bagosora agenda", show actual bias or would lead a reasonable observer to apprehend bias.[17] The Accused recalls that he objected to the admission of the "Bagosora agenda" on the basis that the original, complete agenda has never been disclosed, and that the photocopies admitted into evidence contain marks of tampering and falsification. He submits that the Trial Chamber's refusal to both order the production of the original agenda and exclude the photocopied extracts shows bias or gives rise to a reasonable apprehension of bias.

19. Regarding the 11 April 2007 "Decision on Bagosora Motion for Disclosure of Agenda", the Accused submits that the Trial Chamber's deference to the Prosecution's claim that it is not in possession of the entire Agenda demonstrates actual bias against the Accused. Alternatively, it gives rise to a reasonable apprehension of bias by creating a belief that the Chamber will accept the bald assertions of the Prosecution, notwithstanding contrary evidence. The Bureau notes that, in reaching its conclusion, the Trial Chamber considered the submissions of the parties and the relevant evidence concerning the issue, including a

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[14] *Cf.*, *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant").

[15] *Karemera et al.*, Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para. 27.

[16] *Bagosora et al.*, Decision on request for certification of appeal on disclosure and investigations concerning the assassination of President Habyarimana (TC), 12 December 2006, para 4.

[17] These decisions are: *Bagosora et al.*, Decision on Bagosora Motion for Disclosure of Agenda (TC), 11 April 2007; *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007; *Bagosora et al.*, Decision on Request for Certification or Reconsideration Concerning the "Bagosora Agenda" (TC), 8 May 2007.

clarification the Chamber requested from the Prosecution.[18] The Bureau finds nothing in the Decision that demonstrates actual bias or would give rise to a reasonable apprehension of bias.

20. Turning to the 11 April 2007 "Decision on Bagosora Motion to Exclude Photocopies of Agenda", the Accused alleges that the failure of the Trial Chamber to address his concerns regarding the admission of evidence bearing marks of falsification gives rise to a reasonable apprehension of bias. The Bureau does not accept the contention that the Trial Chamber failed to address the Accused's submissions regarding falsification. Noting the distinction between the admissibility of evidence and the weight ultimately attached to it, the Trial Chamber found that the Accused's allegations were relevant to the weight to be attached to the photocopies of the Agenda and would be considered when the Chamber evaluates the evidence as a whole. However, his submissions did not impact admissibility, which was based on the testimony of a handwriting expert.[19] The Bureau considers that this Decision does not give rise to a reasonable apprehension of bias.

21. The Accused submits that the Trial Chamber's refusal to reconsider the merits of his arguments regarding the Agenda in connection with his request to reconsider or certify its decisions regarding the Agenda displays bias or gives rise to a reasonable apprehension thereof. The Accused further submits that the timing of the decision itself displays bias. As the Bureau noted above, the Trial Chamber's consistency on an issue that is the subject of repetitive motions cannot give rise to a reasonable apprehension of bias. With respect to the alleged inconvenient timing of this Decision, the Bureau finds no evidence that it demonstrates partiality on the part of the Judges.[20]

c) Request to Exclude Testimony Adduced in Relation to Immigration Documents

22. The Accused submits that the 30 April 2007 "Decision on Bagosora Motion to Exclude Testimony Relating to Immigration Documents" reinforces the reasonable apprehension of bias by continuing the trend of decisions which ignore the Accused's submissions and consequently favour the Prosecution. The Bureau notes that the Accused does not specify which, if any, of his arguments were ignored, but rather seek to reargue the merits. As noted above, the Bureau's role is not to review or reconsider the Trial Chamber's decisions for possible error, but rather to determine if the decision demonstrates actual bias or gives rise to a reasonable apprehension of bias. The Bureau concludes that the Trial Chamber considered the submissions of the parties, and the Decision was rendered on the basis of applicable law and assessment of relevant facts; it does not suggest actual bias against the Accused or give rise to a reasonable apprehension thereof.

d) Request to Admit Evidence from Witness B-06

23. The Accused submits that the Trial Chamber's Decision, which refused to admit into evidence the written statement of Witness B-06, continued the trend of negative outcomes for the Accused, and increased the likelihood of a reasonable apprehension of bias as perceived by an informed observer.[21] In addition to re-arguing the merits of the Motion, the Accused submits that the Trial Chamber refused to consider his explanations as to why he had not sought admission of Witness B-06's statement at an earlier stage of the proceedings.

[18] *Bagosora et al.*, Decision on Bagosora Motion for Disclosure of Agenda (TC), 11 April 2007, paras. 5 - 8.

[19] *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007, paras. 5-6.

[20] *Cf.*, *Karemera et al.*, Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para. 27.

[21] *Bagosora et al.*, Decision on Bagosora Motion to Tender Statement of Witness B-06, 3 April 2007.

According to the Accused, these explanations were submitted in his Reply to the Prosecution Response. The Accused fails to mention that the Reply was filed on 31 March 2007, nearly three weeks after it was due. The Bureau notes that the Trial Chamber provided a reasoned opinion in support of its conclusion based on assessment of the relevant facts and concludes that it does not show bias or give rise to a reasonable apprehension of bias. With regard to the alleged trend of negative outcomes, it is worth noting that on the same day that the Trial Chamber denied the request to admit the statement of Witness B-06, it granted the Accused's request to admit the statement of Witness G-10, noting the importance of G-10's statement to the Defence case.[22]

24. The Accused submits that the Trial Chamber again failed to consider his explanations for the timing of his request to admit the statement of Witness B-06 when it denied his request for certification or reconsideration, and that the Trial Chamber's excessive concern for adherence to the judicial timetable in preference to preservation of the right of the Accused to a fair trial is a further example of the Trial Chamber's actual bias against the Accused. Alternatively, it gives rise to a reasonable apprehension of bias. The Bureau has reviewed the Decision and notes that the Trial Chamber denied the requests based on its finding that the Accused had not met the standard for certification to appeal or the standard for reconsideration.

25. Thus, the Bureau considers that these decisions do not show actual bias. Neither do they give rise to a reasonable apprehension of bias.

e) Request for Suspension of Proceedings and Exclusion of Evidence Falling Outside the Indictment

26. The Accused's submissions related to this section and the following section principally arise from the Trial Chamber's 2 May 2007 "Decision on Bagosora Motion for Additional Time for Closing Brief and On Related Matters". The Accused takes no issue with the first part of the Decision, which grants its second request for an extension of time to file its closing brief. Rather the Accused submits that the Trial Chamber's statements regarding other related matters suggest bias. The first of these statements concerns the Accused's pending request for suspension of proceedings. The Trial Chamber noted that its 13 March 2007 Decision granting the Accused's first request for an extension of time to file his closing brief[23] "made it unnecessary to rule on a Bagosora request to suspend proceedings pending decisions on certain motions".[24]

27. The Accused submits that the Trial Chamber's conclusion that it need not rule on Bagosora's request to suspend proceedings because it had granted the Accused an extension of time to file its closing brief denied the Accused his right to a reasoned opinion. The Accused also submits that not all of the pending motions that were the basis of its request to suspend proceedings had been decided as of 2 May 2007 when the Trial Chamber stated that it considered a ruling on the suspension motion unnecessary. Thus, the Accused submits that this ruling contributes to a reasonable apprehension of bias by creating a perception that not only will the Trial Chamber refuse to consider the submissions of the Accused, in some cases it will refuse to rule at all. The Bureau finds unconvincing the Accused's suggestion that, having twice granted him additional time to file his closing brief, the Trial Chamber

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[22] *Bagosora et al.*, Decision on Bagosora Motion to Tender Statement of Witness G-10 (TC), 3 April 2007, paras. 4-5.
[23] Bagosora et al., Decision on Bagosora Motion Concerning Scheduling of its Closing Brief (TC), 13 March 2007.
[24] *Bagosora et al.*, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters (TC), 2 May 2007, para. 4.

displayed actual or reasonably perceived bias against him by refusing to rule on the motion to suspend proceedings.

28. One of the pending motions that provided the basis for the Accused's request for suspension was a request for exclusion of evidence. The Decision on this motion was rendered on 11 May 2007.[25] The Accused submits that the timing of this Decision - which was rendered nearly one year after the underlying motion was filed and three days before the due date for filing of his closing brief - made any meaningful consideration of its contents impossible before the filing of his closing brief. It is submitted that this gives rise to a reasonable apprehension of bias against the Accused. The Bureau reiterates that many factors affect the timing of decisions and finds no evidence that the timing of the Decision demonstrates any partiality on the part of the Trial Chamber.[26] Moreover, a showing of possible prejudice to the Accused is not sufficient, of itself, to show bias, actual or reasonably apprehended.[27]

f) Request to Hear Testimony of Witness Gatsinzi and for Enforcement of Outstanding Subpoena

29. The 2 May 2007 "Decision on Bagosora Motion for Additional Time for Closing Brief and On Related Matters" also addressed the issue of a pending subpoena against General Marcel Gatsinzi, explaining in brief the history of this issue and noting that General Gatsinzi was unwilling to testify as a witness for the Accused in Arusha and that the Chamber could "do nothing more at this time."[28] The Accused submits that the Trial Chamber's refusal to come to a decision on his outstanding motion for enforcement of the subpoena against General Gatsinzi represents total avoidance of its fundamental duties and notes that the 2 May 2007 Decision is unsupported by any legal authority.[29] The Bureau notes that the Accused disagrees with the Trial Chamber's Decision but reiterates that an error of law, if any, is not sufficient to show actual bias or give rise to a reasonable apprehension of bias.[30] The Bureau finds nothing in the Decision that could lead an independent observer to conclude that the Trial Chamber is pre-disposed against the Accused.

g) Request for Admission into Evidence of Rwandan School Archives

30. The Accused alleges that the Trial Chamber's refusal to admit into evidence Rwandan school archives relating to Prosecution Witness ABQ,[31] and its refusal to

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[25] *Bagosora et al.*, Decision on Bagosora Motion for the Exclusion of Evidence Outside the Scope of the Indictment (TC), 11 May 2007.

[26] *Cf.*, *Karemera et al.*, Decision on Motion by Nzirorera for Disqualification of Trial Judges (Bureau), 17 May 2004, para. 27.

[27] *Cf.*, *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant").

[28] *Bagosora et al.*, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters (TC), 2 May 2007, paras. 5, 7.

[29] *Bagosora et al.*, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters (TC), 2 May 2007.

[30] *See e.g.*, *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant"); *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 12; *Karemera et al.*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 13.

[31] *Bagosora et al.*, Decision on Bagosora Defence Request for Admission of Documents (TC), 21 March 2007.

reconsider or certify this Decision for appeal,[32] demonstrate actual bias against the Accused. Alternatively, they create a reasonable apprehension of bias by giving rise to the perception that the Trial Chamber will refuse to consider unavoidable delays in cooperation from sovereign states as sufficient justification for alleged 'late' filings. The Accused further submits that the Trial Chamber's refusal to alter judicial deadlines, even where they may impact the fairness of the proceedings, creates a reasonable apprehension of bias. The Bureau has reviewed the relevant decisions and notes that, in reaching its conclusion, the Trial Chamber considered the submissions of the Accused regarding timeliness, but noted that: (i) Witness ABQ's credibility had been at issue since 2004, (ii) the Accused did not seek the documents until November 2006, and (iii) the Accused did not establish that he had sought to obtain them from Rwandan authorities prior to that time. The Bureau considers that nothing in this Decision demonstrates any actual bias or gives rise to a reasonable apprehension of bias.

CONCLUSION

31. Decisions are rendered on a case by case basis and form part of the inherent discretion and duty of Trial Chambers to control the proceedings in order to ensure a fair and expeditious trial.[33] The Accused has failed to demonstrate that, in rendering the decisions challenged herein, the Judges were animated by any concern other than the relevant legal issues. Neither have the submissions established any trend suggesting a pre-disposition against the Accused. Accordingly, the Bureau finds no evidence of actual bias against the Accused and finds that an objective observer, fully apprised of the relevant circumstances, would not apprehend bias in the instant case.

FOR THE ABOVE REASONS, THE BUREAU

DENIES the Motion.

Arusha, 28 May 2007

Arlette Ramaroson Vice-President	William H. Sekule Presiding Judge, Trial Chamber II	Khalida Rachid Khan Presiding Judge, Trial Chamber III

[Seal of the Tribunal]

[32] *Bagosora et al.*, Decision on Bagosora Request for certification or reconsideration concerning admission of school documents (TC), 9 May 2007.

[33] *Karemera et al.*, Decision on Motion by Nzirorera for Disqualification of Trial Judges (Bureau), paras. 5, 16, 24, 27 (finding, in response to allegations of unequal treatment, that apparently different outcomes reflect the Chamber's view on the merits of the matters before it).

International Criminal Tribunal for the Former Yugoslavia

The present authority exceeds 30 p. In accordance with the Practice Direction on Filing Documents before the Special Court for Sierra Leone, article 7 (E), a copy of the first page of the authority as well as a copy of the relevant section are filed.

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UNITED
NATIONS

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	Case No.:	IT-96-21-A
	Date:	20 February 2001
	Original:	ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge David Hunt, Presiding**
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

Zejnil DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("^*ELEBICI* Case")

JUDGEMENT

Counsel for the Accused:
Mr John Ackerman and Ms Edina Rešidovi} for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:
Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

Standard of review Appeals Chamber

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273. The Trial Chamber characterised the nature of rebuttal evidence as "evidence to refute a particular piece of evidence which has been adduced by the defence", with the result that it is "limited to matters that arise directly and specifically out of defence evidence."[412] This standard is essentially consistent with that used previously and subsequently by other Trial Chambers.[413] The Appeals Chamber agrees that this standard – that rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated – is correct. It is in this context that the Appeals Chamber understands the Trial Chamber's statement, made later in its Decision on Request to Reopen, that "evidence available to the Prosecution *ab initio*, the relevance of which does not arise *ex improviso*, and which remedies a defect in the case of the Prosecution, is generally not admissible."[414] Although the Appeals Chamber would not itself use that particular terminology, it sees, contrary to the Prosecution submission,[415] no error in that statement when read in context.

274. The Trial Chamber's particular reasons for rejecting the evidence as rebuttal evidence, as expressed in the oral hearing on 24 July, were, in relation to category (i), that the other evidence heard by the Trial Chamber was that Delalic had signed such documents only on behalf of the Investigating Commission and not in his own capacity. As the relevant release document also was acknowledged to state that Delalic was signing "for" the Commission,[416] the Trial Chamber queried how it could be considered to rebut what had already been put in evidence.[417] The Trial Chamber appeared to assess the document as having such low probative value in relation to the fundamental matter that the Prosecution was trying to prove – namely, Delalic's authority to release prisoners in his own capacity – that it could not be considered to

[412] Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, ("Decision on Request to Reopen"), para 23.
[413] *Prosecutor v Tadic*, Case No IT-94-1, Trial Transcript, 29 May 1998: p 3676, Judge McDonald refusing the admission in rebuttal of those parts of testimony which were "evidence that [the Prosecutor] could have adduced during [her] case in chief. Our concern is that this not be a practice of offering additional evidence that you would have an opportunity to offer on the case in chief." *Prosecutor v Furundžija*, Case No IT-95-17/2, Confidential Decision on Prosecutor's Motion in Respect of Rebuttal Witness and Witness Protection Issued Pertaining to Disclosure and Testimony by the Witness, 19 June 1998. The right of rebuttal is "to be used to challenge Defence evidence that could not have reasonably been foreseen, and that it would be a misuse of this right to permit it to be used to adduce evidence that should properly have been proved as part of the Prosecution case against an accused". (Nothing referred to here from that decision is confidential material). In *Prosecutor v Kordic*, Case No IT-95-14/2, Transcript 18 Oct 2000. The Trial Chamber endorsed the practice of the Trial Chambers in *^elebi}i* and *Furundžija* of limiting rebuttal evidence strictly to matters arising in the defence case which were not already covered in the Prosecution case. It described the relevant standard to be the "only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted." *See* p 26647.
[414] Decision on Request to Reopen, para 23.
[415] Prosecution Brief, para 3.104.
[416] Trial Transcript, p 14936.
[417] Trial Transcript, p 14938.

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rebut the defence evidence identified by the Prosecution. This assessment was reasonably open to the Trial Chamber.

275. In relation to category (ii), the Trial Chamber rejected the characterisation of the evidence as rebuttal evidence on the basis that it was better characterised as fresh evidence. While it may have been desirable for the Trial Chamber to state more specifically its view as to why the evidence did not refute a particular matters arising directly and specifically out of defence evidence, the Appeals Chamber agrees that it was open to regard the evidence as not being evidence in rebuttal. It is first noteworthy that the Prosecution, in applying to adduce the evidence, described it first as "fresh evidence, not previously available to the prosecution"[418] and gave only a fairly cursory description of how in its view the evidence rebutted defence evidence. It said that the evidence would rebut the evidence of witnesses "who all stated that Zejnil Delalic as Commander of Tactical Group 1 had no *de facto* authority, or any other authority whatsoever" over the ^elebi}i camp.[419] Thus the evidence was intended to establish that Delalic did in fact exercise such authority. As such, it went to a matter which was a fundamental part of the case the Prosecution was required to prove in relation to its counts under Article 7(3). Such evidence should be brought as part of the Prosecution case in chief and not in rebuttal. As the Trial Chamber correctly observed, where the evidence which "is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it", it is inappropriate to admit it in rebuttal, and the Prosecution "cannot call additional evidence merely because its case has been met by certain evidence to contradict it." [420]

276. Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies. This is essentially what the Trial Chamber found. There is therefore no merit in the Prosecution's submission that the evidence should have been admitted as "the reason for not adducing it during the Prosecution's case [was] not due to the failure to foresee

[418] Notification, para A, 4th unnumbered page.
[419] *Ibid.*
[420] Decision on Request to Reopen, para 23.

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530. In the Exclusion Decision, the Trial Chamber found that statements made by Mucic to the Austrian Police Force on 18 March 1996 ("the First Interviews") should be excluded from evidence as having been obtained in breach of his right to counsel under Article 18 of the Statute and Rule 42 of the Rules. It reached this decision on the basis that Mucic was denied the right to counsel during the First Interviews because the Austrian procedural rules did not recognise the right of a suspect to have counsel present during questioning. However, statements made to Prosecution investigators on 19, 20 and 21 March 1996 ("the Second Interviews") were ruled admissible, on the basis that Mucic was clearly informed of his right under the Rules to have counsel present and he voluntarily waived it.[835]

531. Mucic points out that it is clear that the Trial Chamber relied upon the Second Interviews in the course of its Judgement and consequent conviction of him. However, he submits that as the interviews as a whole[836] amounted "to a course of interviewing conduct which was irrevocably tainted, at least in the mind or consciousness of [Mucic...]; <u>all</u> of the interviews should have been thereby excluded."[837] He submits that the overall objective in considering what is said in interviews is that the Trial Chamber should be fair and that the decision by the Trial Chamber breaches this objective.[838]

(ii) <u>Discussion</u>

532. The Appeals Chamber notes that Mucic does not dispute the overall factual findings of the Trial Chamber with regard to the conduct of both the First Interviews and the Second Interviews.[839] However, as a matter of law, he alleges for several reasons that the Trial Chamber erred in the exercise of its discretion in admitting the Second Interviews, having excluded the First Interviews. The Appeals Chamber recalls that for such a ground of appeal to succeed, although an appellant must discharge an initial burden of raising arguments in support of an alleged error of law with the Appeals Chamber, the Appeals Chamber may proceed to examine whether or not the alleged error is such that it invalidates the Trial Chamber's decision.[840]

533. As to the Trial Chamber's decision, the Appeals Chamber notes that a Trial Chamber exercises considerable discretion in deciding on issues of admissibility of evidence. As a result,

[835] Exclusion Decision, para 63.
[836] That is, including the First Interviews.
[837] Mucic Brief, Section 2, p 1 (underlining in original).
[838] Appeal Transcript, p 462.
[839] As pointed out by the Prosecution with regard to the Second Interviews in the Prosecution Response, para 16.8.
[840] Article 25(1)(a) of the Statute. *See Furundžija* Appeal Judgement, paras 35-36.

a Trial Chamber should be afforded a certain degree of deference in making decisions based on the circumstances of the case before it. To this extent the Appeals Chamber agrees with the Prosecution submissions on this point during the hearing on appeal.[841] Nevertheless, the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it. Indeed the Appeals Chamber has intervened in the past to do so.[842] In these decisions, the Appeals Chamber confirmed that a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the relevant evidence is reliable. If evidence is admitted and an appellant can subsequently show that prejudice has been caused by a failure by the Trial Chamber to properly apply such protections, then it may be found that the Trial Chamber has erred and exceeded its discretion. This is when Rule 89(D) and Rule 95 of the Rules may come into play and in these circumstances a ground of appeal may succeed.

534. In its oral ruling on the Exclusion Decision, the Trial Chamber found that the Second Interviews were "reliable and admissible [...]. The weight to be attached and the probative value will be determined by considering all the other circumstances in these proceedings."[843] Mucic submits that "it is plain that the Trial Chamber relied upon the second interview in the course of [its] judgement."[844] This cannot be disputed. The Trial Chamber, in convicting Mucic under Article 7(3) of the Statute[845] found:

> In his interview with the Prosecution, Mucic admitted he had authority over the camp, at least from 27 July 1992. However, in the same interview he admitted that he went to the prison-camp daily from 20 May 1992 onwards.[846]

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841 Appeal Transcript, pp 475–476. The Prosecution submits that "[...] in making [...] determination of this final matter, the Trial Chamber is required to weigh all the facts in evidence before it, and in some cases involving issues of this kind, it may be required to receive evidence and hear witnesses, and so in accordance with general principles, it would be necessary to afford a considerable margin of deference to the finding of the Trial Chamber, and it would only be where the decision of the Trial Chamber could be shown to be an abuse of discretion that there would be justification in the Appeals Chamber intervening on appeal."

842 *See* for example: *Prosecuto v Kordic and Cerkez,* Decision on Appeal Regarding Statement of a Deceased Witness, Case No IT-95-14/2-AR73.5, 21 July 2000; *Prosecutor v Kordic and Cerkez,* Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No IT-95-14/2-AR73.6, 18 Sept 2000; *The Prosecutor v Kupreškic et al,* Decision on Appeal by Dragan Papic Against Ruling to Proceed by Deposition, Case No IT-95-16-AR73.3, 15 July 1999.

843 Trial Transcript, p 4098.

844 Mucic Brief, Section 2, p 1.

845 Trial Judgement, para 775.

846 Trial Judgement, para 737. *See* also, para 767: "Zdravko Mucic had all the powers of a commander to discipline camp guards and to take every appropriate measure to ensure the maintenance of order. Mucic himself admits he had all such necessary disciplinary powers. He could confine guards to barracks as a form of punishment and for serious offences he could make official reports to his superior authority at military headquarters. Further, he could remove guards, as evidenced by his removal of Esad Land'o in October 1992." (Footnotes referring to Trial Exhibit 101-1 – (record of interview with Prosecution) omitted).

XIII. JUDGE ODIO BENITO AND THE VICTIMS OF TORTURE FUND

694. Delic, Mucic and Landžo also filed grounds of appeal asserting that, because Judge Odio Benito was, while a judge of the Tribunal and engaged in hearing this case, a member of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture ("Victims of Torture Fund"), she was automatically disqualified from sitting as a judge in this case. The grounds were in the following terms:

> Delic Issue 2
>
> Whether Judge Elizabeth Odio Benito was disqualified in that she had an undisclosed affiliation which could have cast doubt on her impartiality and which might affect her impartiality.[1174]
>
> Mucic Ground 2
>
> Whether Judge Odio-Benito was disqualified as a member of the Trial Chamber by reason of her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture.[1175]
>
> Landžo Ground 3
>
> The Participation as a Member of the Trial Chamber of a Judge Who Had an Actual or Apparent Conflict of Interest Affecting the Judge's Impartiality as a Member of the Trial Chamber Violated the Rules of Natural Justice and International Law, and, as a Matter of Law, Absent Disclosure by the Judge, and Informed Consent by the Defence, Automatically Disqualified the Judge From Sitting as a Member of the Trial Chamber.[1176]

695. The Victims of Torture Fund was established in 1981 by a resolution of the United Nations General Assembly to extend the mandate of an already existing fund, the United Nations Trust Fund for Chile, and it redesignated the fund by its present name. The mandate of the Victims of Torture Fund, as set out in that resolution, was:

> [...] receiving voluntary contributions for distribution, through established channels of assistance, as humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture and to relatives of such victims, priority being given to aid to victims of violations by States in which the human rights situation has been the subject of resolutions or decisions adopted by either the Assembly, the Economic and Social Council or the Commission on Human Rights.[1177]

The resolution also determined that the Victims of Torture Fund would be administered in accordance with Financial Regulations of the United Nations by the Secretary-General, with the advice of a Board of Trustees "composed of a chairman and four members with wide

[1174] Appellant-Cross Appellee Hazim Delic's Designation of the Issues on Appeal, 17 May 2000, p 2.
[1175] Appellant Zdravko Mucic's Final Designation of His Grounds of Appeal, 31 May 2000, p 2.
[1176] Landžo Brief, p 1.
[1177] General Assembly Resolution 36/151 of 16 December 1981.

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experience in the field of human rights, acting in their personal capacity [...]." It was agreed between the parties that Judge Odio Benito was a member of the Board of Trustees of the Victims of Torture Fund throughout the *Celebici* trial.[1178]

696. The appellants contend that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund gave rise to a reasonable apprehension of bias. The appellants argue that, by virtue of her membership of the Board, Judge Odio Benito had undertaken an obligation to further the goals of the Victims of Torture Fund. Since the Indictment in the *Celebici* trial included allegations of torture, there was, it is said, a strong appearance of bias against those accused who were the subject of those allegations. (Landžo's earlier submission, that it was likely that Judge Odio Benito was *actually* biased against him as a person charged with torture,[1179] was abandoned during the oral submissions.)[1180] The appellants argued that Judge Odio Benito should therefore have disqualified herself pursuant to Rule 15(A) of the Rules or made a full disclosure of the association to the accused and their counsel and obtained their informed consent to proceed.[1181]

697. The relevant question to be determined by the Appeals Chamber is thus the same as that already stated in the previous Chapter: whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case. The apprehension of bias must be a reasonable one. Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold in the solemn declaration made when assuming office, that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously".[1182]

698. The Appeals Chamber agrees that, by accepting a position on the Board of Trustees, Judge Odio Benito undertook in her personal capacity to further the mandate of the Victims of Torture Fund. However, given that the objects of the fund as expressed in its mandate are solely focussed on fundraising to enable material assistance to the victims of torture – through the receipt and redistribution of donations for humanitarian, legal and financial aid to victims of

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1178 Agreement on Evidence, para 1.
1179 Landžo Brief, p 26: "[...] it is at least possible, and in reality very likely, that Judge Odio-Benito had an actual partiality against Appellant Landžo".
1180 Appeal Transcript, p 685: "We do not for a moment suggest that there is evidence that Judge Odio Benito displayed actual bias towards Landžo or the other appellants".
1181 Delic Brief paras 48 and 57; Landžo Brief, pp 35-36; Appeal Transcript, pp 645-646.
1182 *See supra* para 683.

torture and their relatives – the Appeals Chamber does not accept that a commitment by Judge Odio Benito to the objects and the activities of the Fund could reasonably be regarded as in any way inconsistent with the fair and impartial adjudication of charges of torture in her different capacity as a judge of the Tribunal.

699. As noted in the *Furundžija* Appeal Judgement, personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality.[1183] In relation to the particular subject of torture, it is difficult to accept that any judge eligible for appointment to the Tribunal – and thus a person of "high moral character, impartiality and integrity", as required by Article 13 of the Tribunal's Statute – would not be opposed to acts of torture. A reasonable and informed observer, knowing that torture is a crime under international and national laws, would not expect judges to be morally neutral about torture. Rather, such an observer would expect judges to hold the view that persons responsible for torture should be prosecuted.

700. It was nevertheless submitted that Judge Odio Benito, by reason of her membership of the Board of Trustees of the Victims of Torture Fund, "[...] had a clear identification with the victims of the alleged offences, and therefore, by an inescapable process of logic, against the alleged perpetrators of those offences".[1184] But, while an objective observer may reasonably infer from such membership that Judge Odio Benito sympathises with victims of torture, it is far from "inescapable logic" that she would therefore be biased against persons *alleged* to be perpetrators of torture. A person opposed to torture may be expected to hold the view that those *responsible* for committing that offence should be punished, but this is fundamentally different to bias against any person *accused* of torture. This is particularly so in the case of judges who, as discussed above, are presumed to be impartial,[1185] and are professionally equipped, by virtue of their training and experience, for the task of fairly determining the issues before them by applying their minds to the evidence in the particular case.[1186]

701. The appellants submitted that, even though the activities of the Victims of Torture Fund are praiseworthy, they are nevertheless incompatible with judicial office because "[j]udges ... have an obligation to set themselves apart from the political fray and the activism on behalf of

[1183] *Furundžija* Appeal Judgement, para 203.
[1184] Landžo Brief, p 26. *See* also Mucic Brief, para 5, p 5: "[...] it can reasonably be assumed that, by agreeing to be a trustee of the fund, Judge Odio Benito was sympathetic to its objectives and thus hostile to acts of torture and to those who were, or alleged to have been, engaged in those acts".
[1185] *Supra*, para 683, *see* also *Furundžija* Appeal Judgement, paras 196-197.
[1186] *Prosecutor v Brdanin and Talic,* Case No. IT-99-36-PT, Decision on Application by Momir Tali} for the Disqualification and Withdrawal of a Judge, 18 May 2000, para 17.

causes".[1187] Such a submission is wholly inapposite to the present case. The purposes of the Victims of Torture Fund are not even remotely political, and Judge Odio Benito's membership of its Board of Trustees, with its overseeing role in the receipt and redistribution of donations for victims of torture, cannot be characterised as activism on behalf of a cause in any natural sense of the term.

702. It is clear that the Statute of the Tribunal, by requiring that the "experience of the judges in criminal law, international law, including humanitarian law and human rights law" be taken into account in composing the Chambers,[1188] anticipated that a number of the judges of the Tribunal would have been members of human rights bodies or would have worked in the human rights field. As Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was included on her curriculum vitae submitted by the Secretary-General to the General Assembly prior to the election of judges of the Tribunal in 1993 and 1997,[1189] it was no doubt considered to be relevant to her experience in the field of human rights law and therefore to the judicial qualification requirements. As noted in the *Furundžija* Appeal Judgement, it would be an odd result if the fulfilment of the qualification requirements of Article 13 were to operate as a disqualifying factor on the basis that it gives rise to an inference of bias.[1190] Counsel for Landžo was obliged to argue that such membership was both a qualification and a disqualification at the same time and that, given the prevalence of allegations of torture in cases to be tried by the Tribunal, Judge Odio Benito should accordingly have spent four years as a judge of the Tribunal doing absolutely nothing.[1191]

703. The appellants placed heavy reliance in their submissions upon the decision of the United Kingdom House of Lords decision in the *Pinochet* case, in which it was determined that a member of the House of Lords (Lord Hoffman) was disqualified from hearing an earlier case because he was a director and chairperson of a charitable organisation which was controlled by Amnesty International, an intervenor in the case.[1192] It was submitted that the facts of the two cases were "almost exactly the same",[1193] and that the result in both cases should be the same.[1194] The Appeals Chamber observes that a single decision from a national court does not (contrary to what was suggested by certain of the appellants' submissions) constitute any kind

[1187] Appeal Transcript, p 686.
[1188] Article 13.
[1189] General Assembly documents A/47/1006, 1 Sept 1993, p 58; A/51/878, p 59.
[1190] *Furundžija* Appeal Judgement, para 205.
[1191] Appeal Transcript, pp 687-689.
[1192] *R v Bow Street Metropolitan Stipendiary Magistrate and Others; Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272 ("*Pinochet* Decision").
[1193] Appeal Transcript p 684.

of definitive code for matters arising in the unique context of this international Tribunal. That said, the *Pinochet* Decision is nevertheless of some assistance in applying the law in the present case, because the legal principles it discussed in relation to judicial disqualification are substantially similar to the principles which the *Furundžija* Appeal Judgement has held to govern the issue of disqualification for bias in this Tribunal.[1195]

704. An examination of the reasoning of the members of the House of Lords in the *Pinochet* Decision, however, makes it quite apparent that it does not support the conclusions the appellants seek to draw from it. Contrary to the submissions of the appellants, it was critical to the actual result in that decision that Amnesty International was, as an intervenor in the earlier proceedings, a party to the litigation. The significance of the status of Amnesty International as a party to the proceedings lies in the fact that the House of Lords held that the circumstances in which a judge should be disqualified because of an appearance of bias encompass two categories of case. The first is that, where a judge is party to a litigation or has a relevant interest in its outcome, he is automatically disqualified from hearing the case. The second category is that a judge who is not party to the litigation, but whose conduct or behaviour in some other way gives rise to a reasonable suspicion that he is not impartial, is obliged to disqualify himself.[1196]

705. Lord Browne-Wilkinson, who gave the principal reasons for judgement and with whose reasons the other members of the House of Lords agreed,[1197] found that Lord Hoffman's circumstances fell within the first category of automatic disqualification. His Lordship held that automatic disqualification extended to any judge "who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit", and he found that Lord Hoffman "was disqualified as a matter of law automatically by reason of his directorship of AICL, a company controlled by a party, AI [Amnesty International]".[1198] Lord Browne-Wilkinson then reiterated the exceptional nature of the case, stating:

> The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) [and that] the judge was a director of a charity closely

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[1194] Landžo Brief, p 34.
[1195] The Appeals Chamber stresses that it does not intend in any way to depart from the principles expressed in the *Furundžija* Appeal Judgement on this issue.
[1196] *Pinochet* Decision, p 281.
[1197] *Pinochet* Decision, p 285 (Lord Goff of Chieveley); p 288 (Lord Nolan and Lord Hope of Craighead), p 291 (Lord Hutton).
[1198] *Pinochet* Decision, p 284.

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> allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties.[1199]

In the present case, the Victims of Torture Fund was not a party to the *Celebici* proceedings in any capacity. There was no evidence put forward by the appellants nor any indication of any kind that the Fund was allied to or acting with any party to the proceedings. Landžo submitted that, because both the Fund and the Tribunal are organs of the United Nations, the Fund has a common cause with the Office of the Prosecutor of the Tribunal.[1200] That submission is simply untenable. Even if it is accepted that, in the broadest sense of the concept, the Prosecutor and the Victims of Torture Fund have a common cause, that cause is simply one of opposition to the crime of torture. That is not a disqualifying common interest.

706. The second category of disqualification referred to by Lord Browne-Wilkinson, which substantially reflects the concept of reasonable apprehension of bias as expressed by the Appeals Chamber in relation to the Tribunal, is the only category relevant to the facts of the present case. Because of the conclusion that Lord Hoffman had been automatically disqualified by the application of the first category, Lord Browne-Wilkinson found it unnecessary to consider the question raised by the second category, namely whether the circumstances gave rise to a real danger or suspicion of bias.[1201] The decision is therefore of limited assistance in the present case.

707. The Appeals Chamber has already emphasised that, as there is a high threshold to reach in order to rebut the presumption of impartiality and before a judge is disqualified, the reasonable apprehension of bias must be "firmly established".[1202] The reason for this high threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias. As has been observed in a decision cited by the Appeals Chamber in the *Furundžija* Appeal Judgement:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party [....]. Although it is important

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[1199] *Pinochet* Decision, p 284. *See* also Lord Goff of Chieveley at p 286: "[...] we have to consider Lord Hoffmann [...] as a person who is, as a director and chairperson of AICL, closely connected with AI which is, or must be treated as, a party to the proceedings".
[1200] Landžo Brief, p 34; Landžo Reply, para 6.26.
[1201] *Pinochet* Decision, p 284.
[1202] *Furundžija* Appeal Judgement, par 197.

> that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[1203]

708. The Appeals Chamber is not satisfied that a reasonable and informed observer would consider that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund would render her unable to consider and determine with an impartial and unbiased mind the matters, including charges of torture, which were before her in the *Celebici* trial. There was therefore no basis upon which Judge Odio Benito should have disqualified herself, nor (taking the second limb of the appellants' argument) any requirement that she make a formal disclosure of her membership of the Board and obtain consent to proceed from the parties to the *Celebici* case. Although the issue of disclosure is therefore not strictly relevant, the Appeals Chamber does note that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was a matter of public knowledge,[1204] published in three successive Year Books of the Tribunal,[1205] and in documents of the United Nations General Assembly.[1206]

709. Accordingly, Delic Issue 2, Mucic Ground 2 and Landžo Ground 3 are dismissed.

[1203] Per Mason J, *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 (High Court of Australia), adopted unanimously by the High Court of Australia in *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448; cited in the *Furundžija* Appeal Judgement at para 197.

[1204] The Appeals Chamber has already observed in the *Furundžia* Appeal Judgement that because of the numerous public sources of information about the qualifications and associations of Judges of the Tribunal, such information is freely available to the parties: *Furundžia* Appeal Judgement, para 173.

[1205] Yearbook for 1994, p 200; Yearbook for 1995, p 355; Yearbook for 1996, p 23. The fact of Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was also in the Yearbook for 1997 (p 28) which was published after the conclusion of the *Celebici* trial.

[1206] General Assembly documents A/47/1006, 1 Sept 1993, p 58; A/51/878, p 59. *See* above para 702.

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Cases:
IT-99-37-AR73
IT-01-50-AR73
IT-01-51-AR73

Date: 18 April 2002

Original: French & English

BEFORE THE APPEALS CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 18 April 2002

PROSECUTOR

v

Slobodan MILOSEVIC

REASONS FOR DECISION ON PROSECUTION INTERLOCUTORY APPEAL FROM REFUSAL TO ORDER JOINDER

Counsel for the Prosecutor:

Ms Carla Del Ponte, Prosecutor

Mr Geoffrey Nice

Ms Hildegard Uertz-Retzlaff

Mr Dirk Reyneveld

The Accused: *Amici Curiae*

Mr Slobodan Milosevic (unrepresented) Mr Steven Kay

Mr Branislav Tapuskovic

Mr Mischa Wladimiroff

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The appeal

1. Pursuant to leave granted by a Bench of the Appeals Chamber,(1) the Prosecutor ("prosecution") appealed against the decision of Trial Chamber III dismissing in part the application made to join the three indictments brought against Slobodan Milosevic ("accused").(2) The Trial Chamber had ordered that two of the three indictments filed against the accused be joined, those relating to events in Croatia and Bosnia,(3) but it ordered that the first of the indictments, which related to events in Kosovo ,(4) be tried separately and before the trial of the two joined indictments.(5)

2. Following an oral hearing of the interlocutory appeal,(6) the Appeals Chamber gave its formal decision by which it allowed the appeal. It ordered that there should be the one trial and that, for the purposes of that one trial, the three indictments were deemed to constitute one indictment.(7) It was stated that the Appeals Chamber's reasons for that decision would be issued in due course.(8) Those reasons are now stated.

The nature of the appeal

3. The prosecution accepts, correctly, that the decision of a Trial Chamber as to whether two or more crimes should be joined in the one indictment pursuant to Rule 49 of the Rules of Procedure and Evidence ("Rules") is a discretionary one.(9) A Trial Chamber exercises a discretion in many different situations – such as when imposing sentence,(10) in determining whether provisional release should be granted,(11) in relation to the admissibility of some types of evidence,(12) in evaluating evidence,(13) and (more frequently) in deciding points of practice or procedure.(14)

4. Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently. That is fundamental to any discretionary decision. It is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.

5. It is for the party challenging the exercise of a discretion to identify for the Appeals Chamber a "discernible" error made by the Trial Chamber.(15) It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations , or that it has failed to give weight or sufficient weight to relevant considerations , or that it has made an error as to the facts upon which it has exercised its discretion .(16)

6. In relation to the Trial Chamber's findings of fact upon which it based its exercise of discretion, the party challenging any such finding must demonstrate that the particular finding was one which no reasonable tribunal of fact could have reached ,(17) or that it was invalidated by an error of law. Both in determining whether the Trial Chamber incorrectly exercised its discretion and (in the event that it becomes necessary to do so) in the exercise of its own discretion, the Appeals Chamber is in the same position as was the Trial Chamber to decide the correct principle to be applied or any other issue of law which is relevant to the exercise of the discretion. Even if the precise nature of the error made in the

exercise of the discretion may not be apparent on the face of the impugned decision, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.(18) Once the Appeals Chamber is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise, it will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber.(19)

The basis of the Trial Chamber's decision

7. The prosecution's argument before the Trial Chamber was that, although it had presented three separate indictments against the accused, the crimes charged in all three indictments should nevertheless be tried together because:

> (i) they could all have been pleaded in the one indictment, because the acts upon which they are based were committed by the same accused,(20) and they formed part of the same transaction;
>
> (ii) one trial would be the most fair and expeditious way of dealing with all the crimes charged;
>
> (iii) the public interest in the efficient administration of international justice would best be served in having one trial;
>
> (iv) the victims and witnesses would best be protected if they were required to give evidence only once; and
>
> (v) inconsistent verdicts and sentences and multiple appeals would be avoided.(21)

8. The principal issue in dispute before the Trial Chamber was whether the events to which all three indictments related formed part of the same transaction. The prosecution's argument that they did so required an acceptance that the allegations made in the three indictments were all part of a common scheme, strategy or plan on the part of the accused to create a "Greater Serbia", a centralised Serbian state encompassing the Serb-populated areas of Croatia and Bosnia and all of Kosovo, and that this plan was to be achieved by forcibly removing non-Serbs from large geographical areas through the commission of the crimes charged in the indictments. Although the events in Kosovo were separated from those in Croatia and Bosnia by more than three years, they were, the prosecution claimed, no more than a continuation of that plan,(22) and they could only be understood completely by reference to what had happened in Croatia and Bosnia.(23) The events in Kosovo, it was said, amounted to a crime waiting to happen but which had been delayed by pressure from the international community.(24) The prosecution also argued that, were the Kosovo indictment to be heard separately , evidence of the accused's role in the events of Croatia and Bosnia would be admissible in that trial.(25)

9. The Trial Chamber described the "essence of the test" to be applied for joinder to be permitted as being –

> [...] to determine whether there were a series of acts committed which together formed the same transaction, *ie* part of a common scheme, strategy or plan. However , the reference to a "series" and the use of the phrase "committed together" in Rule 49 indicates that the acts must be connected in the same way that common law and civil law jurisdictions require. There is no power to join unconnected acts on the ground that they form

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> part of the same plan. As Judge Shahabuddeen explained , the plan must be such that the counts represent interrelated parts of a particular criminal episode.(26) If there was no such series of acts and no plan, any application for joinder must fail. Where there is no similarity in time and in place, the conclusion that the counts represent interrelated parts of a particular criminal episode will be more difficult, albeit not impossible, to draw.(27)

10. When the Trial Chamber came to apply that test, it drew attention to the gap of more than three years between the last events in Bosnia and the first events in Kosovo,(28) to the facts that the conflicts in Croatia and Bosnia took place in neighbouring States to the Federal Republic of Yugoslavia ("FRY"), whereas those in Kosovo took place in the FRY itself ,(29) and that the accused is alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the Supreme Commander of the Armed Forces of the FRY) in relation to Kosovo,(30) and to the circumstances that there is no reference to a "Greater Serbia" plan in the Kosovo indictment and the only reference to it in the Croatia and Bosnia indictments is in relation to other individuals.(31) The Trial Chamber concluded that such a nexus was –

> [...] too nebulous to point to the existence of "a common scheme, strategy or plan " required for the "same transaction" under Rule 49. As noted *supra*, there is a distinction in time and place between the Kosovo and the other Indictments and also a distinction in the way in which the accused is alleged to have acted. Consequently, the Trial Chamber does not consider that the acts alleged in the three Indictments form the same transaction for the purposes of Rule 49.(32)

On the other hand, the Trial Chamber concluded, the Croatia and Bosnia indictments "exhibit a close proximity in time, type of conflict and responsibility of the accused ", and contained:

> [...] allegations of a series of acts which together formed the same transaction, *ie,* a plan to take over the areas with a substantial Serbian population in two neighbouring States.(33)

The Trial Chamber also relied upon a number of other matters affecting its discretion , to which reference will be made later.

11. It is clear from these statements that the Trial Chamber's finding of fact for the purposes of Rule 49 – that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia – depended upon its interpretation of Rule 49 as requiring the acts to be "committed together" [« *commis ensemble* »]. The proper interpretation of Rule 49 was a question of law. If the Trial Chamber erred in relation to that question of law, its finding of fact was necessarily invalidated, and its discretion was wrongly exercised.

12. The issue of law upon which the Trial Chamber's finding of fact depended, therefore , was whether the prosecution had to establish that the events in Kosovo were "committed together" with the events in Croatia and Bosnia. To that issue, the Appeals Chamber now turns.

The relevant Rules, and their proper interpretation

13. Rule 49 ("Joinder of Crimes") has necessarily to be considered in conjunction with Rule 48 ("Joinder of Accused"), as each is based upon events which must form "the same transaction". That phrase is defined in Rule 2. As reference will be made to what could be a discrepancy between the English and French versions of Rule 49, and for convenience, the text of all three rules (Rule 2 so far as here relevant) is set out below in both languages.

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Rule 48
Joinder of Accused

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Article 48
Jonction d'instances

Des personnes accusées d'une même infraction ou d'infractions différentes commises à l'occasion de la même opération peuvent être mises en accusation et jugées ensemble .

Rule 49
Joinder of Crimes

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Article 49
Jonction de chefs d'accusation

Plusieurs infractions peuvent faire l'objet d'un seul et même acte d'accusation si les actes incriminés ont été commis à l'occasion de la même opération et par le même accusé.

Rule 2
Definitions

(A) In the Rules, unless the context otherwise requires, the following terms shall mean:

[...]

Transaction: A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;

Article 2
Définitions

A) Sauf incompatibilité tenant au contexte, les expressions suivantes signifient :

[...]

Opération: un certain nombre d'actions ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs, en un seul endroit ou en plusieurs, et faisant partie d'un plan, d'une stratégie ou d'un dessein commun ;

14. The English version of Rule 49 does contain the words "committed together" in sequence and, if Rule 49 were to be read in isolation, it is a possible interpretation of that Rule that it requires the prosecution to establish that all of the offences sought to be joined were committed together.(34) Such an interpretation, however, creates an unnecessary dichotomy between the test for the joinder of offences (which would require the indictment to show that they were committed together for the purposes of Rule 49) and the test for the joinder of defendants (where Rule 48 has no such requirement). Such an interpretation may also produce a difficulty of consistency with the definition of "transaction" in Rule 2. That definition clearly contemplates a much less restrictive approach by permitting the common scheme, strategy or plan to include one or a number of events at the same or different locations. There is no logical explanation immediately apparent for a distinction to be drawn between allowing different events at different locations but not allowing different events at different times.

15. More importantly, an interpretation of Rule 49 requiring the offences to have been committed together is not available in relation to the French version of the Rule where – for the words "if the series of acts committed together form the same transaction" – the Rule reads « *si les actes incriminés ont été commis à l'occasion de la même opération* », which translates literally as "if the acts charged have been committed as part of the same transaction". Rule 7 ("Authentic Texts") provides that the English and French texts of the Rules are equally authentic. In the case of a discrepancy, the Rule requires the version which is "more consonant with the spirit of the Statute and the Rules" to prevail, but this provision would normally be applied only where the discrepancy between the two versions is

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intractable. The Appeals Chamber is satisfied that the apparent discrepancy in the present case is not intractable.

16. Although neither the Tribunal's Statute nor its Rules of Procedure and Evidence are, strictly speaking, treaties, the principles of treaty interpretation have been used by the Appeals Chamber as guidance in the interpretation of the Tribunal's Statute, as reflecting customary rules.(35) Such principles may also be used appropriately as guidance in the interpretation of the Tribunal's Rules of Procedure and Evidence. Article 33 of the 1969 Vienna Convention on the Law of Treaties ("Interpretation of treaties authenticated in two or more languages") provides that the terms of a treaty are presumed to have the same meaning in each authentic text and that (except where the treaty provides that, in the case of divergence, a particular text shall prevail), when a comparison of the authentic texts discloses a difference of meaning which the application of the provisions of the Convention does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted .(36) In its Commentary upon Article 75 of the Draft Convention, which did not relevantly differ in substance from Article 33 of the Convention, the International Law Commission commented that there are few plurilingual treaties containing more than one or two articles without some discrepancy between the texts, if only through "the different genius of the languages ".(37) The ILC stressed that, "in law there is only one treaty – one set of terms [...] and one common intention with respect to those terms – even when two authentic texts appear to diverge",(38) and that, because of the presumption that each of the authentic texts are to have the same meaning, "every effort should be made to find a common meaning for the texts before preferring one to another".(39)

17. The words in the English version of Rule 49 already quoted may also reasonably be interpreted as "if the series of acts committed [by the accused] together [in the sense of 'considered together as a whole'] form the same transaction". Such an interpretation would be fully consistent with the French version, and there would be no discrepancy between the two versions, or inconsistency with the definition of "transaction" in Rule 2 or with Rule 48, such as is produced by the interpretation which the Trial Chamber adopted.

18. The Appeals Chamber is satisfied that, properly interpreted, Rule 49 does *not* require the events in Kosovo to have been "committed together" with the events in Croatia and Bosnia. It is unfortunate that the argument put to the Appeals Chamber and based upon the inconsistency between the English and French versions of the Rule if the former were interpreted in the way suggested by the Trial Chamber was not put to the Trial Chamber for its consideration. As the Trial Chamber has been shown to have erred in relation to the proper interpretation of Rule 49 (a question of law), its finding of fact that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia based upon that interpretation is invalidated, and its discretion must be found to have been wrongly exercised as a result of that error of law.

The same transaction?

19. It therefore becomes necessary now for the Appeals Chamber to determine for itself whether all these events formed part of the same transaction – as being part of a common scheme, strategy or plan. Although this Chamber is not for that purpose bound by the particular matters which led to the Trial Chamber's decision that the events in Kosovo did not form part of the same transaction as the events in Croatia and Bosnia, it is nevertheless appropriate to consider them – particularly in the present case where there is, effectively, no contradictor to the prosecution's appeal . As already indicated,(40) those matters were the gap of more than three years between the last events in Bosnia and the first events in Kosovo, the facts that the conflicts in Croatia and Bosnia took place in neighbouring States to the

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Federal Republic of Yugoslavia ("FRY"), whereas those in Kosovo took place in the FRY itself, and that the accused is alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the Supreme Commander of the Armed Forces of the FRY) in relation to Kosovo, and the circumstances that there is no reference to a "Greater Serbia" plan in the Kosovo indictment and the only reference to it in the Croatia and Bosnia indictments is in relation to other individuals.

20. Each of those matters is a relevant consideration, but none is decisive. Nor are they in combination an answer to the prosecution's application when, as the Appeals Chamber has now held, it is unnecessary for the prosecution to establish that the events in Kosovo were "committed together" with the events in Croatia and Bosnia. The wording of the indictments could certainly have been better expressed to bring out the overall nature of the prosecution case but, when taken as a whole , the three indictments make it sufficiently clear that the purpose behind the events in each of the three areas for which the accused is alleged to be criminally responsible was the forcible removal of the majority of the non-Serb civilian population from areas which the Serb authorities wished to establish or to maintain as Serbian-controlled areas by the commission of the crimes charged.(41) The fact that some events occurred within a province of Serbia and others within neighbouring states does not alter the fact that, in each case, the accused is alleged to have acted in order to establish or maintain Serbian control over areas which were or were once part of the former Yugoslavia. The fact that the accused is alleged to have acted directly in the province but indirectly in the neighbouring states merely reflects the available means by which the accused is alleged to have sought to achieve the same result.

21. On the other hand, the delay of three years between the last events in Bosnia and the first events in Kosovo is emphasised by the allegation in the Kosovo indictment that the joint criminal enterprise is pleaded as having come into existence "no later than October 1998",(42) rather than at a time when the joint criminal enterprise relating to the events in Croatia and Bosnia came into existence. Nevertheless, the Appeals Chamber does not interpret Rule 49 (together with the definition of "transaction" in Rule 2) as requiring the transaction in question to maintain exactly the same parameters at all times. A common scheme, strategy or plan may include the achievement of a long term aim. Here, that long term aim is alleged to have been to establish or to maintain control by the Serb authorities over particular areas which were or were once part of the former Yugoslavia. Each of the stages of the conflict in the Balkans has been marked by conflict breaking out in different places at different times, either as a result of or as requiring action by the Serb authorities (so the prosecution case would have it) to ensure their domination of those areas. A joint criminal enterprise to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged remains the same transaction notwithstanding the fact that it is put into effect from time to time and over a long period of time as required. Despite the misleading allegation in the Kosovo indictment, therefore , the Appeals Chamber is satisfied that the events alleged in all three indictments do form part of the same transaction.

Discretionary considerations

22. Having determined that the requirements of Rule 49 have been satisfied by the prosecution, the Appeals Chamber must next determine whether it should nevertheless exercise the discretion given by that Rule to refuse the joinder sought notwithstanding that all the crimes charged in the indictments concern the same transaction. Again , although the Appeals Chamber is not bound by the particular matters which led the Trial Chamber to decide that it would in any event have refused the joinder in the exercise of its discretion,(43) it is nevertheless appropriate for the reason expressed earlier to consider them in the present case.(44) Those matters were (i) the prejudice seen to the accused's rights under Article 21 of the Tribunal's Statute to a fair and speedy trial which would be caused by the lack of readiness on the part of the prosecution to proceed with a trial which included the events in Croatia and

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Bosnia,(45) (ii) the interests of justice, in that the length of a single trial would make it less manageable than two separate trials,(46) (iii) the onerous nature of such a trial for the accused personally,(47) and (iv) the possible prejudice to him in relation to evidence relevant to Croatia and Bosnia but not relevant to Kosovo.(48)

23. The prosecution gave different estimates to the Appeals Chamber as to when it would be ready for a trial of the Croatia and Bosnia indictments to those which it gave to the Trial Chamber. Even though those shorter estimates given to the Appeals Chamber may prove to be unduly optimistic, the Appeals Chamber nevertheless determined in its formal decision allowing the prosecution's appeal that, unless the Trial Chamber otherwise decided, the trial of the joined three indictments should commence on 12 February 2002, the date fixed by the Trial Chamber for the commencement of the trial of the Kosovo indictment. That order was made subject to the condition that evidence relevant only to the Kosovo events would be adduced until the material relating to the Croatia and Bosnia indictments (including that which must be disclosed pursuant to Rules 66 and 68) has been made available to the accused and until his rights pursuant to Article 21 of the Tribunal's Statute in relation to that material had been complied with.(49)

24. On appeal, the prosecution criticised the finding of the Trial Chamber that the length of a single trial in this case would make it less manageable than two separate trials, upon the basis that it had failed to elaborate in its Decision what those difficulties would be.(50) Such difficulties are obvious. The sheer number of different events which the prosecution has to establish to prove its case in relation to all three indictments, the usual (and understandable) inability of the parties to concentrate the production of their evidence in relation to each event, the time which necessarily elapses between hearing the evidence and the final submissions and writing the judgment, and the likelihood that counsel, too, will (understandably) for the same reasons be less able to assist the Trial Chamber because of the size of the trial are all so obvious that they did not need to be stated. It is important that the Trial Chamber described a single trial as being *less* manageable than two separate trials; it did not state that a single trial would be unmanageable. What the Trial Chamber said was no more than common sense.

25. That a single trial will indeed be long and complex is inevitable once the nature of the overall purpose which the prosecution seeks to establish in a trial of the joined charges is recognised. The prosecution will bear a heavy responsibility to ensure that the single trial which it wanted does not become unmanageable by overloading the Trial Chamber and the Defence with unnecessary material. The prosecution must ensure that only essential evidence to prove its case is presented, and that inessential evidence is discarded. If it sees that evidence which it leads in relation to a particular event is not relevantly and meaningfully challenged in cross-examination , it should not continue to call evidence in relation to that event. Subject to the rulings of the Trial Chamber, substantial reliance should be placed upon the provisions of Rule *92bis*, which permits evidence of a witness to be given in the form of a written statement in lieu of oral testimony of matters other than "the acts and conduct of the accused as charged" in the indictments, with the witnesses being called for cross-examination if the Trial Chamber so decides.

26. If the prosecution fails to discharge this responsibility, the Trial Chamber has sufficient powers under the Rules of Procedure and Evidence to order the prosecution to reduce its list of witnesses to ensure that the trial remains as manageable as possible. Finally, if with the benefit of hindsight it becomes apparent to the Trial Chamber that the trial has developed in such a way as to become unmanageable – especially if, for example, the prosecution is either incapable or unwilling to exercise the responsibility which it bears to exercise restraint in relation to the evidence it produces – it will still be open to the Trial Chamber at that stage to order a severance of the charges arising out of one or more of the three areas of the former Yugoslavia. Nothing in the present Decision or in these reasons will

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prevent it from doing so.

27. The third matter which the Trial Chamber took into account in the exercise of its discretion to refuse the application was the onerous nature of such a trial for the accused personally. That is a relevant matter, but there must be taken into account also the onerous nature of two successive trials which in total would inevitably take even longer than a single trial. As has been shown to be necessary in all long trials before this Tribunal, the Trial Chamber will from time to time have to take a break in the hearing of evidence to enable the parties to marshal their forces and, if need be, for the unrepresented accused to rest from the work involved. The responsibility for the accused's decision not to avail himself of defence counsel, however, cannot be shifted to the Tribunal. When asked his view by the Trial Chamber, the accused merely criticised the prosecution's reliance upon reasons of "judicial economy" by saying that the prosecution "certainly don't care whether I will be fatigued or not".(51) He was similarly asked by the Appeals Chamber to state whether he would prefer to defend himself in a single trial, and he replied:(52)

> [...] how you are going to conduct your proceedings, that's up to you. I will give you no suggestions regarding that.

However, two of the *amici curiae* addressed the Trial Chamber to support the prosecution application for a joinder upon the basis that a single trial would be less burdensome for the accused than multiple trials,(53) a view which was reiterated before the Appeals Chamber.(54)

28. The last of the matters which the Trial Chamber is said to have taken into account in the exercise of its discretion to refuse the application was the possible prejudice to the accused in relation to evidence admissible in relation to Kosovo but not admissible in relation to Croatia and Bosnia. The Trial Chamber said this:(55)

> The Prosecution also argued that the accused would receive a fairer and more expeditious trial in the case of a single trial. However, in the Trial Chamber's view, the fact that the accused would have to defend himself on the contents of three Indictments together would be onerous and prejudicial, particularly in the case of the Kosovo Indictment and its different circumstances. The Trial Chamber, comprised as it is of professional judges, should not to [*sic*] be influenced by prejudicial evidence in one trial affecting another. However, if there is such a risk, the evidence must be excluded.

On appeal, the prosecution has argued that this statement has "raised the spectre of excluding evidence even in separate trials if the Trial Chamber would not be able to keep the matters separate", and that this would unnecessarily prejudice the prosecution.(56)

29. It must be said that the Trial Chamber perhaps did not make its meaning entirely clear in the passage quoted, but the interpretation placed upon it by the prosecution would necessarily create a contradiction between the last two sentences. A far more likely interpretation of the passage quoted – one which creates no such contradiction between the two sentences – is that, if evidence were to be admitted in the Kosovo trial which would be prejudicial to the accused in the Croatia and Bosnia trial, the members of the Trial Chamber as professional judges would be able to exclude that prejudicial evidence from their minds when they came to determine the issues in the Croatia and Bosnia trial. That is a task which is commonplace in domestic jurisdictions when, for example, a judge has to deal with two co-accused who have fought "cut throat" defences of blaming each other. It would be quite wrong to attribute an unreasonable interpretation to the Trial Chamber when such a reasonable one is the more likely. The Appeals Chamber does not accept that the Trial Chamber treated the issue as one which affected its discretion to refuse the joinder sought .

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30. The Appeals Chamber does not accept that any of these matters compels it to exercise its discretion to refuse the joinder sought. In the view of the Appeals Chamber, any possible prejudice to the accused in facing one trial (and it sees none of any significance) is completely outweighed by the fact that a substantial body of evidence relevant to the issue of the acts and conduct of the accused himself in the Croatia and Bosnia trial is also relevant to that issue in the Kosovo trial . If there were to be two separate trials, there would necessarily be a large amount of evidence which would have to be repeated in each.(57) In order to establish that the accused participated in a joint criminal enterprise (stated in general terms) to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged, the prosecution must establish that he intended that those crimes be committed for that purpose.(58)

31. A person's state of mind is no different to any other fact concerning that person which is not usually visible or audible to others. It may be established by way of inference from other facts in evidence. Where, as here, the state of mind to be established is an essential ingredient of the basis of criminal responsibility charged, the inference must be established beyond reasonable doubt. If there is any other inference reasonably open from the evidence which is consistent with the innocence of the accused, the required inference will not have been established to the necessary standard of proof. Any words of or conduct by the accused which point to or identify a particular state of mind on his part is relevant to the existence of that state of mind. It does not matter whether such words or conduct precede the time of the crime charged, or succeed it. Provided that such evidence has some probative value, the remoteness of those words or conduct to the time of the crime charged goes to the weight to be afforded to the evidence, not its admissibility . The prosecution would therefore be entitled to prove in the Kosovo trial what is in effect its case in the Croatia and Bosnia trial. To have to do so twice would be a grave waste of the scarce resources available, for no discernible benefit.

32. For all these reasons, the Appeals Chamber was satisfied that the joinder sought by the prosecution was justified and should, in the exercise of the Appeals Chamber's own discretion, be granted.

A technical submission

33. The prosecution's interlocutory appeal was heard expeditiously on the basis of the original record of the Trial Chamber, without requiring a formal record of proceedings, and without requiring the *detailed* Briefs from the parties which are otherwise required by Rules 111-113. This was done pursuant to Rule *116bis* , which is directed to the hearing of interlocutory appeals and which permits such appeals (where appropriate) to be determined entirely on the basis of written briefs. In the present case, of course, there was an oral hearing.

34. It was submitted by Mr Tapuskovic (an *amicus curiae*) that, as the application for leave to appeal was filed by the prosecution pursuant to Rule 73(D) on 20 December 2001, no such procedure was then available for an expedited hearing.(59) His submission was that such a procedure only became available when Rule *116bis* was amended to include applications for leave to appeal pursuant to Rule 73(D), the amendment becoming effective as from 28 December 2001.(60) This was, he submitted, untenable and contrary to legal principle.(61) Because of the importance of the issue raised and its delicate nature, he said, in fairness the expedited hearing procedure should not have been applied,(62) and its adoption had denied time for the *amici curiae* to file a Brief of thirty pages or so.(63)

35. These submissions are misconceived. Prior to the amendment of Rule 73 in April 2001, leave to appeal from decisions given on motions other than preliminary motions was sought and granted pursuant to Rule 73(B). At that time, Rule *116bis* provided that an appeal under Rule 73(B) was to be

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heard expeditiously on the basis of the original record of the Trial Chamber and might be determined entirely on the basis of written briefs. This was the procedure adopted in most interlocutory appeals once leave had been granted.

36. In April 2001, Rule 73 was amended to insert new paragraphs (B) and (C), to deal with appeals from decisions rendered during the course of the trial on motions involving evidence and procedure. What had been Rule 73(B), dealing with the grant of leave for interlocutory appeals, became Rule 73(D). Rule *116bis*, however , was not amended to conform with this change until 12 December 2001, by substituting "Rule 73" for "Rule 73(B)". This was the amendment which came into operation on 28 December 2001. It did no more than repeat the substance of the original rule , and to continue its application to interlocutory appeals from decisions given on motions other than preliminary motions. The submission that interlocutory appeals pursuant to Rule 73(D) could be heard expeditiously for the first time in December 2001, after the prosecution has sought leave to appeal, is therefore plainly wrong .

37. The complaint by Mr Tapuskovic concerning the denial of time to file a Brief is also misconceived. A party to the proceedings at first instance who wishes to oppose the grant of leave to appeal from an interlocutory decision of a Trial Chamber is permitted to file a response to the motion for leave within ten days of that motion.(64) Once leave has been granted , such a party may file a response to the interlocutory appeal itself within ten days.(65) Such a response may be thirty pages in length.(66) This remains the case whether the appeal is dealt with expeditiously or otherwise. The only difference between the ordinary appeal and an expeditious appeal in the present case is the absence of a formal record of the proceedings. The *amicus curiae* have therefore suffered no prejudice by the adoption of the expeditious appeal procedure.

38. The submission made by Mr Tapuskovic is unfounded.

Done in French and English, both texts being equally authoritative.

Dated this 18th day of April 2002,

At The Hague,

The Netherlands.

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Judge Claude Jorda

Presiding

[Seal of the Tribunal]

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(1) Decision on Prosecution Application for Leave to File an Interlocutory Appeal, 9 Jan 2002.
(2) Decision on Prosecution's Motion for Joinder, 13 Dec 2001 ("Decision").
(3) IT-01-50-I and IT-01-51-I, respectively .
(4) IT-99-37-I.
(5) Decision, par 53.
(6) The hearing took place on 30 January 2002.

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(7) Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 1 Feb 2002 ("Formal Decision of Appeals Chamber "), p 3.
(8) Ibid, p 4.
(9) Interlocutory Appeal of the Prosecution Against "Decision on Prosecution's Motion for Joinder", 15 Jan 2002 ("Appellant's Written Submissions"), par 6. Rule 49, the full terms of which are discussed later, states: "Two or more crimes *may* be joined [...]" (the emphasis has been added).
(10) Prosecutor v Tadic, IT- 94-1-A and IT-94-1-*Abis*, Judgment in Sentencing Appeals, 26 Jan 2000 (" *Tadic* Sentencing Appeal"), par 22; *Prosecutor v Aleksovski,* IT-95-14 /1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal"), par 187; *Prosecutor v Furundžija,* IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundžija* Appeal "), par 239; *Prosecutor v Delalic et al,* IT-96-21-A, Judgment 20 Feb 2001 ("*Delalic* Appeal"), pars 712, 725, 780; *Prosecutor v Kupreskic et al,* IT-96-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreskic* Appeal"), pars 408 , 456-457, 460.
(11) Prosecutor v Brdanin & Talic , IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release , 25 July 2000, par 22 (Leave to appeal denied: *Prosecutor v Brdanin & Talic* , IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000, p 3); *Prosecutor v Krajisnik & Plasvic,* IT-00-39&40-AR73.2, Decision on Interlocutory Appeal by Momcilo Krajisnik, 26 Feb 2002, pars 16, 22.
(12) Prosecutor v Aleksovski , Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 19; *Prosecutor v Kordic & Cerkez,* IT-95-14/2-73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, par 20; *Delalic* Appeal, pars 532-533.
(13) Aleksovski Appeal, par 64; *Kupreskic* Appeal, par 32.
(14) For example, granting leave to amend an indictment: *Prosecutor v Galic,* IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 Nov 2001, par 17; determining the limits to be imposed upon the length of time available to the prosecution for presenting evidence : *Prosecutor v Galic,* IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 Dec 2001, par 7.
(15) Tadic Sentencing Appeal , par 22; *Aleksovski* Appeal, par 187; *Furundžija* Appeal, par 239 ; *Delalic* Appeal, par 725; *Kupreskic* Appeal, par 408.
(16) Tadic Sentencing Appeal , par 20; *Furundžija* Appeal, par 239; *Delalic* Appeal, pars 725, 780; *Kupreskic* Appeal, par 408. *See* also *Serushago v Prosecutor* , ICTR-98-39-A, Reasons for Judgment, 6 Apr 2000, par 23.
(17) Prosecutor v Tadic, IT- 94-1-A, Judgment, 15 July 1999 ("*Tadic* Conviction Appeal"), par 64; *Aleksovski* Appeal, par 63; *Furundžija* Appeal, par 37; *Delalic* Appeal, pars 434-435, 459, 491, 595; *Kupreskic* Appeal, par 30.
(18) Aleksovski Appeal, par 186.
(19) cf Tribunal's Statute, Article 25.2.
(20) Although the accused is charged with four other persons in the Kosovo indictment, and alone in the other two indictments , his four co-accused in the Kosovo indictment have not yet been arrested.
(21) Prosecutor's Motion for Joinder , 27 Nov 2001 ("Motion"), pars 7, 8.
(22) Oral hearing of the Motion, 11 Dec 2001 ("Trial Chamber Hearing"), IT-01-51 Transcript p 77. References throughout this Decision are to the transcript taken in the Bosnia trial.
(23) Trial Chamber Hearing, IT-01-51 Transcript p 77.
(24) Ibid, pp 77-78.
(25) This is described in the Motion as similar fact evidence (par 30), but during the Trial Chamber Hearing it was said , more relevantly (but still not very clearly), that the evidence of the actions and thoughts of the accused in relation to Kosovo would be incomplete without the evidence of what happened in Croatia and Bosnia (Transcript, pp 51-52).
(26) Reference is made to *Prosecutor v Kovacevic,* IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, Separate Opinion of Judge Mohamed Shahabuddeen, pp 2-3: "Joinder of offences is of course possible, within limits. Additional charges must bear a reasonable relationship to the matrix of facts involved in the original charge. [...] the question is whether all the counts, old and new, represent interrelated parts of a particular criminal episode. [...] It is not necessary for all the facts to be identical. It is enough if the new charges cannot be alleged but for the facts which give rise to the old." That was said by Judge Shahabuddeen in an appeal from the refusal of a Trial Chamber to permit the [footnote continued next page] prosecution to add 14 counts (alleging breaches of the crimes falling within Articles 2, 3 and 5 of the Tribunal's Statute) to the original, sole, count of complicity in genocide (which falls under Article 4). The factual allegations in the original indictment were expanded for this purpose , but it is unclear from either the Decision or the Separate Opinion to what extent they went beyond the specific incidents pleaded in the original indictment. No point had been taken before the Trial Chamber that Rule 49 did not permit the joinder of the additional counts. Nor was any argument addressed to the Appeals Chamber to that effect. The Joint Decision made no reference to Rule 49.
(27) Decision, par 36.
(28) Ibid, par 42.
(29) Ibid, pars 43-44.
(30) Ibid, pars 43-44.
(31) Ibid, par 45.
(32) Ibid, par 45.
(33) Ibid, par 46.
(34) It is important to emphasise (as did the Trial Chamber) that, in an application under Rule 49, the Tribunal is concerned

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only with what is alleged in the indictment (or proposed indictment), and not with what may be established by evidence at the trial.

(35) *Tadic* Conviction Appeal , par 282; *Delalic* Appeal, pars 67-70. *See* also *Aleksovski* Appeal, par 98; *Prosecutor v Bagosora*, ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 9 June 1998, par 28.

(36) For examples of instances where this principle has been applied, *see*: *Mavrommatis Palestine Concessions* case, 1924, CPIJ, Series A, No 2, pp 9, 18-19; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Dantzig Territory*, 1932, CPIJ, Series A/B, No 44, p 6; *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, *Judgment*, *ICJ Reports* 1988, pp 69, 89, par 45; *Electronica Sicula SpA (ELSI)*, *ICJ Reports* 1989, pp 15, 79, par 132; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Jurisdiction and Admissibility, *Judgment* , *ICJ Reports* 1995, p 6, pars 34-40; *Germany v United States of America* , "LaGrand Case", Judgment, 27 June 2001, par 101. *See* also, *Young Loan* Arbitration (1980), 59 ILR 495, pars 548-550. In the most recent of these , the "LaGrand Case", the International Court of Justice said (at par 101): "In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads 'when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'."

(37) *Yearbook of the International Law Commission*, 1964, Vol II, A/CN.4/SER.A/1964/ADD.1, p 63.

(38) *Ibid*, p 63.

(39) *Ibid*, pp 63-64.

(40) Paragraph 10, *supra*.

(41) In relation to the events in *Croatia*, Indictment IT-01-50 pleads (at par 6) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

[...] the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state through the commission of crimes in violation of Articles 2, 3, and 5 of the Statute of the Tribunal.

In relation to the events in *Bosnia*, Indictment IT-01-51 pleads (at par 6) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

[...] the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina [...], through the commission of crimes which are in violation of Articles 2, 3, 4 and 5 of the Statute of the Tribunal.

In relation to the events in *Kosovo*, Indictment IT-99-37 pleads (at par 16) that the purpose of the joint criminal enterprise of which the accused is alleged to have been a member was:

[...] *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.

(42) Indictment IT-99-37, par 17. This allegation is repeated in the Pre-Trial Brief, par 113.

(43) As the Trial Chamber had determined that the requirements of Rule 49 had not been satisfied by the prosecution, it was unnecessary for it to exercise its discretion under the Rule, but it was not inappropriate for the Trial Chamber to have done so as an alternative to its principal determination .

(44) Paragraph 18, *supra*.

(45) Decision, pars 38, 49, 52.

(46) *Ibid*, pars 39, 47.

(47) *Ibid*, par 50.

(48) *Ibid*, par 50.

(49) Formal Decision of Appeals Chamber , p 3.

(50) Appellant's Written Submissions , par 70.

(51) Trial Chamber Hearing, IT-01-51 Transcript p 134.

(52) Oral Hearing of the Interlocutory Appeal, 30 Jan 2002 ("Appeals Chamber Hearing"), IT-01-51 Transcript p 352. References throughout this Decision are to the transcript taken in the Bosnia trial.

(53) Mr Kay, purporting to express the views of all three *amici curiae*: Trial Chamber Hearing, IT-01-51 Transcript pp 118-119; Mr Wladimiroff: *Ibid*, p 111.

(54) Mr Tapuskovic: Appeals Chamber Hearing, IT-01-51 Transcript p 364; Mr Kay: *Ibid*, p 366.

(55) Decision, par 50.

(56) Appellant's Written Submissions , par 57.

(57) This is not directed to the prosecution's complaint that many witnesses would have to give evidence twice (Appellant's Written Submissions, pars 54-55). It is directed to the evidence itself.

(58) *Prosecutor v Tadic*, IT- 94-1-A, Judgment, 15 July 1999, par 196; *Prosecutor v Brdanin & Talic*, IT -99-36-PT, 26 June 2001, par 26.

(59) Appeals Chamber Hearing, IT-01 -51 Transcript, p 374.

(60) *Ibid*, p 354.

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(61) Ibid, p 355.
(62) Ibid, p 358.
(63) Ibid, p 374.
(64) Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, 1 Oct 1999 (IT/155), par 5. The position is the same in par 5 of the Revised IT/155, 7 Mar 2002.
(65) Ibid, par 8. Again, the position is the same in par 8 of the Revised IT/155, 7 Mar 2002.
(66) Practice Direction on the length of Briefs and Motions, 19 Jan 2001 (IT/184), par 2(b)(2). The position is the same in par 2(b)(2) the Revised IT/185, 5 Mar 2002.

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Case: IT-03-67-PT

IN THE BUREAU

Before:
Judge Theodor Meron, President
Judge Fausto Pocar, Vice-President
Judge Richard May
Judge Daqun Liu
Judge Claude Jorda

Registrar:
Mr Hans Holthuis

Decision of:
10 June 2003

PROSECUTOR
v.
Vojislav SESELJ

DECISION ON MOTION FOR DISQUALIFICATION

The Applicant:

Vojislav Seselj

Counsel for the Prosecution:

Hildegard Uertz-Retzlaff
Daniel Saxon

1. On 21 May 2003, Vojislav Seselj ("Applicant") applied pursuant to Rule 15(B) of the Rules of Procedure and Evidence ("Rules") to have Judges Schomburg, Mumba, and Agius of Trial Chamber II disqualified from hearing his case because of actual bias.[1] Because one of the Judges Seselj seeks to have disqualified, Judge Schomburg, is the Presiding Judge of the Chamber , the matter has been referred to the Bureau.[2] For the reasons given below, the Bureau denies the application.
2. The only bases for the Applicant's claim are Judge Schomburg's nationality and Judge Mumba's and Judge Agius's religion. The Applicant is a Serb and an Orthodox Christian. He claims that, because of a long history of conflict between

Germans and Serbs, Judge Schomburg's German nationality prevents him from being impartial . He also asserts Judge Schomburg's nationality undermines his impartiality because Germany is a member of the North Atlantic Treaty Alliance ("NATO"). Finally, he contends that Judge Agius and Judge Mumba are Catholic and that, because of a long history of conflict between the Serbian Orthodox Church and the Catholic Church, those Judges could not hear his case impartially.

3. The nationalities and religions of Judges of this Tribunal are, and must be , irrelevant to their ability to hear the cases before them impartially. The Statute of the Tribunal requires Judges to be "persons of high moral character, impartiality and integrity." Before taking up their duties, each Judge must make a solemn declaration committing himself or herself to performing those duties "honourably, faithfully, impartially and conscientiously." Judges in every domestic system of justice need to put aside any identification with a particular group based on religion, ethnicity, gender or other traits, characteristics, or grounds. Similarly, they must put aside any of these bases of identification in relation to any accused who appear before them. Their ability to do so, and to consider nothing but the evidence presented to them in deciding on an individual's guilt, constitute a touchstone of their role as judges. So it is at this International Tribunal.
4. Similar considerations demonstrate the groundlessness of the Applicant's assertion that a citizen of a NATO country cannot judge him impartially. The policies of the governments of the countries from which Judges of this International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities . Judges of this International Tribunal serve only the international community. In taking their solemn declaration to perform their duties "honourably, faithfully , impartially and conscientiously," they necessarily disavow any influence by the policies of any government, including the government of their home country.
5. This Application calls for one further comment from the Bureau. The Application contains several phrases or statements that are abusive and insulting. Parties appearing before the Tribunal have great latitude in phrasing their pleadings. But that latitude is not boundless. Insults are not arguments, and insults based on group identities, such as nationality, religion, and ethnicity, are particularly offensive. The Bureau has previously held that Rule 46(C) of the Rules applies in proceedings before the Bureau.[3] That Rule authorizes the imposition of sanctions on a counsel who brings a motion that is "frivolous or an abuse of process." When, as in this case, a defendant chooses to represent himself, the power given in the Rule may be exercised against the defendant himself. Motions containing abusive and insulting language of the sort included in the present Application are indeed "frivolous or an abuse of process," and the Bureau wishes to underline that the present Application is manifestly frivolous and an abuse of process. In this case, the particular sanction mentioned in Rule 46(C) cannot be applied because the Applicant is not represented by counsel . It should be noted, however, that one sanction the Bureau may apply to such filings is to direct the Registrar to deny filing. The applicant would then be required to file a new application without the offensive language. If the applicant were to persist, the Bureau might bar the filing of the application altogether. The Trial Chambers may well apply similar

principles, and the Applicant should be aware of these principles in drafting pleadings in the future.

6. The Application is denied as frivolous and an abuse of process.

Done in English and French, the English text being authoritative.

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Theodor Meron
President

Dated this 10th day of June,
At the Hague,
The Netherlands.

[Seal of the Tribunal]

1- The Prosecution has waived its right to respond.

2 - Rule 15(B) provides: "Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question, *and if necessary the Bureau shall determine the matter*. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge." (emphasis added). For an example of an application directed against a Presiding Judge and referred to the Bureau, see *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-PT, Decision of the Bureau, 4 May 1998. Judge Schomburg, as the Presiding Judge of Trial Chamber II, normally sits as a member of the Bureau. See Rule 23(A). Because the application under review is directed against him, the Bureau decided, pursuant to Rule23(E), to replace Judge Schomburg with Judge Jorda for the consideration of the application. Rule 23(E) provides that "[i]f any member of the Bureau is unable to carry out any of the functions of the Bureau, these shall be assumed by the senior available Judge determined in accordance with Rule 17." Judge Jorda is the senior available judge.

3 - *Prosecutor v. Vidoje Blagojevic et al.*, IT-02-60-T, Decision on Blagojevic's Motion for Clarification, 27 March 2003, para. 1.

The present authority exceeds 30 p. In accordance with the Practice Direction on Filing Documents before the Special Court for Sierra Leone, article 7 (E), a copy of the first page of the authority as well as a copy of the relevant section are filed.

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UNITED NATIONS

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	Case No.	IT-98-34-A
	Date:	3 May 2006
	Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 May 2006**

PROSECUTOR

v.

MLADEN NALETILIĆ, *a.k.a.* "TUTA"
VINKO MARTINOVIĆ, *a.k.a.* "ŠTELA"

JUDGEMENT

Counsel for the Prosecutor:

Mr. Norman Farrell
Mr. Peter M. Kremer
Ms. Marie-Ursula Kind
Mr. Xavier Tracol
Mr. Steffen Wirth

Counsel for Naletilić and Martinović:

Mr. Matthew Hennessy and Mr. Christopher Meek for Mladen Naletilić
Mr. Želimir Par and Mr. Kurt Kerns for Vinko Martinović

249. For the aforementioned reasons, Naletilić's fifth ground of appeal is dismissed in its entirety.

D. Prosecution rebuttal case (eighth ground of appeal)

1. Arguments of the Parties

250. Under his eighth ground of appeal, Naletilić alleges that the Trial Chamber erred and abused its discretion in allowing the Prosecution to present improper rebuttal evidence that was merely used to support and bolster its case in chief.[508] He refers to the Trial Chamber's Confidential Decision of 9 October 2002 which, *inter alia*, allowed the Prosecution to introduce the Radoš Diary as rebuttal exhibit,[509] and seeks to have all evidence introduced in the rebuttal case as well as all findings and inferences derived from it disregarded.[510] The Prosecution contends that "it was not until the Prosecution's rebuttal case that the original diary was obtained", although a copy had been tendered earlier during the cross-examination of a defence witness, and that the Trial Chamber did not err in admitting it.[511] Moreover, it argues that Naletilić was not prejudiced by the fact that the Radoš Diary was not admitted until the rebuttal stage.[512]

2. Procedural background to the rebuttal case

251. In its Filing and Scheduling Order of 29 August 2002, the Trial Chamber set the dates for the parties' motions to lead evidence in rebuttal and rejoinder.[513] Pursuant to this order, the Prosecution submitted a motion to call six witnesses, including Safet Idrizović, who was said to be able to authenticate the Radoš Diary[514] and other documents.[515] In a subsequent filing, the

[508] Naletilić Notice of Appeal, p. 4.
[509] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on the Prosecution's Supplemental Filing Concerning the Rebuttal Case, 9 October 2002 (Confidential) ("Confidential Decision of 9 October 2002"), p. 3.
[510] Naletilić Notice of Appeal, p. 4; Naletilić Revised Appeal Brief, paras 133, 135-137; Confidential Naletilić Revised Appeal Brief, para. 136.
[511] Prosecution Response to Naletilić Revised Appeal Brief, paras 4.57-4.60.
[512] Prosecution Response to Naletilić Revised Appeal Brief, para. 4.61.
[513] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Filing and Scheduling Order, 29 August 2002, p. 2.
[514] The Prosecution had earlier put passages of the Radoš Diary to Defence Witnesses NE (T. 11834-11836 (private session)), NL (T. 12700-12707 (private session)) and NW (T. 14987-14990 (private session)) on cross-examination and had tendered "P 928, [the] hand-written Diary", as an exhibit during the cross-examination of Witness NE: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Prosecutor's Submission of Cross-Examination Exhibits Concerning Witness NE, 3 June 2002 (Confidential and Under Seal) ("Prosecution Submission of Witness NE Exhibits"). However, the Trial Chamber reserved its position as to the admissibility of the Radoš Diary pending further information: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on the Admission of Exhibits Tendered through Witnesses NE and NH, 28 June 2002 ("Decision on Witnesses NE and NH Exhibits"), p. 4; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Order for Additional Information, 4 September 2002.

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Prosecution sought to introduce the original version of the Radoš Diary itself, and to call its investigator Apolonia Bos to authenticate it.[516] Naletilić objected to Witnesses Safet Idrizović and Apolonia Bos, as well as to the introduction of the diary, on the basis that they were intended to bolster the Prosecution case in chief and were not appropriate for the rebuttal stage.[517] On 20 September 2002, the Trial Chamber ordered that Safet Idrizović be heard as a rebuttal witness and that his testimony be restricted to the Radoš Diary.[518]

252. On 23 October 2002, the Trial Chamber ordered, "in respect to the exhibits submitted in the course of the rebuttal case" that *inter alia* Exhibit P 928c be admitted.[519] Exhibit PP 928c consisted of the complete, handwritten B/C/S version of the Radoš Diary.[520] The Trial Judgement refers solely to Exhibit PP 928.

3. Discussion

(a) Witness Safet Idrizović

253. The Appeals Chamber notes that the Confidential Decision of 9 October 2002, the only decision referred to by Naletilić in his Notice of Appeal under his eighth ground of appeal, did not allow the testimony of Witness Safet Idrizović. That decision merely noted a previous decision whereby the Trial Chamber allowed three Prosecution witnesses, including Witness Safet Idrizović, to testify in rebuttal.[521] Naletilić was not entitled to submit arguments relating to the decision to allow this witness to be called in rebuttal without first obtaining leave to amend his Notice of Appeal to include it under his eighth ground of appeal as is required under Rule 108. The Appeals Chamber notes that Naletilić has not done so. Furthermore, the Prosecution does not respond to

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[515] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Prosecution's Filing Concerning Rebuttal Case, 13 September 2002 (Confidential and Under Seal) ("Prosecution Filing on Rebuttal Case"), paras 3(b), 4.

[516] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Prosecution's Supplemental Filing Concerning Rebuttal Case, 3 October 2002 (Confidential and Under Seal), para. 2(b) and (d).

[517] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Submission Concerning Prosecution's Rebuttal Witness/Evidence Filing, 18 September 2002 (Confidential and Under Seal), paras 2, 4, 6; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Objections to Additional Rebuttal Witnesses and Violation of Previous Order Concerning the Rebuttal Case, 7 October 2002 (Confidential).

[518] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on the Prosecution's Filing Concerning Rebuttal Case, 20 September 2002 (Confidential) ("Decision on Rebuttal Witnesses"), p. 3.

[519] Decision on Admission of Rebuttal Exhibits (Confidential), p. 4.

[520] The Trial Chamber held that "translations of exhibits are not admitted as separate documents and that a complete translation of the Radoš Diary is required". It requested the Registry to arrange that the English translation of the Radoš Diary be compared with the admitted version of PP 928c and amended where necessary to match PP 928c. Exhibits P 928, P 928a, P 928b, P 928d, P 928e, P 928f, P 928g and P 928f/1 were denied admission: Decision on Admission of Rebuttal Exhibits (Confidential), pp. 4, 5.

[521] Confidential Decision of 9 October 2002, p. 2 (citing Decision on Rebuttal Witnesses (Confidential)).

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Naletilić's arguments in his brief with respect to Witness Safet Idrizović.[522] As a result, the Appeals Chamber will not consider the merits of Naletilić's arguments in this regard, as doing so would result in unfair prejudice to the Prosecution.

(b) Witness Apolonia Bos

254. The Appeals Chamber notes that Naletilić merely restates the objections to the admissibility of the evidence of Witness Apolonia Bos that he made at trial, without explaining how the Trial Chamber erred in its decision to admit this evidence in rebuttal.[523] Naletilić's argument in this respect is dismissed.

(c) Radoš Diary

255. It is necessary as a preliminary matter to deal with the Prosecution's contention that Naletilić is mistaken in assuming that the standard for admissibility of the Radoš Diary was that applicable to the admission of evidence in rebuttal.[524] The Appeals Chamber notes that both the Confidential Decision of 9 October 2002 and the Decision on Admission of Rebuttal Exhibits rely on Rule 89(C), according to which a Trial Chamber may admit any relevant evidence which it deems to have probative value. The decisions reiterate the jurisprudence of the International Tribunal relevant to the admission of evidence in rebuttal, and recall that evidence in rebuttal "must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated", "the Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it" and "only high evidence on a significant issue will be permitted in rebuttal".[525] The Prosecution correctly asserts that it tendered the Radoš Diary for the first time well before its rebuttal case, when it used it to challenge a Defence witness in cross-examination. However, the Trial Chamber did not admit the Radoš Diary at that point, but reserved its decision as to its admission.[526] Moreover, the wording of the Confidential Decision of 9 October 2002 ("[c]onsidering that the [Trial] Chamber is of the view that those principles [applicable to the admission of rebuttal evidence] apply equally to the submission of exhibits in rebuttal; that the [Trial] Chamber will therefore only allow for the submission of exhibits relating to the issues that the three previously authorised rebuttal witnesses were to testify upon") unequivocally shows that the Trial Chamber considered the Radoš Diary as evidence in rebuttal. This conclusion is further

[522] *See* Prosecution Response to Naletilić Revised Appeal Brief, paras 4.51-4.61; Confidential Prosecution Response to Naletilić Revised Appeal Brief, para. 4.57.
[523] Naletilić Revised Appeal Brief, para. 136; Confidential Naletilić Revised Appeal Brief, para. 136.
[524] Prosecution Response to Naletilić Appeal Brief, para. 4.59.
[525] Confidential Decision of 9 October 2002, pp. 2, 3; Decision on Admission of Rebuttal Exhibits (Confidential), pp. 2, 3.
[526] Decision on Witnesses NE and NH Exhibits, pp. 3-4.

borne out by the fact that the Trial Chamber subsequently admitted the complete, handwritten Radoš Diary as evidence in rebuttal in the Decision on Admission of Rebuttal Exhibits. Notwithstanding that it asserts that the standard for the admission of the Radoš Diary was not the same as the standard for admission of evidence in rebuttal, the Prosecution does not maintain that the Trial Chamber erred in admitting the Radoš Diary as evidence in rebuttal.

256. The Appeals Chamber understands Naletilić to be arguing that the Trial Chamber erred in admitting the Radoš Diary as evidence in rebuttal because it did not amount to evidence in rebuttal. Naletilić submits in support of his contention that the Prosecution was aware of the Radoš Diary years before the trial began,[527] and that the Diary was used to support and bolster the Prosecution's case in chief.[528] Naletilić seeks to have the Radoš Diary excluded from the body of evidence before the Trial Chamber.[529]

257. The Appeals Chamber notes that it will intervene to exclude evidence in the event that it finds that a Trial Chamber committed a discernible error in the exercise of its discretion to admit evidence and that this error resulted in unfair prejudice to the appellant, thereby rendering his trial unfair.[530]

258. The Appeals Chamber recalls that, for evidence to be admissible in rebuttal, the evidence must be "highly probative"[531] and it "must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated".[532] The Prosecution "cannot call additional evidence merely because its case has been met by certain evidence to contradict it".[533]

259. As noted earlier, the Trial Chamber directed itself to the proper legal standard in its decision to admit the Radoš Diary as evidence in rebuttal.[534] It erred, however, in applying this standard to the facts before it. The Trial Chamber found that the Radoš Diary was admissible as rebuttal evidence on the basis that it concerned "the events related to Sovići and Doljani".[535] The Appeals

[527] Appeals Hearing, T. 98-99.
[528] Naletilić Notice of Appeal, p. 4; Naletilić Revised Appeal Brief, para. 135
[529] Naletilić Notice of Appeal, p. 4.
[530] *See Čelebići* Appeal Judgement, para. 533; *see* also *Milošević* Joinder Decision, paras 3-5.
[531] *Kordić and Čerkez* Appeal Judgement, paras 220-221; *see* also *Čelebići* Appeal Judgement, para. 274.
[532] *Čelebići* Appeal Judgement, para. 273.
[533] *Čelebići* Appeal Judgement, para. 275; *Kordić and Čerkez* Appeal Judgement, paras 220-221.
[534] Confidential Decision of 9 October 2002; Decision on Admission of Rebuttal Exhibits (Confidential).
[535] The Appeals Chamber notes that the Decision on Admission of Rebuttal Exhibits (Confidential), in which the Radoš Diary was finally admitted, did not provide any factual basis for the admissibility of the Diary. However, in its previous Confidential Decision of 9 October 2002, the Trial Chamber had stated that Exhibit PP 928c, the complete B/C/S version of the Diary which was subsequently admitted in the 23 October 2002 Decision, "may be introduced" as a rebuttal exhibit because it related to issues that previously authorised rebuttal witnesses were to testify upon, namely "the events related to Sovići and Doljani" and "the Radoš Diary": Confidential Decision of 9 October 2002, p. 3. *See* also Decision on Rebuttal Witnesses (Confidential), p. 3; Prosecution Filing on Rebuttal Case (Confidential), paras 3(a),

Chamber notes that the events related to Sovići and Doljani were not issues "arising directly out of defence evidence which could not reasonably have been anticipated". The events in Sovići and Doljani formed an integral part of a number of charges in the Indictment, and thus were fundamental to the case brought by the Prosecution.[536] Thus, evidence pertaining to the events in Sovići and Doljani should have been brought as part of the Prosecution case in chief and not in its case in rebuttal.[537] For this reason, the Appeals Chamber finds that the Trial Chamber committed a discernable error when it admitted the Radoš Diary as evidence in rebuttal on the basis that the Radoš Diary related to "the events in Sovići and Doljani".

260. The Appeals Chamber turns now to the question whether Naletilić suffered unfair prejudice as a result of the Trial Chamber's error.[538]

261. In the first place, the Appeals Chamber notes that the Radoš Diary was included in the Prosecution Rule 65 *ter* Exhibit's List[539] and that a typed-out version in B/C/S of the Radoš Diary was disclosed to Naletilić at the pre-trial stage.[540] Also at the pre-trial stage, the Prosecution indicated that the Radoš Diary might become relevant at trial.[541] When, at trial, the Prosecution put the Radoš Diary to Naletilić's Defence Witnesses, Naletilić questioned the provenance of the Radoš Diary,[542] and stated that he would "continue [his] investigation" to find the author of the Radoš Diary.[543] Naletilić does not argue that, when the Trial Chamber finally decided to admit the Radoš Diary, it did not take into consideration his objections to the admission of the Radoš Diary. There is no indication that this was actually the case.[544] To the contrary, the Trial Chamber on several occasions invited Naletilić to submit his objections in written form[545] and alerted him to the fact that it was in the process of considering the issue of the admissibility of the Radoš Diary.[546]

3(b). The Appeals Chamber further notes in this regard that the reference in the Trial Chamber's decision to "the Radoš Diary"as one of the issues that rebuttal witnesses were to testify upon was, for obvious reasons, not a valid basis for admitting the Diary as evidence in rebuttal.

536 Indictment, paras 9, 25, 46, 53, 55, 56.

537 *Čelebići* Appeal Judgement, para. 275.

538 *See Čelebići* Appeal Judgement, para. 533.

539 Prosecution Rule 65 *ter* Exhibit's List (Under Seal), item 20.

540 On 7 December 2000, the Prosecution submitted that it had disclosed the Radoš Diary to Naletilić, to which submission he did not object: T. 394. When the Radoš Diary was put to Defence Witness NE during cross-examination, Naletilić objected that he had only received a printed version of it: T. 11844. In relation to the testimony of Defence Witness NL, the Prosecution stated that the typed out B/C/S version of the Radoš Diary was disclosed to Naletilić in September 2000: T. 12726. During the Appeals Hearing, the Prosecution stated, without objection from Naletilić, that it had disclosed the Diary to him on 18 September 2000: Appeals Hearing, T. 148. The Appeals Chamber considers that it is not in dispute that a typed out version in B/C/S of the Radoš Diary was disclosed by the Prosecution to Naletilić in September 2000.

541 T. 395 (Status Conference of 7 December 2000).

542 Witness NE, T. 11844 (private session); Witness NL, T. 12705, T. 12710-12711.

543 T. 12730.

544 Decision on Admission of Rebuttal Exhibits (Confidential), p. 2; *see* also T. 16224.

545 T. 11844 (private session); T. 12731; T. 16224; Decision on Witnesses NE and NH Exhibits, p. 4. Naletilić also filed his objections in written form: *see Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",*

262. In the second place, the Appeals Chamber notes that Naletilić had and made use of the opportunity to conduct a detailed re-examination concerning the Radoš Diary of the Defence witnesses to whom it had been put by the Prosecution.[547] During the Prosecution case in rebuttal, he had and made use of the opportunity to cross-examine Witness Apolonia Bos extensively as to the discrepancies between the different copies of the Radoš Diary as well as to its provenance.[548]

263. Finally, Naletilić had and made use of the opportunity to lead evidence in rejoinder relating to the events in Sovići and Doljani and the Radoš Diary.[549] Indeed, Naletilić's examination of his sole witness in rejoinder, Defence Witness NX, concerned the events in Sovići and Doljani. Naletilić also examined Defence Witness NX as to the witness' knowledge of Alojz Radoš' position in the HVO.[550]

264. In light of the foregoing, the Appeals Chamber finds that Naletilić did not suffer unfair prejudice as a result of the Trial Chamber's error when it admitted the Radoš Diary as evidence in rebuttal on the basis that it related to "the events in Sovići and Doljani". Naletilić had ample time and opportunity to challenge the Radoš Diary and to respond to the allegations therein concerning

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Case No. IT-98-34-T, Accused Naletilić's Submission, Objection and Motion Concerning the Purported Radoš Diary, 10 October 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Submission Concerning Documents Tendered by the Prosecution Through Witnesses Prelec and Idrizović, 17 October 2002.

[546] T. 12728. *See* also Decision on Witnesses NE and NH Exhibits, p. 4, where the Trial Chamber stated that it "reserves its decision [on admission] with regard to Exhibits P 928 and P 928/1".

[547] Witness NE, T. 11856-11858 (private session); Witness NW, T. 14997-14998 (private session). In relation to Witness NW, Naletilić himself put parts of the Radoš Diary to the witness in re-examination: Witness NW, T. 14997-14998 (private session). The Appeals Chamber also notes in this context that the Prosecution moved for the admission of a hand-written version of the Radoš Diary in relation to Defence Witness NE: Prosecution Submission of Witness NE Exhibits (Confidential).

[548] Witness Apolonia Bos, T. 16230-16243.

[549] Naletilić initially requested to call four witnesses in rejoinder, *inter alia*, Witnesses NX and X, who, he stated, would give evidence on "the events in Sovići and Doljani": *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Submission Concerning Rejoinder, 23 September 2002 (Confidential). The Trial Chamber allowed Naletilić to call one of these witnesses in rejoinder and further allowed him, should he choose to call Witness X, to "file a request for another witness to be called in rejoinder regarding the Radoš Diary": *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on Accused Naletilić's Submission Concerning Rejoinder, 27 September 2002 (Confidential), p. 3. Naletilić chose to call Witness NX and specified that the witness would give evidence concerning the following issues in relation to Sovići: (1) Naletilić's alleged presence there at the relevant time; (2) the alleged capture and mistreatment of members of the ABiH; (3) the destruction of Muslim houses; and (4) the HVO commander in Sovići: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Filing Concerning Rejoinder Witnesses, 7 October 2002 (Confidential). Naletilić also requested the evidence of Witness X concerning "the fate" of the Radoš Diary to be admitted as evidence in rejoinder: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Request for Additional Witness in Rejoinder, 7 October 2002 (Confidential), p. 2. The Trial Chamber granted Naletilić's requests, but ordered that the testimony of Witness X should be limited to "the alleged presence of the Accused Naletilić in Sovići [at the relevant time] and the authenticity of the Radoš Diary": *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on Accused Naletilić's Request for Additional Witness in Rejoinder, 9 October 2002 (Confidential), p. 2. Naletilić subsequently withdrew his application to bring Witness X because the witness could not appear before a date which, in Naletilić's submission, would have been too late in view of his "other obligation [...] in terms of the closing brief and the closing argument": T. 16448 (private session).

[550] Witness NX, T. 16482-16483.

the events in Soviđi and Doljani and did make extensive use of this opportunity at trial. This finding is further borne out by the detailed manner in which Naletilić addressed these issues in his Final Trial Brief and closing arguments.[551] For the foregoing reasons, Naletilić's eighth ground of appeal is dismissed in its entirety.

E. Admission of transcripts from other cases (10th ground of appeal)

265. Naletilić alleges under this ground of appeal that the Trial Chamber "erred and abused its discretion in admitting, over objection, the prior testimonies of twelve witnesses by way of introduction of transcripts of their testimony in other cases, thus violating [his] right to confront the witnesses against him and his right to a fair trial pursuant to Article 21 [of the Statute]".[552]

266. Naletilić argues that the Trial Chamber ignored the fact that, while these witnesses may have been cross-examined in the cases where they testified live, those cases dealt with conflicts in other parts of the former Yugoslavia, "not Herzegovina".[553] Naletilić states that the transcripts in question were obviously relied upon to show the international nature of the armed conflict and its "widespread and systematic nature", which was improper as the geographical areas involved in those cases were different from the instant case.[554]

267. The Appeals Chamber finds that Naletilić has failed to demonstrate how the admission of the transcripts absent cross-examination affected the judgement. In particular, even if some portions of the transcripts in question do deal with areas other than Herzegovina, he has not shown that reliance on them was critical to any of the Trial Chamber's findings. As to both the "widespread and systematic" requirement for crimes against humanity and the "international armed conflict" element of war crimes, the Trial Chamber relied on a substantial amount of live testimony and exhibits introduced before it, and made appropriate findings concerning the situation in and around Mostar, Doljani, and Soviđi at the time relevant to the Indictment.[555] Thus, Naletilić has not

[551] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Final Brief of the Accused Mladen Naletilić a.k.a Tuta, 4 November 2002 ("Naletilić Final Trial Brief"), pp. 19 *et seq*. *See* in particular, *ibid.*, pp. 35-36; T. 16854.

[552] Naletilić Notice of Appeal, p. 5. *See* also *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Decision on Prosecution Motion for Admission of Transcripts and Exhibits Tendered During the Testimony of Certain Blaškić and Kordić Witnesses, 27 November 2000; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Decision Regarding Prosecutor's Notice of Intent To Offer Transcripts Under 92 *bis* (D), 9 July 2001.

[553] Naletilić Revised Appeal Brief, para. 139.

[554] Naletilić Reply Brief, para. 41.

[555] *See* Trial Judgement, paras 181-202, 238-241. Moreover, with respect to the international armed conflict element, the Trial Chamber stated:

> [w]hile it is clear from the evidence that HV troops were directly involved in the conflict in and around Mostar, this is not the case as far as the HVO attacks on Soviđi/Doljani and Raštani are concerned. This finding does not have the effect that the Geneva Conventions were not applicable in Soviđi/Doljani and Raštani. There is no requirement to prove that HV troops were present in every single area where crimes were allegedly committed.

UNITED
NATIONS

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

Case: IT-03-67-AR73.4

Date: 8 December 2006

Original: English

BEFORE THE APPEALS CHAMBER

Before:

Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **8 December 2006**

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

DECISION ON APPEAL AGAINST THE TRIAL CHAMBER'S DECISION (NO.2) ON ASSIGNMENT OF COUNSEL

Office of the Prosecutor
Ms. Hildegard Uertz-Retzlaff
Mr. Daniel Saxon
Mr. Ulrich Müssemeyer
Ms. Melissa Pack

The Accused
Mr. Vojislav Šešelj

Independent Counsel
Mr. Tjarda Van der Spoel

Assigned Counsel
Mr. David Hooper
Mr. Andreas O'Shea

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seized with an appeal filed by Mr. Vojislav Šešelj ("Šešelj") on 7 December 2006, Mr. Vojislav Šešelj ("Šešelj") filed an appeal before the Appeals Chamber[1] against the second decision of the Trial Chamber to assign Counsel.[2] The Impugned Decision was certified for appeal by the Trial Chamber on 5 December 2006.[3]

Background

2. To understand fully the nature of this appeal, it is necessary for the Appeals Chamber to revisit the background to the Impugned Decision. On 20 October 2006, the Appeals Chamber issued a decision[4] overturning a decision of the Trial Chamber of 21 August 2006, by which it assigned Counsel to represent Šešelj. [5] The decision of the Trial Chamber was based on its finding that "[t]he conduct of the Accused as a whole – obstructionist and disruptive behaviour; deliberate disrespect for the rules; intimidation of, and slanderous comments about, witnesses" provided "a strong indication that his self-representation may substantially and persistently obstruct the proper and expeditious conduct of a fair trial".[6] The Appeals Chamber overturned the 21 August Decision, finding that the Trial Chamber failed to issue a specific warning to Šešelj before assigning him counsel. However, it explicitly warned Šešelj "that, should his self-representation subsequent to this Decision substantially obstruct the proper and expeditious proceedings in his case, the Trial Chamber will be justified in promptly assigning him counsel after allowing Šešelj the right to be heard with respect to his subsequent behaviour".[7]

3. Following the Appeals Chamber Decision, on 25 October 2006, the Trial Chamber issued a decision appointing standby counsel to Šešelj and delaying the commencement of his trial scheduled to commence on 2 November 2006.[8] In its Decision to Appoint Standby Counsel, the Trial Chamber identified the role of standby counsel to be:

[1] Submission for Motion 226, 7 December 2006 ("Appeal").
[2] Reasons for Decision (No.2) on Assignment of Counsel, 27 November 2006 ("Impugned Decision").
[3] Decision on Request for Certification to Appeal Decision (No.2) on Assignment of Counsel, 5 December 2006.
[4] Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006 ("Appeal Decision").
[5] Decision on Assignment of Counsel, 21 August 2006 ("21 August Decision").
[6] *Ibid.*, paras. 79.
[7] Appeal Decision, para. 52.
[8] Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, 25 October 2006 ("Decision to Appoint Standby Counsel").

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> (a) to assist the Accused in the preparation and presentation of his case during the pre-trial and trial phases whenever so requested by the Accused;
> (b) to offer advice or to make suggestions to the Accused as standby counsel sees fit, in particular on evidential and procedural issues;
> (c) to address the court whenever so requested by the Accused or the Trial Chamber;
> (d) to receive copies of all court documents, filings and disclosed materials that are received by or sent to the Accused;
> (e) to be present in the courtroom during proceedings;
> (f) to be prepared to take over the conduct of the defence from the Accused and effectively bring the defence case to conclusion;
> (g) in the event of abusive conduct by the Accused, and if so ordered by the Trial Chamber, to put questions to witnesses, in particular sensitive or protected witnesses, on behalf of the Accused, without depriving the Accused of his right to control the strategy of the defence case;
> (h) to temporarily take over the conduct of the defence from the Accused should the Trial Chamber find, following a warning, that the Accused is engaged in disruptive conduct or conduct requiring his removal from the courtroom under Rule 80 (B) of the Tribunal's Rules of Procedure and Evidence;
> (i) to permanently take over the conduct of the defence from the Accused should the Trial Chamber find that the Accused's conduct is substantially obstructing the proper and expeditious proceedings, having allowed the Accused the right to be heard with respect of the conduct in question.[9]

In its Decision to Appoint Standby Counsel, the Trial Chamber also determined that a new start date for the trial would be made at the status conference scheduled to be held on 1 November 2006.[10]

4. At the Status Conference held on 1 November 2006, Šešelj made clear his objections to the Decision to Appoint Standby Counsel, repeatedly disrupted the proceedings, and refused to remain in court in the presence of standby counsel. Šešelj was advised by the Trial Chamber that there were legal avenues available to him to challenge its decision. Eventually, the Trial Chamber ordered the removal of Šešelj from the courtroom and instructed standby counsel to temporarily take over the conduct of the defence in accordance with subparagraph (h) of paragraph 5 of its Decision to Appoint Standby Counsel.[11]

5. On 7 November 2006, Šešelj applied for certification to appeal the Trial Chamber's Decision to Appoint Standby Counsel.[12] In that Motion, Šešelj argued that "the issue involved has a significant impact on the fair and expeditious conduct of the proceedings, trial and the outcome of the proceedings, and a decision by the Appeals Chamber would materially advance the proceedings

[9] Decision to Appoint Standby Counsel, para. 5.
[10] *Ibid.*, para. 4.
[11] Status Conference, 1 November 2006, T 627-628, 633-635, 636.
[12] Motion for Certification to File an Interlocutory Appeal Against the Order of Trial Chamber I Issued on 25 October 2006, 7 November 2006 ("Motion for Certification").

and render them relatively lawful".[13] The Trial Chamber did not agree and refused the Motion for Certification.[14]

6. In refusing the Motion for Certification, the Trial Chamber claimed that its Decision to Assign Standby Counsel merely "reinstated the situation to how it was prior to the Chamber's Decision on Assignment of Counsel of 21 August 2006, and it did not affect the Accused's self-represented status and freedom to represent himself".[15] It reasoned that the exact role to be played by standby counsel "would, to a large extent, be for the Accused to determine" and that any assistance in "the preparation and presentation of the case, would be solely at the request of the Accused. Also, the temporary or permanent take over of the conduct of the defence by standby counsel would be as a result of the conduct of the Accused" and that "[t]he Chamber could only order standby counsel to put questions to witnesses 'in the event of abusive conduct by the Accused'".[16] The Chamber also noted that standby counsel would only be permitted to temporarily take over the conduct of the case "if the Accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom [...] and to permanently take over if the Accused's conduct is substantially obstructing the proper and expeditious proceedings." [17] An exception to the rule that the role of standby counsel would be determined by the Accused is that standby counsel would be allowed to address the court, either upon the request of the Accused, or the Chamber. However, the Trial Chamber noted that this exception would be of "limited practical significance" and that the existence of standby counsel as defined by the Decision to Appoint Standby Counsel, "would not, in itself, affect the conduct of the proceedings".[18]

7. On 8 November 2006, the Trial Chamber held a further Status Conference, in which it confirmed a finding against Šešelj that he had deliberately disclosed confidential information to a third party. Šešelj refused to accept the finding of the Trial Chamber. The Trial Chamber determined this refusal to be unacceptable and issued Šešelj a formal warning that if there was any further breach it could lead the Trial Chamber to impose Counsel upon him and take other measures to ensure the protection of witnesses.[19]

8. At a further Status Conference, held on 22 November 2006, Šešelj failed to attend. The Deputy Registrar informed the Trial Chamber that Šešelj felt too weak to attend the Status

[13] Motion for Certification, p.1.
[14] Decision on Application for Certification to Appeal Order of 25 October 2006, 30 November 2006 ("Certification Decision").
[15] *Ibid.*, para. 6.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

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Conference because of a decision he had taken on 11 November 2006 not to take any food or medicine.[20] In response, the Trial Chamber issued a warning to be delivered to Šešelj in the United Nations Detention Unit ("UNDU") stating as follows:

> The Chamber has been informed that Mr. Šešelj is on a hunger strike. The Chamber has also been informed that Mr. Šešelj felt too weak to attend the Status Conference. And on the basis of this information this Chamber received and in the absence of any direct message from the accused addressed to the Chamber, the Chamber cannot but conclude that the physical condition of Mr. Šešelj is related to his hunger strike. The Chambers consider that whether this self induced physical condition prevents Mr. Šešelj from attending today's hearing, or whether Mr. Šešelj has wilfully decided not to attend the hearing. Mr. Šešelj's absence, not further explained by him, constitutes disruptive conduct. The Chamber hereby warns Mr. Šešelj that his behaviour may result in the temporary takeover of the defence by stand-by counsel during today's Status Conference, in accordance with the Chamber's order of the 25th of October, paragraph 5(h)."[21]

So that the warning could be immediately issued to Šešelj, the Trial Chamber adjourned the Status Conference while the warning was communicated to Šešelj at the UNDU.[22]

9. Following the issuing of the warning to Šešelj in the UNDU, the Status Conference was resumed. The Deputy Registrar informed the Trial Chamber that he had delivered the warning of the Chamber and that Šešelj maintained his refusal to attend. In response, the Trial Chamber ordered standby counsel to temporarily take over the conduct of Šešelj's defence in accordance with its Decision to Assign Standby Counsel, subparagraph (h) of paragraph 5.[23]

10. During the Status Conference, the Trial Chamber issued a further warning to the Accused, which it directed be delivered to him via a video tape of the Status Conference proceedings. This warning was in relation to filings made by Šešelj on 6 November 2006, which were returned to him on the basis that they exceeded the word limit or failed to include a word count. These failings were in violation of a Trial Chamber decision of 19 June 2006.[24] The Trial Chamber warned Šešelj that "persistent non-compliance with the Chamber's decision on word limits is a form of obstructionist conduct" and that if he continued to submit oversized filings, the Chamber may consider imposing counsel, after having given an opportunity for him to be heard.[25]

11. Following the 22 November Status Conference, the Trial Chamber issued an invitation to Šešelj to make submissions.[26] In that Invitation, the Trial Chamber noted the Appeals Chamber Decision, "that persistence in his disruptive behaviour may warrant termination of his self-

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[19] Status Conference, 8 November 2006, Closed Session T. 766.
[20] Status Conference, 22 November 2006, T.777.
[21] *Ibid.*, T.782.
[22] *Ibid.*, T.783.
[23] *Ibid.*, T. 784.
[24] Decision on Filing of Motions, 19 June 2006.
[25] Status Conference, 22 November 2006, T. 804

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represented status and the assignment of counsel to represent him, after he is given an opportunity to be heard" and warned Šešelj that it found his conduct to have been "substantially obstructive" and warranting the imposition of counsel. Recognising his right to be heard, the Trial Chamber invited Šešelj to make written submissions to be filed with the Registry no later than Friday, 24 November 2006 and if he wished to make further submissions, he could do so at the Pre-Trial Conference scheduled to be held on Monday, 27 November 2006.[27]

12. Šešelj submitted no response to the Invitation of the Trial Chamber in writing, nor did he appear at the Pre-Trial Conference on 27 November 2006. After hearing the reasons for his absence from the Registry, the Trial Chamber issued an oral decision imposing counsel on Šešelj. Following that oral decision, it issued a reasoned written decision that same day, which forms the Impugned Decision for the purposes of this Appeal.

13. In the Impugned Decision, the Trial Chamber requested the Registry to appoint Mr. Tjarda Eduard van der Spoel "as independent counsel to take any necessary action in relation to an appeal." No appeal has yet been filed by Mr. van der Spoel on behalf of Šešelj.[28] Rather, an Appeal has been filed by Šešelj before the Appeals Chamber on his own behalf. The Appeals Chamber does not find that there is any reason why Šešelj should not be permitted to file the Appeal despite the fact that it does not conform with the Practice Direction on filing of appeals before the Appeals Chamber.[29] In this instance, Šešelj has sought to appeal by filing a letter before the Appeals Chamber requesting that it take into account all arguments he has made in prior submissions filed before the Appeals Chamber, the President and the Bureau with respect to his right to self-representation and his opposition to standby counsel and counsel as forming the grounds of his appeal.[30]

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[26] Invitation to Accused to Make Submissions, 22 November 2006 ("Invitation").

[27] *Ibid.*, p. 3.

[28] On 4 December 2006, Mr. van der Spoel requested certification to appeal the Trial Chamber Decision of 27 November 2006. Certification was granted by the Trial Chamber on 5 December 2006 in its "Decision on Request for Certification to Appeal Decision (No.2) on Assignment of Counsel".

[29] In accordance with Paragraph 9 of the on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155/Rev.3, 16 September 2005 ("Practice Direction") a certified appeal should be filed within seven days of the decision of certification so the time for the filing of an appeal by independent counsel will expire on 12 December 2006. Is the time expiration the reason or is it a question of form?

[30] The Appeals Chamber sought clarification from the Commanding Officer of the UNDU as to the scope of Šešelj's appeal. It was advised upon instruction from Šešelj that he wished the Appeals Chamber to consider the arguments he made in various filings with respect to the assignment of counsel and standby counsel. In determining this appeal the Appeals Chamber will consider arguments made by Šešelj in his "Request for Certification Pursuant to Rule 73(B) to Appeal Against the Trial Chamber Oral Decision to Assign Counsel to the Accused, 4 December 2006; Motion to Disqualify Judges Alphonsus Orie, Patrick Robinson and Frank Höpfel from the Trial and Appeals Proceedings in the Case Against Professor Vojislav Šešelj, 5 December 2006; Request by Professor Vojislav Šešelj for Approval to File Interlocutory Appeal Against Eight Oral Decisions of Trial Chamber I of 8 November 2006, 13 November2006; Motion for Certification to File an Interlocutory Appeal Against the Order of Trial Chamber I Issued on 25 October 2006 , 13 November 2006; Appeal by Professor Vojislav Šešelj Against the Decision of the Deputy Registrar of 30 October 2006 to Assign David Hooper as Standby Defence Counsel, 3 November 2006; Initiative on the Part of Dr Vojislav Šešelj for

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14. In determining that it is appropriate for the Appeals Chamber to accept Šešelj's filing of an appeal before it in this way, the Appeals Chamber recognises that there are extraordinary circumstances justifying its departure from the requirements of its own Practice Direction. Šešelj has persisted in his refusal to take food or medicine since 11 November 2006. He has also since that time refused to be medically assessed by doctors assigned to his care. The only doctors that have been able to make any assessment of Šešelj's condition could only make a rudimentary assessment. However, it is abundantly clear to the Appeals Chamber that the action taken by Šešelj is seriously damaging his health and could have grave consequences. Šešelj has made a choice to undertake this action, and he has purportedly done so because of his opposition to the decision of the Trial Chamber to impose standby counsel following the Appeal Decision. That opposition of Šešelj caused the Trial Chamber to take the further step of assigning counsel, but Šešelj's opposition leading to that decision of the Trial Chamber was based in the first instance on his strong belief that the Appeal Decision, which reinstated his right to self-representation, left no room for the imposition of standby counsel by the Trial Chamber as an immediate response to the Appeal Decision, without establishing any obstructionist behaviour on his part. Upon that basis, and in light of the fact that the Trial Chamber certified its decision to assign counsel for appeal, the Appeals Chamber will consider the Appeal on the merits.

15. The Appeals Chamber decision to do so should in no way be construed as evidence of the Appeals Chamber rewarding Šešelj's behaviour, rather it is recognising that he does have a right to appeal the Impugned Decision and that resolution of this issue is of utmost importance to Šešelj and to the interests of the Tribunal. It is also recognition of the fact that after 28 days of refusing to take food and medicine, Šešelj's condition is such that he is simply unable to do more to comply with the Practice Direction, albeit due to his own actions.

Standard of Review

16. A decision of a Trial Chamber to assign counsel is a discretionary decision of the Trial Chamber, which draws upon the Trial Chamber's familiarity with the conduct of the parties and the

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Dismissal Proceedings to be Initiated by the Bureau Against Judges Alphonsus Orie, Patrick Robinson and Bakone Moloto, 4 October 2006; Appeal Against the Registrar's Decision to Assign David Hooper as Defence Counsel in the Proceedings Against Dr Vojislav Šešelj, 18 September 2006; Reply to the Prosecution's Response to Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 2 October 2006; Appeal Against the Registrar's Decision to Assign David Hooper as Defence Counsel in the Proceedings Against Dr Vojislav Šešelj, 4 September 2006; Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 25 August 2006.

demands of the case.[31] In this Appeal, the issue for the Appeals Chamber is not whether it agrees with the decision made by the Trial Chamber but "whether the Trial Chamber correctly exercised its discretion in reaching that decision".[32] When challenging a discretionary decision the moving party must establish that the Trial Chamber committed a "discernible error" resulting in prejudice to that party.[33] The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be " (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."[34]

Applicable Law

19. An accused appearing before this Tribunal is entitled to certain minimum guarantees pursuant to Article 21(4) of the Statute of the International Tribunal. Article 21(4)(d) of the Statute grants the right of an accused "to defend himself in person or through legal assistance of his own choosing" The jurisprudence of this Tribunal has interpreted this provision of Article 21 as providing an accused with "the presumptive right to self-representation".[35] However, a presumptive right to self-representation does not translate into an absolute right and there are circumstances in which this right may be curtailed. Of relevance to this appeal, a Trial Chamber may place restrictions on the right of an accused to self-representation where "a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial".[36] A Trial Chamber has the discretionary power to do so whether the conduct of the Accused is intentional or unintentional. All that matters is that the disruptive behaviour of the Accused "is substantially and persistently obstructing the proper and expeditious conduct of his trial". [37]

The Appeal

[31] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Decision on Defence Counsel"), para. 9.
[32] *Ibid*, para. 10 citing *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević*Decision on Joinder"), para. 4.
[33] *Prosecutor v. Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Provisional Release Decision"), para. 6.
[34] *Milošević* Decision on Defence Counsel, para. 10. The Appeals Chamber will also consider whether the Trial Chamber "[gave] weight to extraneous or irrelevant considerations" or "failed to give weight or sufficient weight to relevant considerations [. . .]". *Ibid., citing* the *Milošević* Decision on Joinder, paras. 5-6.
[35] *Milošević* Decision on Defence Counsel, para. 11.
[36] *Ibid.*, paras. 12-13.
[37] *Ibid.*, para. 14 (holding that "it cannot be that the only disruption legitimately cognizable by a Trial Chamber is the intentional variety.").

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20. The Appeals Chamber has already indicated that in determining this Appeal it is relying upon submissions made by Šešelj in various filings before different bodies of this Tribunal and it has already identified what it considers to be the real issue for it to determine. That is, whether the Appeal Decision, wherein Šešelj's right to self-representation was re-instated, allowed the Trial Chamber to immediately order the assignment of standby counsel without establishing any persistent or obstructionist behaviour on his part. Šešelj's view is that it did not and it is in light of that view that Šešelj has undertaken action, which resulted in the Trial Chamber determining that it had the right to impose Counsel in the Impugned Decision. While the decision of the Trial Chamber to assign standby counsel was not certified for appeal by the Trial Chamber, the two decisions are inextricably linked.[38] It was because of the decision of the Trial Chamber to immediately impose standby counsel and Šešelj's inability to find an avenue to legally challenge that decision before the Trial Chamber that he was placed on a collision course with the Trial Chamber leading to the Trial Chamber's issuing of the Impugned Decision. In this respect, while the Tribunal's jurisprudence limits the Appeals Chamber to examining whether the Trial Chamber erred in issuing the Impugned Decision, such a review in this appeal would not resolve the real issue of dispute between Šešelj and the Trial Chamber. That dispute concerns the scope of the Appeal Decision reinstating Šešelj's right to self- representation.

21. The Appeal Decision reinstating Šešelj's right to self-representation addressed the argument of Acting Counsel that the Trial Chamber failed to take into account the practical difficulties of assigning counsel to represent Šešelj because Šešelj had, since the imposition of standby counsel by the Trial Chamber in its decision of 9 May 2003,[39] refused to communicate with standby counsel at all.[40] While the Appeals Chamber did not find that the Trial Chamber erred in not taking into account this consideration, it also found that the Trial Chamber was "undoubtedly aware that such potential problems could arise given that it knew of the history of Šešelj's objection to counsel and refusal to communicate or cooperate with Standby Counsel during the pre-trial proceedings".[41] While this issue was raised by Acting Counsel before the Appeals Chamber, it was not addressed any further by the Appeals Chamber in its decision because it was not the issue before it.

22. Nonetheless, upon reflection, it would have been better if the Appeals Chamber in returning to Šešelj the right to self-representation would have made clearer what it considered that to mean

[38] *Cf. United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1196 (D.C. Cir. 2005) (observing that "questions logically antecedent and essential to the order under review" fall within the jurisdiction of a court of appeals in reviewing an order certified for interlocutory appeal).
[39] Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003.
[40] Appeal Decision, para. 44.
[41] *Ibid.*, para. 45.

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with respect to the discretion on the part of the Trial Chamber to immediately impose standby counsel with a right to jump in and take over the proceedings in the circumstances identified by the Trial Chamber in its Decision to Assign Standby Counsel. This is particularly so given that the Appeals Chamber was made abundantly aware of Šešelj's opposition to standby counsel during his pre-trial proceedings.

23. From the objections made by Šešelj, it is clear that in his view, the decision of the Trial Chamber to impose standby counsel was a provocative move, which he interpreted as a violation of the Appeal Decision. This was a less than ideal situation for Šešelj to take up his restored right to self-representation and placed the Trial Chamber in an untenable position. Having just had its decision on the assignment of counsel overturned on appeal the Trial Chamber viewed it as a necessary move to preserve Šešelj's right to a fair and expeditious trial in light of the history of proceedings in his case pre-trial.

24. While the Appeals Chamber has acknowledged that the Decision to Assign Standby Counsel is not the Impugned Decision before it, it must also acknowledge that its decision restoring the right of Šešelj to self-representation was not clear as to whether the restoration of that right to self-representation allowed the Trial Chamber to restore the status quo by immediately reassigning standby counsel, following the Appeal Decision without establishing any obstructionist conduct on the part of Šešelj. The Appeals Chamber notes that standby counsel is not assigned counsel, and there are clear limits on the ability of standby counsel to participate in the proceedings, including that such participation did depend upon the conduct of Šešelj. However, the fact that the Registry appointed former assigned counsel to act as standby counsel following the Appeal Decision, and then following the protest by Šešelj to that appointment, the Trial Chamber ordered the reassignment of standby counsel to act as assigned counsel in the Impugned Decision[42] further entrenched Šešelj's belief that the Trial Chamber had not respected the right restored to him by the Appeals Chamber. He was not given a clean slate by the Trial Chamber following the Appeal Decision.

25. If the Appeals Chamber was to ignore the background to the Impugned Decision and apply the applicable law and the standard of review to the Impugned Decision, it would find no error on the part of the Trial Chamber in ordering the imposition of assigned counsel. As the test makes clear, all that must be established is that the disruptive behaviour of the Accused "is substantially and persistently obstructing the proper and expeditious conduct of his trial" and it does not matter

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[42] *Ibid.*

whether that conduct is intentional or unintentional. In the Impugned Decision, the Trial Chamber after citing the legal test stated that:

> Aside from the facts already established in the Trial Chamber's decision of 21 August 2006, which were not disturbed in appeal, the Trial Chamber has considered the conduct of the Accused onwards from the date of the Appeals Chamber's decision reinstating the Accused's self-represented status. The Trial Chamber finds that the Accused has continued to deliberately disregard decisions by the Trial Chamber, in particular its Decision on Filing of Motions, submitting motions that are often tens of thousands of words over the limit set by the Trial Chamber. The Trial Chamber finds that the Accused has repeatedly disrupted court hearings he deliberately and unreasonably interrupting the proceedings and by refusing to appear in court to represent himself. The Accused has been put on notice, and specifically warned by the Trial Chamber, that should his disruptive and obstructionist conduct continue, the Trial Chamber will consider imposing counsel on the Accused. In its warning arising from the Accused's failure to attend the 22 November 2006 status conference, the Trial Chamber informed the Accused that his conduct amounted to substantial obstruction and warranted the imposition of counsel. The Trial Chamber gave the Accused an opportunity to challenge this conclusion, but the Accused not only passed up the opportunity, he once again failed to appear in court to represent himself at the pre-trial conference on 27 November 2006, causing further obstruction to the proceedings.[43]

There is no doubt that in light of the behaviour exhibited by Šešelj that the Trial Chamber was entitled by the terms of the Appeal Decision to impose assigned counsel upon him. However, the matter does not end there. In this particular case, what must and also can be considered by the Appeals Chamber is whether the Trial Chamber erred in the interpretation of its decision restoring Šešelj's right to self-representation. The Appeals Chamber is satisfied that it did so.

26. In the Appeal Decision, Šešelj's right to self-representation was fully restored. That restoration occurred in the context of a situation where the only obstacle to the full exercise of that right was assigned counsel, standby counsel had been removed by the Registrar following that assignment. While the Appeals Chamber did not explicitly state that the Trial Chamber was prohibited from imposing standby counsel, the Appeals Chamber finds that the Trial Chamber decision to do so, immediately upon the issuing of its decision and without establishing any additional obstruction by Šešelj, did have the practical effect of undermining the practical implementation of that decision. The Trial Chamber was fully aware of Šešelj's opposition to standby counsel throughout the pre-trial proceedings in his case, and its decision to order the immediate imposition of standby counsel and the Registry decision to appoint the assigned counsel removed by the Appeals Chamber Decision to the position of standby counsel created a situation where to all intents and purposes Counsel removed by the Appeals Chamber were still permitted to be part of the proceedings. In this circumstance, Šešelj's objection that his right to self-representation restored by the Appeals Chamber was not being respected by the Trial Chamber has merit.

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[43] Impugned Decision, para. 13.

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27. While the Appeals Chamber well appreciates the efforts of the Trial Chamber to ensure the fair and expeditious conduct of this trial, it finds that the Trial Chamber abused its discretion by immediately ordering the imposition of standby counsel, without first establishing additional obstructionist behaviour on the part of Šešelj warranting that imposition, with the clear possibility to take over the proceedings. By so doing, the Trial Chamber failed to give Šešelj a real opportunity to show to the Trial Chamber that despite his conduct pre-trial, and the conduct leading up to the imposition of assigned counsel, he now understood that in order to be permitted to conduct his defence, he would have to comply with the Rules of Procedure and Evidence of the Tribunal and that he was willing to do so. It was this opportunity that the Appeal Decision intended to accord to Šešelj.

28. On the basis of the foregoing, the Impugned Decision assigning counsel to Šešelj is reversed and the Trial Chamber is directed not to impose standby counsel unless Šešelj exhibits obstructionist behaviour fully satisfying the Trial Chamber that, in order to ensure a fair and expeditious trial, Šešelj requires the assistance of standby counsel. Should a time come when the Trial Chamber feels justified to make such a decision, the Rule 44 list of Counsel should be provided to Šešelj and he should be permitted to select standby counsel from that list. Alternatively, should the full restoration of Šešelj's right to self-representation fail to curb his obstructionist behaviour, the Trial Chamber would be permitted to proceed to assign counsel to Šešelj. Again, such a decision may only be taken once Šešelj has been given a real chance to effectively exercise the right to self-representation and if the Trial Chamber feels justified in making such a decision, the Rule 44 list of Counsel should be provided to Šešelj, and he should be permitted to select counsel from that list. Should Šešelj refuse to cooperate in selecting counsel from the list, the Registry may choose counsel at its discretion.

29. In light of the decision of the Appeals Chamber, and in interests of fairness to Šešelj, the Appeals Chamber nullifies the opening of the proceeding in this case and orders that the trial restart. Due to the current health condition of Šešelj, the Appeals Chamber orders that his trial should not open until such time as he is fully able to participate in the proceeding as a self-represented accused.

Disposition

30. The Appeal of Šešelj against the Impugned Decision is **ALLOWED**. All trial proceedings in this case following the order of the Trial Chamber directing the Registry to appoint standby counsel are set aside. The trial of Šešelj is suspended until such time as he is fit enough to fully participate in the proceeding as a self-represented accused.

Done in English and French, the English text being authoritative.

Dated this 8th day of December 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

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European Court of Human Rights

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COURT (CHAMBER)

CASE OF DE CUBBER v. BELGIUM

(Application no. 9186/80)

JUDGMENT

STRASBOURG

26 October 1984

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In the De Cubber case*,

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

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

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

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

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

PROCEDURE

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

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 27 October 1983, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. M. Zekia, Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Mr. F. Gölcüklü and Mr. F. Matscher (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Sir Vincent Evans and Mr. R. Bernhardt, substitute judges, replaced Mr. Zekia and Mr. Lagergren, who were prevented from taking part in the consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. Having assumed the office of President of the Chamber (Rule 21 para. 5) and having on each occasion consulted, through the Registrar, the Agent of the Belgian

Government ("the Government"), the Commission's Delegate and Mr. De **Cubber**'s lawyer, Mr. Wiarda

- decided, on 17 November 1983, that there was no call at that stage for memorials to be filed (Rule 37 para. 1);
- directed, on 9 February 1984, that the oral proceedings should open on 23 May (Rule 38).

On 16 April, the Registrar received, from the applicant's lawyer, her client's claims under Article 50 (art. 50) of the Convention.

5. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

  Mr. J. Niset, Legal Adviser
  the Ministry of Justice, *Agent*,
  Mr. André De Bluts, avocat, *Counsel*;

- for the Commission

  Mr. M. Melchior, *Delegate*;

- for the applicant

  Mrs. F. De Croo-Desguin, avocat, *Counsel*.

The Court heard addresses by Mr. De Bluts for the Government, by Mr. Melchior for the Commission and by Mrs. De Croo-Desguin for the applicant, as well as their replies to questions put by it and by several of its members.

6. On 4 April and on 7, 14, 18 and 23 May, the Commission, the Government and the applicant, as the case may be, filed various documents, either on their own initiative or in response to a request made by the Registrar in accordance with the President's instructions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant is a Belgian citizen born in 1926. He lives in Brussels and is a sales manager.

8. On 4 April 1977, he was arrested by the police at his home and taken to Oudenaarde where he was questioned in connection with a car theft.

Warrants of arrest for forgery and uttering forged documents were issued against the applicant on the following day, on 6 May and on 23 September 1977. The first warrant - notice no. 10.971/76 - was issued by Mr. Pilate, an investigating judge at the Oudenaarde criminal court (tribunal correctionnel), and the second and third - notices nos. 3136/77 and 6622/77 - by Mr. Van Kerkhoven, the other investigating judge at the same court.

9. Prior to that, in the capacity of judge (juge assesseur) of the same court sitting either on appeal (judgment of 3 May 1968) or at first instance (judgments of 17 January, 7 March and 28 November 1969), Mr. Pilate had already dealt with criminal proceedings brought against Mr. De **Cubber** in connection with a number of offences; those

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proceedings had led variously to an unconditional or conditional discharge (relaxe) (17 January and 7 March 1969, respectively) or to conviction.

More recently, Mr. Pilate had had to examine, in his capacity of investigating judge, a criminal complaint filed by Mr. De Cubber (16 November 1973) and, in his capacity of judge dealing with the attachment of property (juge des saisies), certain civil cases concerning him (1974-1976). In regard to each of these cases, the applicant had applied to the Court of Cassation to have the case removed, on the ground of bias (suspicion légitime; Article 648 of the Judicial Code), from Mr. Pilate or from the Oudenaarde court as a whole; each of these requests had been held inadmissible or unfounded.

10. At the outset Mr. Van Kerkhoven dealt with cases nos. 3136/77 and 6622/77 but he was on several occasions prevented by illness from attending his chambers. He was replaced, initially on an occasional and temporary basis and, as from October 1977, on a permanent basis, by Mr. Pilate, who retained responsibility for case no. 10.971/76.

11. In case no. 6622/77, a single-judge chamber of the Oudenaarde court (Mr. De Wynter) sentenced Mr. De Cubber on 11 May 1978 to one year's imprisonment and a fine of 4,000 BF. He did not appeal against this decision.

12. After preliminary investigations lasting more than two years, a chamber of the court (the chambre du conseil) ordered the joinder of cases nos. 10.971/76 and 3136/77 and on 11 May 1979 committed Mr. De Cubber for trial. These cases related to several hundred alleged offences committed by fifteen accused, headed by the applicant; there were no less than nineteen persons intervening to claim damages (parties civiles).

For the purpose of the trial, the court, which over the years had nine or ten titular judges, sat as a chamber composed of a president and two judges, including Mr. Pilate. Mr. De Cubber stated that he protested orally against the latter's presence, but he did not have recourse to any of the legal remedies open to him for this purpose, such as a formal challenge (procédure de récusation; Article 828 of the Judicial Code).

After a hearing which lasted two half-days on 8 and 22 June 1979, the court gave judgment on 29 June 1979. Mr. De Cubber was acquitted on two counts and convicted on the remainder, note being taken of the fact that he was a recidivist. He was accordingly sentenced, in respect of one matter, to five years' imprisonment and a fine of 60,000 BF and, in respect of another, to one year's imprisonment and a fine of 8,000 BF; his immediate arrest was ordered.

13. Both the applicant and the public prosecutor's department appealed. On 4 February 1980, the Ghent Court of Appeal reduced the first sentence to three years' imprisonment and a fine of 20,000 BF and upheld the second. In addition, it unanimously imposed a third sentence, namely one month's imprisonment and a fiscal fine (amende fiscale), for offences which the Oudenaarde court had - wrongly, in the Court of Appeal's view - treated as being linked with others by reason of a single criminal intent.

14. Mr. De Cubber appealed to the Court of Cassation, raising some ten different points of law. One of his grounds, based on Article 292 of the Judicial Code (see paragraph 19 below) and Article 6 para. 1 (art. 6-1) of the Convention, was that Mr. Pilate had been both judge and party in the case since after conducting the preliminary investigation he had acted as one of the trial judges.

The Court of Cassation gave judgment on 15 April 1980 (Pasicrisie 1980, I, pp. 1006-1011). It held that this combination of functions violated neither Article 292 of the Judicial Code nor any other legal provision - such as Article 6 para. 1 (art. 6-1) of the

Convention - nor the rights of the defence. On the other hand, the Court of Cassation upheld a plea concerning the confiscation of certain items of evidence and, to this extent, referred the case back to the Antwerp Court of Appeal; the latter court has in the meantime (on 4 November 1981) directed that the items in question be returned. The Court of Cassation also quashed, of its own motion and without referring the case back, the decision under appeal in so far as the appellant had been sentenced to a fiscal fine. The remainder of the appeal was dismissed.

II. THE RELEVANT LEGISLATION

A. Status and powers of investigating judges

15. Investigating judges, who are appointed by the Crown "from among the judges of the court of first instance" (Article 79 of the Judicial Code), conduct the preparatory judicial investigation (Articles 61 et seq. of the Code of Criminal Procedure). The object of this procedure is to assemble the evidence and to establish any proof against the accused as well as any circumstances that may tell in his favour, so as to provide the chambre du conseil or the chambre des mises en accusation, as the case may be, with the material which it needs to decide whether the accused should be committed for trial. The procedure is secret: it is not conducted in the presence of both parties (non contradictoire) nor is there any legal representation.

The investigating judge also has the status of officer of the criminal investigation police (police judiciaire). In this capacity, he is empowered to inquire into serious and lesser offences (crimes et délits), to assemble evidence and to receive complaints from any person claiming to have been prejudiced by such offences (Articles 8, 9 in fine and 63 of the Code of Criminal Procedure). When so acting, he is placed under the "supervision of the procureur général (State prosecutor)" (Article 279 of the Code of Criminal Procedure and Article 148 of the Judicial Code), although this does not include a power to give directions. "In all cases where the suspected offender is deemed to have been caught in the act", the investigating judge may take "directly" and in person "any action which the procureur du Roi (public prosecutor) is empowered to take" (Article 59 of the Code of Criminal Procedure).

16. Save in the latter category of case, the investigating judge can take action only after the matter has been referred to him either by means of a formal request from the procureur du Roi for the opening of an inquiry (Articles 47, 54, 60, 61, 64 and 138 of the Code of Criminal Procedure) or by means of a criminal complaint coupled with a claim for damages (constitution de partie civile; Articles 63 and 70).

If a court includes several investigating judges, it is for the presiding judge to allocate cases amongst them. In principle, cases are assigned to them in turn, from week to week; however, this is not an inflexible rule and the presiding judge may depart therefrom, for example if the matter is urgent or if a new case has some connection with one that has already been allocated.

17. In order to facilitate the ascertainment of the truth, the investigating judge is invested with wide powers: according to the case-law of the Court of Cassation, he may "take any steps which are not forbidden by law or incompatible with the standing of his office" (judgment of 2 May 1960, Pasicrisie 1960, I, p. 1020). He can, inter alia, summon

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the accused to appear or issue a warrant for his detention, production before a court or arrest (Articles 91 et seq. of the Code of Criminal Procedure); question the accused, hear witnesses (Articles 71 to 86 and 92 of the same Code), confront witnesses with each other (Article 942 of the Judicial Code), visit the scene of the crime (Article 62 of the Code of Criminal Procedure), visit and search premises (Articles 87 and 88 of the same Code), take possession of evidence (Article 89), and so on. The investigating judge has to report to the chambre du conseil on the cases with which he is dealing (Article 127); he takes, by means of an order, decisions on the expediency of measures requested by the public prosecutor's department, such orders being subject to an appeal to the chambre des mises en accusation of the Court of Appeal.

18. When the investigation is completed, the investigating judge transmits the case-file to the procureur du Roi, who will return it to him with his submissions (Article 61, first paragraph).

It is then for the chambre du conseil, which is composed of a single judge belonging to the court of first instance (Acts of 25 October 1919, 26 July 1927 and 18 August 1928), to decide - unless it considers it should order further inquiries - whether to discharge the accused (non-lieu; Article 128 of the Code of Criminal Procedure), to commit him for trial before a district court (tribunal de police; Article 129) or a criminal court (tribunal correctionnel; Article 130) or to send the papers to the procureur général attached to the Court of Appeal (Article 133), depending upon the circumstances.

Unlike his French counterpart, the Belgian investigating judge is thus never empowered to refer a case to the trial court himself. Before taking its decision, the chambre du conseil - which sits in camera - will hear the investigating judge's report. This report will take the form of an oral account of the state of the investigations; the investigating judge will express no opinion therein as to the accused's guilt, it being for the public prosecutor's department to deliver concluding submissions calling for one decision or another.

B. Investigating judges and incompatibilities

19. Article 292 of the 1967 Judicial Code prohibits "the concurrent exercise of different judicial functions ... except where otherwise provided by law"; it lays down that "any decision given by a judge who has previously dealt with the case in the exercise of some other judicial function" shall be null and void.

This rule applies to investigating judges, amongst others. Article 127 specifies that "proceedings before an assize court shall be null and void if the presiding judge or another judge sitting is a judicial officer who has acted in the case as investigating judge ...".

Neither can an investigating judge sit as an appeal-court judge, for otherwise he would have "to review on appeal, and thus as last-instance trial judge, the legality of investigation measures ... which [he] had taken or ordered at first instance" (Court of Cassation, 18 March 1981, Pasicrisie 1981, I, p. 770, and Revue de droit pénal et de criminologie, 1981, pp. 703-719).

20. On the other hand, under the third paragraph of Article 79 of the Judicial Code, as amended by an Act of 30 June 1976, "investigating judges may continue to sit, in accordance with their seniority, to try cases brought before a court of first instance".

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According to the drafting history and decided case-law on this provision, it is immaterial that the cases are ones previously investigated by the judges in question: they would in that event be exercising, not "some other judicial function" within the meaning of Article 292, but rather the same function of judge on the court of first instance; it would be only their assignment that had changed (Parliamentary Documents, House of Representatives, no. 59/49 of 1 June 1967; Court of Cassation, 8 February 1977, Pasicrisie 1977, I, p. 622-623; Court of Cassation judgment of 15 April 1980 in the present case, see paragraph 14 above).

In the case of Blaise, the Court of Cassation confirmed this line of authority in its judgment of 4 April 1984, which followed the submissions presented by the public prosecutor's department. After dismissing various arguments grounded on general principles of law, the Court of Cassation rejected the argument put forward by the appellant on the basis of Article 6 para. 1 (art. 6-1) of the Convention:

> "However, as regards the application of Article 6 para. 1 (art. 6-1) ..., when a case requires a determination of civil rights and obligations or of a criminal charge, the authority hearing the case at first instance and the procedure followed by that authority do not necessarily have to satisfy the conditions laid down by the above-mentioned provision, provided that the party concerned or the accused is able to lodge an appeal against the decision affecting him taken by that authority with a court which does offer all the guarantees stipulated by Article 6 para. 1 (art. 6-1) and has competence to review all questions of fact and of law. In the present case, the appellant does not maintain that the court of appeal which convicted him did not offer those guarantees ...
>
> In any event, the principles and the rule relied on in the ground of appeal do not have the scope therein suggested;
>
> From the sole fact that a trial judge inquired into the case as an investigating judge it cannot be inferred that the accused's right to an impartial court has been violated. It cannot legitimately be feared that the said judge does not offer the guarantees of impartiality to which every accused is entitled.
>
> The investigating judge is not a party adverse to the accused, but a judge of the court of first instance with the responsibility of assembling in an impartial manner evidence in favour of as well as against the accused.
>
> ... ."

PROCEEDINGS BEFORE THE COMMISSION

21. In his application of 10 October 1980 to the Commission (no. 9186/80), Mr. De **Cubber** raised again several of the pleas which he had unsuccessfully made to the Belgian Court of Cassation. He alleged, inter alia, that the Oudenaarde criminal court had not constituted an impartial tribunal, within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, since one of the judges, Mr. Pilate, had previously acted as investigating judge in the same case.

22. On 9 March 1982, the Commission declared the application admissible as regards this complaint and inadmissible as regards the remainder. In its report of 5 July 1983 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a violation of Article 6 para. 1 (art. 6-1) on the point in question. The full text of the Commission's opinion is reproduced as an annex to the present judgment.

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AS TO THE LAW

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

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

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

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

The Government disagreed. They submitted:

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

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

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

A. The Government's principal plea

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

25. As to the subjective approach, the applicant alleged before the Commission that Mr. Pilate had for years shown himself somewhat relentless in regard to his (the applicant's) affairs (see paragraphs 45-47 of the Commission's report), but his lawyer did not maintain this line of argument before the Court; the Commission, for its part, rejected the Government's criticism that it had made a subjective analysis (see paragraphs 63, 68-69 and 72-73 of the report; verbatim record of the hearings held on 23 May 1984).

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

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

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

28. The Government put forward a series of arguments to show that this combination of functions, which was unquestionably compatible with the Judicial Code as construed in the light of its drafting history (see paragraph 20, first sub-paragraph, above), was also reconcilable with the Convention. They pointed out that in **Belgium** an investigating judge is fully independent in the performance of his duties; that unlike the judicial officers in the public prosecutor's department, whose submissions are not binding on him, he does not have the status of a party to criminal proceedings and is not "an instrument of the prosecution"; that "the object of his activity" is not, despite Mr. De **Cubber**'s allegations, "to establish the guilt of the person he believes to be guilty" (see paragraph 44 of the Commission's report), but to "assemble in an impartial manner evidence in favour of as well as against the accused", whilst maintaining "a just balance between prosecution and defence", since he "never ceases to be a judge"; that he does not take the decision whether to commit the accused for trial - he merely presents to the chambre du conseil, of which he is not a member, objective reports describing the progress and state of the preliminary investigations, without expressing any opinion of his own, even assuming he has formed one (see paragraphs 52-54 of the Commission's report and the verbatim record of the hearings held on 23 May 1984).

29. This reasoning no doubt reflects several aspects of the reality of the situation (see paragraphs 15, first sub-paragraph, 17 in fine and 18 above) and the Court recognises its cogency. Nonetheless, it is not in itself decisive and there are various other factors telling in favour of the opposite conclusion.

To begin with, a close examination of the statutory texts shows the distinction between judicial officers in the public prosecutor's department and investigating judges to be less clear-cut than initially appears. An investigating judge, like "procureurs du Roi and their deputies", has the status of officer of the criminal investigation police and, as such, is "placed under the supervision of the procureur général"; furthermore, "an investigating

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judge" may, in cases "where the suspected offender is deemed to have been caught in the act", "take directly" and in person "any action which the procureur du Roi is empowered to take" (see paragraph 15, second sub-paragraph, above).

In addition to this, as an investigating judge he has very wide-ranging powers: he can "take any steps which are not forbidden by law or incompatible with the standing of his office" (see paragraph 17 above). Save as regards the warrant of arrest issued against the applicant on 5 April 1977, the Court has only limited information as to the measures taken by Mr. Pilate in the circumstances, but, to judge by the complexity of the case and the duration of the preparatory investigation, they must have been quite extensive (see paragraphs 8 and 12 above).

That is not all. Under Belgian law the preparatory investigation, which is inquisitorial in nature, is secret and is not conducted in the presence of both parties; in this respect it differs from the procedure of investigation followed at the hearing before the trial court, which, in the instant case, took place on 8 and 22 June 1979 before the Oudenaarde court (see paragraphs 12 and 15 above). One can accordingly understand that an accused might feel some unease should he see on the bench of the court called upon to determine the charge against him the judge who had ordered him to be placed in detention on remand and who had interrogated him on numerous occasions during the preparatory investigation, albeit with questions dictated by a concern to ascertain the truth.

Furthermore, through the various means of inquiry which he will have utilised at the investigation stage, the judge in question, unlike his colleagues, will already have acquired well before the hearing a particularly detailed knowledge of the - sometimes voluminous - file or files which he has assembled. Consequently, it is quite conceivable that he might, in the eyes of the accused, appear, firstly, to be in a position enabling him to play a crucial role in the trial court and, secondly, even to have a pre-formed opinion which is liable to weigh heavily in the balance at the moment of the decision. In addition, the criminal court (tribunal correctionnel) may, like the court of appeal (see paragraph 19 in fine above), have to review the lawfulness of measures taken or ordered by the investigating judge. The accused may view with some alarm the prospect of the investigating judge being actively involved in this process of review.

Finally, the Court notes that a judicial officer who has "acted in the case as investigating judge" may not, under the terms of Article 127 of the Judicial Code, preside over or participate as judge in proceedings before an assize court; nor, as the Court of Cassation has held, may he sit as an appeal-court judge (see paragraph 19 above). Belgian law-makers and case-law have thereby manifested their concern to make assize courts and appeal courts free of any legitimate suspicion of partiality. However, similar considerations apply to courts of first instance.

30. In conclusion, the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt. Although the Court itself has no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation (see paragraph 25 above), it recognises, having regard to the various factors discussed above, that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part. Without underestimating the force of the Government's arguments and without adopting a subjective approach (see paragraphs 25 and 28 above), the Court recalls that a restrictive interpretation of Article 6 para. 1 (art. 6-1) - notably in regard to observance of the fundamental principle of the impartiality of the

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courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention (see the above-mentioned Delcourt judgment, Series A no. 11, pp. 14-15, para. 25 in fine).

B. The Government's first alternative plea

31. In the alternative, the Government submitted, at the hearings on 23 May 1984, that the Court should not disregard its previous case-law; they relied essentially on the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981 and on the Albert and Le Compte judgment of 10 February 1983.

In both of these judgments, the Court held that proceedings instituted against the applicants before the disciplinary organs of the Ordre des médecins (Medical Association) gave rise to a "contestation" (dispute) over "civil rights and obligations" (Series A no. 43, pp. 20-22, paras. 44-49, and Series A no. 58, pp. 14-16, paras. 27-28). Since Article 6 para. 1 (art. 6-1) was therefore applicable, it had to be determined whether the individuals concerned had received a hearing by a "tribunal" satisfying the conditions which that Article lays down. Their cases had been dealt with by three bodies, namely a Provincial Council, an Appeals Council and the Court of Cassation. The European Court did not consider it "indispensable to pursue this point" as regards the Provincial Council, for the reason which, in its judgment of 23 June 1981, was expressed in the following terms:

> "Whilst Article 6 para. 1 (art. 6-1) embodies the 'right to a court' ..., it nevertheless does not oblige the Contracting States to submit 'contestations' (disputes) over 'civil rights and obligations' to a procedure conducted at each of its stages before 'tribunals' meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system." (Series A no. 43, pp. 22-23, paras. 50-51)

The judgment of 10 February 1983 developed this reasoning further:

> "In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 (art. 6-1) is applicable, conferring powers in this manner does not in itself infringe the Convention.... Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (art. 6-1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction" - that is to say, which has the competence to furnish "a [judicial] determination ... of the matters in dispute, both for questions of fact and for questions of law" - "and does provide the guarantees of Article 6 para. 1 (art. 6-1)." (Series A no. 58, p. 16, para. 29)

In the Government's submission, the principles thus stated apply equally to "criminal charges" within the meaning of Article 6 para. 1 (art. 6-1). As confirmation of this, the Government cited the Oztürk judgment of 21 February 1984 (Series A no. 73, pp. 21-22, para. 56) in addition to the above-mentioned judgments of 23 June 1981 and 10 February 1983 (Series A no. 43, pp. 23-24, para. 53, and Series A no. 58, pp. 16-17, para. 30).

In the particular circumstances, the Government noted, Mr. De **Cubber**'s complaint was directed solely against the Oudenaarde court; he had no objection to make

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concerning the Ghent Court of Appeal, which in the present case, so they argued, constituted the "judicial body that has full jurisdiction", as referred to in the above-quoted case-law.

On the whole of this issue, the Government cited the Blaise judgment of 4 April 1984, which the Belgian Court of Cassation had delivered in a similar case, and the concordant submissions of the public prosecutor's department in that case (see paragraph 20 above).

32. The Commission's Delegate did not share this view; the Court agrees in substance with his arguments.

The thrust of the plea summarised above is that the proceedings before the Oudenaarde court fell outside the ambit of 1Article 6 para. 1 (art. 6-1). At first sight, this plea contains an element of paradox. Article 6 para. 1 (art. 6-1) concerns primarily courts of first instance; it does not require the existence of courts of further instance. It is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up (see the above-mentioned Delcourt judgment, Series A no. 11, p. 14 in fine, and, as the most recent authority, the Sutter judgment of 22 February 1984, Series A no. 74, p. 13, para. 28). However, even when this is the case it does not follow that the lower courts do not have to provide the required guarantees. Such a result would be at variance with the intention underlying the creation of several levels of courts, namely to reinforce the protection afforded to litigants.

Furthermore, the case-law relied on by the Government has to be viewed in its proper context. The judgments of 23 June 1981, 10 February 1983 and 21 February 1984 concerned litigation which was classified by the domestic law of the respondent State not as civil or criminal but as disciplinary (Series A no. 43, p. 9, para. 11) or administrative (Series A no. 73, pp. 10-14, paras. 17-33); these judgments related to bodies which, within the national system, were not regarded as courts of the classic kind, for the reason that they were not integrated within the standard judicial machinery of the country. The Court would not have held Article 6 para. 1 (art. 6-1) applicable had it not been for the "autonomy" of the concepts of "civil rights and obligations" and "criminal charge". In the present case, on the other hand, what was involved was a trial which not only the Convention but also Belgian law classified as criminal; the Oudenaarde criminal court was neither an administrative or professional authority, nor a jurisdictional organ of a professional association (see the above-mentioned judgments, Series A no. 43, p. 23, para. 51, Series A no. 58, p. 16, para. 29, and Series A no. 73, pp. 21-22, para. 56), but a proper court in both the formal and the substantive meaning of the term (Decisions and Reports, no. 15, p. 78, paras. 59-60, and p. 87: opinion of the Commission and decision of the Committee of Ministers on application no. 7360/76, Zand v. Austria). The reasoning adopted in the three above-mentioned judgments, to which should be added the Campbell and Fell judgment of 28 June 1984 (Series A no. 80, pp. 34-39, paras. 67-73 and 76), cannot justify reducing the requirements of Article 6 para. 1 (art. 6-1) in its traditional and natural sphere of application. A restrictive interpretation of this kind would not be consonant with the object and purpose of Article 6 para. 1 (art. 6-1) (see paragraph 30 in fine above).

33. At the hearings, the Commission's Delegate and the applicant's lawyer raised a further question, concerning not the applicability of Article 6 para. 1 (art. 6-1) but rather its application to the particular facts: had not "the subsequent intervention" of the Ghent

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Court of Appeal "made good the wrong" or "purged" the first-instance proceedings of the "defect" that vitiated them?

The Court considers it appropriate to answer this point although the Government themselves did not raise the issue in such terms.

The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention's provisions: this is precisely the reason for the existence of the rule of exhaustion of domestic remedies, contained in Article 26 (art. 26) (see the Guzzardi and the Van Oosterwijck judgments of 6 November 1980, Series A no. 39, p. 27, para. 72, and Series A no. 40, p. 17, para. 34). Thus, the Adolf judgment of 26 March 1982 noted that the Austrian Supreme Court had "cleared ... of any finding of guilt" an applicant in respect of whom a District Court had not respected the principle of presumption of innocence laid down by Article 6 para. 2 (art. 6-2) (Series A no. 49, pp. 17-19, paras. 38-41).

The circumstances of the present case, however, were different. The particular defect in question did not bear solely upon the conduct of the first-instance proceedings: its source being the very composition of the Oudenaarde criminal court, the defect involved matters of internal organisation and the Court of Appeal did not cure that defect since it did not quash on that ground the judgment of 29 June 1979 in its entirety.

C. The Government's further alternative plea

34. In the further alternative, the Government pleaded that a finding by the Court of a violation of Article 6 para. 1 (art. 6-1) would entail serious consequences for Belgian courts with "limited staff", especially if it were to give a judgment "on the general question of principle" rather than a judgment "with reasoning limited to the very special" facts of the case. In this connection, the Government drew attention to the following matters. From 1970 to 1984, the workload of such courts had more than doubled, whereas there had been no increase in the number of judges. At Oudenaarde and at Nivelles, for example, taking account of vacant posts (deaths, resignations, promotions) and occasional absences (holidays, illness, etc.), there were only six or seven judges permanently in attendance, all of whom were "very busy", if not overwhelmed with work. Accordingly, it was virtually inevitable that one of the judges had to deal in turn with different aspects of the same case. To avoid this, it would be necessary either to constitute "special benches" - which would be liable to occasion delays incompatible with the principle of trial "within a reasonable time" - or to create additional posts, an alternative that was scarcely realistic in times of budgetary stringency.

35. The Court recalls that the Contracting States are under the obligation to organise their legal systems "so as to ensure compliance with the requirements of Article 6 para. 1 (art. 6-1)" (see the Guincho judgment of 10 July 1984, Series A no. 81, p. 16, para. 38); impartiality is unquestionably one of the foremost of those requirements. The Court's task is to determine whether the Contracting States have achieved the result called for by the Convention, not to indicate the particular means to be utilised.

D. Conclusion

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36. To sum up, Mr. De Cubber was the victim of a breach of Article 6 para. 1 (art. 6-1).

II. THE APPLICATION OF ARTICLE 50 (art. 50)

37. The applicant has filed claims for just satisfaction in respect of pecuniary and non-pecuniary damage, but the Government have not yet submitted their observations thereon. Since the question is thus not ready for decision, it is necessary to reserve it and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 6 para. 1 (art. 6-1);

2. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Government to submit to the Court, within the forthcoming two months, their written observations on the said question and, in particular, to notify the Court of any agreement reached between them and the applicant;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 26 October 1984.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

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

** The revised Rules of Court, which entered into force on1 January 1983, are applicable to the present case.

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DE CUBBER v. BELGIUM JUGDMENT

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COURT (PLENARY)

CASE OF HAUSCHILDT v. DENMARK

(Application no. 10486/83)

JUDGMENT

STRASBOURG

24 May 1989

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In the Hauschildt case*,

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

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr B. GOMARD, *ad hoc judge*,

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

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

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 October 1987, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 10486/83) against Kingdom of Denmark lodged with the Commission on 27 October 1982 under Article 25 (art. 25) by a Danish citizen, Mr Mogens Hauschildt.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Denmark recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included, as ex officio members, Mr J. Gersing, the elected judge of Danish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 30 November 1987, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr J. Pinheiro Farinha, Mr R. Macdonald, Mr R. Bernhardt, Mr A. Spielmann and Mr J. De Meyer (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Professor B. Gomard was appointed by the Government of Denmark ("the Government") on 1 August 1988 to sit as an ad hoc judge in place of Mr Gersing, who had died, and Mr C. Russo replaced Mr Pinheiro Farinha, who was prevented from taking part in the consideration of the case (Rules 22 para. 1, 23 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the

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Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the President's orders and directions, the registry received on 29 April 1988 the applicant's memorial and on 16 May 1988 the Government's memorial.

By letter of 4 August 1988, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, the representatives who would be appearing before the Court, the President directed on 4 August 1988 that the oral proceedings should open on 26 September 1988 (Rule 38).

6. The hearing took place in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before it opened, the Chamber held a preparatory meeting, in the course of which it decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

There appeared before the Court:

- for the Government

  Mr T. LEHMANN, Ministry of Foreign Affairs, *Agent*,
  Mr I. FOIGHEL, Professor of Law, *Counsel*,
  Mr J. BERNHARD, Ministry of Foreign Affairs,
  Mr K. HAGEL-SØRENSEN, Ministry of Justice,
  Mr J. HALD, Ministry of Justice,
  Mrs N. HOLST-CHRISTENSEN, Ministry of Justice, *Advisers*;

- for the Commission

  Mr H. DANELIUS, *Delegate*;

- for the applicant

  Mr G. ROBERTSON, Barrister-at-Law, *Counsel*,
  Mr F. REINDEL,
  Mr K. STARMER, *Advisers*.

The Court heard addresses by Mr Lehmann and Mr Foighel for the Government, by Mr Danelius for the Commission and by Mr Robertson and Mr Reindel for the applicant, as well as their replies to its questions. The Agent of the Government and counsel for the applicant filed several documents during the hearing.

7. On various dates between 26 September 1988 and 27 January 1989, the registry received the applicant's claims under Article 50 (art. 50) of the Convention and the observations of the Government and the Commission thereon.

AS TO THE FACTS

I. THE PARTICULAR FACTS OF THE CASE

8. The applicant, Mr Mogens **Hauschildt**, who is a Danish citizen born in 1941, currently resides in Switzerland.

In 1974, he established a company, Scandinavian Capital Exchange PLC ("SCE"), which traded as a bullion dealer and also provided financial services. SCE became the largest bullion dealer in Scandinavia, with associated companies in Sweden, Norway, the Netherlands, the United Kingdom and Switzerland. The applicant was appointed its managing director.

9. Over the years and until the end of 1979, difficulties arose between SCE and the Danish National Bank, the Internal Revenue Service and the Ministry of Trade. They concerned the flow of money to and from SCE and its associated companies abroad.

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A. Criminal proceedings against the applicant

1. Investigation stage

10. On 30 January 1980 the Internal Revenue Service forwarded a complaint to the police in which it stated that the activities of the applicant and SCE seemed to involve violations of the Danish tax laws and the Penal Code.

After obtaining a warrant from a court, the police arrested the applicant, seized all available documents at the seat of the company and closed its business on 31 January 1980.

11. The applicant was brought before the Copenhagen City Court (Københavns byret) the following day and charged with fraud and tax evasion. The court directed that he should be kept under arrest for three consecutive periods of twenty-four hours; no objection was raised.

On 2 February 1980, after hearing the prosecution and the defence, the City Court held that the charges were not ill-founded and remanded the applicant in custody in solitary confinement under sections 762 and 770(3) of the Administration of Justice Act (Retsplejeloven - "the Act"; see paragraphs 33 and 36 below).

As a result of successive decisions, a number of which were taken by Judge Claus Larsen, Mr **Hauschildt** was held in detention on remand until the public trial began before the City Court on 27 April 1981 (see paragraphs 19-21 below). He also spent some time in solitary confinement (31 January to 27 August 1980).

12. During the investigation stage, the police seized further documents and property. Inquiries were also carried out in the United Kingdom, the Netherlands, Belgium, Switzerland, Liechtenstein and the United States of America. In accordance with the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters, the judge of the City Court on several occasions authorised the prosecution to seek co-operation from other European countries in securing documents as well as in other matters (see paragraph 22 below).

On 4 February 1981 the indictment, which ran to 86 pages, was served on Mr **Hauschildt**. He was charged with fraud and embezzlement on eight counts involving approximately 45 million Danish crowns.

2. First-instance proceedings

13. The trial at first instance began before the City Court, sitting with one professional judge, Judge Larsen, and two lay judges, on 27 April 1981. According to the applicant, he had complained about the presiding judge before the trial, but no formal request was made on the matter. At the trial he was advised by his lawyers that section 60(2) of the Act debarred any challenge of the judge on the basis of the pre-trial decisions that he had made (see paragraphs 20-22 and 28 below).

14. In the course of over 130 court sittings at the trial the City Court heard some 150 witnesses as well as the applicant and examined a substantial number of documents. Furthermore, opinions from appointed experts, in particular accountants, were taken into consideration. The court also issued numerous orders concerning the remand in custody and solitary confinement of the applicant, the sending of commissions rogatory and other procedural matters (see paragraph 24 below).

15. The City Court, with Judge Larsen presiding, gave judgment on 1 November 1982. It found Mr **Hauschildt** guilty on all counts and sentenced him to seven years' imprisonment.

3. Appeal proceedings

16. The applicant appealed to the High Court of Eastern Denmark (Østre Landsret). This court sat with three professional judges and three lay judges. Its jurisdiction extended to both the law and the facts, and involved a trial de novo.

The hearing of the appeal began on 15 August 1983. Before the appeal hearing, the applicant had raised with the presiding judge an objection against one of the judges on the ground of his involvement

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in a City Court decision to seize the applicant's correspondence and assets. However, counsel for the defence refused to argue this point on the basis of section 60(2) of the Act, and Mr **Hauschildt** withdrew the objection.

17. On 2 March 1984 the High Court found the applicant guilty on six of the eight counts and sentenced him to five years' imprisonment. The extensive character of the fraud was treated as an aggravating factor. On the other hand, the court took into account the fact that the applicant had been held in custody on remand since 31 January 1980, and considered this detention harsher than regular imprisonment. Mr **Hauschildt** was released on the same day.

18. The applicant's subsequent application for leave to appeal to the Supreme Court (Højesteret) was rejected by the Ministry of Justice on 4 May 1984.

B. Mr Hauschildt's detention on remand and other procedural matters

1. At the investigation stage

19. As already mentioned (see paragraph 11 above), the City Court judge had decided on 2 February 1980 to remand Mr **Hauschildt** in custody in solitary confinement. In the judge's opinion, there were reasons to believe that the applicant, if at large, would abscond or impede the investigation (section 762 (1) nos. 1 and 3 and section 770(3) of the Act; see paragraphs 33 and 36 below). As justification for the detention he listed the following elements:

(1) the circumstance that the applicant had lived outside Denmark until 1976 and at the time of his arrest was planning to move to Sweden;

(2) his economic interests abroad;

(3) the importance of the case;

(4) the risk of his obstructing the investigation by exerting influence on persons in Denmark and abroad.

20. In accordance with section 767 of the Act, the applicant's continued detention on remand was subject to regular judicial control carried out at maximum intervals of four weeks. The elements set out in the initial decision of 2 February 1980, which had been taken by Judge Rasmussen, were the basis for the applicant's detention until 10 April 1980.

On 10 April the City Court judge, Mr Larsen, who was subsequently to preside over the trial court that heard the applicant's case (see paragraph 13 above), also relied on section 762(1) no. 2 as a ground for his remand in custody (danger of his committing new crimes; see paragraph 33 below). The reason prompting that decision was the fact that the applicant had, whilst in custody, secretly communicated with his wife and asked her to remove money from certain bank accounts as well as certain personal property. Subsequently, on 30 April, the same judge ordered her detention on remand and the stopping of a letter written by the applicant.

At a later stage, when ruling on 5 September 1980 on an appeal against an order of further remand in custody, the High Court referred in addition to sub-section 2 of section 762 (see paragraph 33 below), since the investigations carried out by the police at that time indicated a possible loss by the injured parties of approximately 19,5 million Danish crowns. From 24 September on, Judge Larsen also relied additionally on this sub-section.

The applicant's detention on remand continued to be based on each of the three paragraphs of sub-section (1) and on sub-section (2) of section 762 (see paragraph 33 below) until 17 August 1982 when paragraph 3 of sub-section (1) was no longer relied on.

21. As from the applicant's arrest on 31 January 1980 and until the trial started on 27 April 1981, police investigations and his continuing detention on remand necessitated decisions to be taken by the City Court sitting with one professional judge. A total of approximately forty court sittings were held in connection with the case during this period, twenty of which were concerned with remand in custody and, from 31 January to 27 August 1980, also with the question of solitary confinement. Fifteen of these decisions were taken by Judge Larsen (10 April, 30 April, 28 May, 25 June, 20 August, 27 August, 24

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September, 15 October, 12 November, 3 December and 10 December 1980 and 4 February, 25 February, 11 March and 8 April 1981). On five of these occasions he ordered prolongation of the applicant's solitary confinement (10 April, 30 April, 28 May, 25 June and 20 August 1980). On 27 August 1980, however, he terminated the solitary confinement.

22. During this period, the City Court decided on three occasions (5 March, 16 June and 13 August), on application by the police, to request the co-operation of other countries in securing documents and in other matters (see paragraph 12 above). Two of these decisions were taken by Judge Larsen (16 June and 13 August 1980).

The City Court judge was furthermore called on to rule on a number of other procedural matters such as the seizure of the applicant's property and documents, his contacts with the press, access to police reports, visits in prison, payment of defence counsel fees and correspondence. Besides the order of 30 April 1980 to detain Mr **Hauschildt**'s wife on remand (see paragraph 20 above), Judge Larsen gave directions on 28 May 1980 as to the stopping of another of the applicant's letters, on 12 November 1980 as to the seizure of a certain amount of money which allegedly belonged to the applicant, on 4 February 1981 as to a change of defence counsel, and finally on 11 March 1981 as to the applicant's access to certain parts of the police files. These rulings were delivered at the request either of the prosecutor or of the defence counsel.

23. Mr **Hauschildt** brought various decisions taken by the City Court judge before the High Court sitting on appeal with three professional judges. On five occasions the High Court was called upon to inquire into the applicant's continued remand in custody. Altogether thirteen different judges participated in these decisions, none of whom was subsequently involved in the appeal proceedings regarding conviction and sentence. The same applied to the six judges who heard appeals on other procedural matters.

2. During the trial at first instance

24. During Mr **Hauschildt**'s trial, from 27 April 1981 to 1 November 1982 (see paragraphs 13-15 above), the City Court, sitting with Judge Larsen as presiding judge and two lay judges, was also required to give rulings on a number of procedural matters. In particular, the court prolonged the applicant's detention on remand twenty-three times on the basis of section 762(1) and (2). Except on two occasions, these orders were made by Judge Larsen and, on four, he was joined by the two lay judges. Furthermore, from 2 July to 7 October 1981, the applicant was kept in solitary confinement at the request of the prosecuting authorities. Although the first order to this effect was made by another judge, Judge Larsen on two occasions prolonged the solitary confinement. In addition, on five occasions, he authorised the seeking of the co-operation of other countries.

25. The applicant entered nineteen appeals against these various rulings to the High Court. On twelve occasions, the High Court upheld the decision of the City Court concerning remand in custody. Fourteen judges participated in these judgments, none of whom was subsequently involved in the hearing of the applicant's appeal against conviction and sentence. The applicant's other appeals related to matters such as the appointment of defence counsel, the hearing of further witnesses, the issue of search warrants, custody in solitary confinement and travel expenses for defence counsel. Twelve different judges took part in these decisions. On 14 July 1981 three High Court judges upheld the order continuing the applicant's solitary confinement, one of whom also sat on the court for the hearing of the applicant's appeal against judgment.

3. During the appeal proceedings

26. According to Danish law, the applicant was still considered as being in custody on remand during the appeal proceedings (see paragraphs 16-17 above). The High Court had accordingly to review the detention at least every four weeks. Out of the nineteen renewals ordered, ten were ordered before the hearing opened, whereas the remaining nine were ordered during the sittings. With a few exceptions all decisions concerning detention on remand were adopted by the same judges as took part in the

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proceedings on appeal. During the hearing (15 August 1983 to 2 March 1984), the professional judges were joined by three lay judges.

The above-mentioned rulings of the High Court were based on section 762(1) no. 1 and 762(2) of the Act (see paragraph 33 below). The court attached particular importance to the gravity of the charges and to the fact that the applicant had lived abroad and still had substantial economic interests abroad.

27. The applicant twice obtained leave from the Ministry of Justice to bring the issue of his continued detention on remand before the Supreme Court. On 26 January 1983 the Supreme Court upheld the decision of the High Court, while considering that the detention should also be based on section 762(1) no. 2 (see paragraph 33 below). In fact, some of the offences for which the applicant had been convicted by the City Court had been committed whilst he had been in custody on remand. On 9 December 1983 the Supreme Court directed that the detention should continue but be based solely on section 762(1) nos. 1 and 2 (see paragraph 33 below). The majority of the court found that the public interest no longer required the applicant to be kept in custody under section 762(2).

II. RELEVANT DOMESTIC LAW

28. The challenge of a judge is governed by sections 60 to 63 of the Act:

Section 60

"(1) No one may act as a judge in a case where he,

1. is himself a party to the case, or has an interest in its outcome, or, if it is a criminal case, has suffered injury as a result of the criminal offence;

2. is related by blood or marriage to one of the parties in a civil case or with the accused in a criminal case, whether in lineal ascent or descent or collaterally up to and including first cousins, or is the spouse, guardian, adoptive or foster parent or adoptive or foster child of one of the parties or of the accused;

3. is married, or related by blood or marriage in lineal ascent or descent or collaterally up to and including first cousins, to a lawyer or other person representing one of the parties in a civil case or, in a criminal case, to the injured party or his representative or to any public prosecutor or police officer appearing in such a case or to the accused's defence counsel;

4. has appeared as a witness or as an expert (syn- og skønsmand) in the case, or, if the case is a civil one, has acted in it as a lawyer or otherwise as representative of one of the parties, or, if the case is a criminal one, as a police officer, public prosecutor, defence counsel or other representative of the injured party;

5. has dealt with the case as a judge in the lower instance, or, if it is a criminal case, as member of the jury or as lay judge.

(2) The fact that the judge may previously have had to deal with a case as a result of his holding several official functions shall not disqualify him, when there is no ground, in the circumstances of the case, to presume that he has any special interest in the outcome of the case."

Section 61

"In the situations mentioned in the preceding section, the judge shall, if he sits as a single judge, withdraw from sitting on the court by a decision pronounced by himself. If he sits on the court together with other judges, he shall inform the court of the circumstances which according to the preceding section may disqualify him. Likewise, the other judges on the court, whenever aware of such circumstances, are entitled and have the duty to raise the question of disqualification, whereafter the question is decided by the court, without the judge in question being excluded from taking part in the decision."

Section 62

"(1) The parties can not only demand that a judge withdraw from sitting in the instances referred to in section 60 but may also object to a judge hearing a case when other circumstances are capable of raising doubt about his complete impartiality. In such instances the judge, too, if he fears that the parties cannot trust him fully, may withdraw from sitting even when no objection is lodged against him. Where a case is heard by several judges, any one of them may raise the question whether any of the judges on the bench should step down on account of the circumstances described

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above.

(2) The questions which might arise under this section shall be decided in the same manner as is laid down in section 61 in regard to the situations enumerated in section 60."

Section 63

"The question whether or not a judge should remain on the bench, which when raised by one of the parties in civil matters is treated as other procedural objections, should as far as possible be raised before the beginning of the oral hearing. This question may be decided without the parties having been given the opportunity to submit comments."

29. According to the Government, no case-law on section 60(2) had been established by the Supreme Court at the time when the applicant's case was pending before the Danish courts. However, by a ruling of 12 March 1987, the Supreme Court held that if a judge has directed the remand in custody of a person charged with a criminal offence, this shall not in itself be deemed to disqualify the judge from taking part in the subsequent trial and delivery of judgment.

30. In connection with an amendment extending the application of section 762(2) (see paragraph 35 below), section 60 was amended on 10 June 1987 by the Danish Parliament. Sub-section (2) as amended now provides that "no one shall act as a judge in the trial if, at an earlier stage of the proceedings, he has ordered the person concerned to be remanded into custody solely under section 762(2), unless the case is tried as a case in which the accused pleads guilty."

This amendment came into force on 1 July 1987.

31. In Denmark, the investigation is carried out by the prosecuting authorities, with the assistance of the police, and not by a judge. The functions of the police at the investigation stage are regulated by sections 742 and 743 of the Act, which provide:

Section 742

"(1) Information about criminal offences shall be submitted to the police.

(2) The police shall set in motion an investigation either on the basis of such information or on their own initiative where there is a reasonable ground for believing that a criminal offence which is subject to public prosecution has been committed."

Section 743

"The aim of the investigation is to clarify whether the requirements for establishing criminal responsibility or for imposing any other sanction under criminal law are fulfilled and to produce information to be used in the determination of the case as well as to prepare the case for trial."

32. Section 746 of the Act governs the role of the court:

"The court shall settle disputes concerning the lawfulness of measures of investigation taken by the police as well as those concerning the rights of the suspect and the defence counsel, including requests from the defence counsel or the suspect concerning the carrying out of further investigation measures. The decision shall be taken on request by order of the court."

33. Arrest and detention on remand are dealt with in sections 760 and 762 of the Act:

Section 760

"(1) Any person who is taken into custody shall be released as soon as the reason for the arrest is no longer present. The time of his release shall appear in the report.

(2) Where the person taken into custody has not been released at an earlier stage he shall be brought before a judge within 24 hours after his arrest. The time of his arrest and of his appearance in court shall appear in the court transcript."

Section 762

"(1) A suspect may be detained on remand when there is a justified reason to believe that he has committed an offence which is subject to public prosecution, provided the offence may under the law result in imprisonment for one year and six months or more and if

1. according to information received concerning the suspect's situation there is specific reason to believe that he will

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evade prosecution or execution of judgment, or

2. according to information received concerning the suspect's situation there is specific reason to fear that, if at large, he will commit a new offence of the nature described above, or

3. in view of the circumstances of the case there is specific reason to believe that the suspect will impede the investigation, in particular by removing evidence or by warning or influencing others.

(2) A suspect may furthermore be detained on remand when there is a 'particularly confirmed suspicion' [translation supplied by the Government of the Danish phrase saerlig bestyrket mistanke] that he has committed an offence which is subject to public prosecution and which may under the law result in imprisonment for six years or more and when respect for the public interest according to the information received about the gravity of the case is judged to require that the suspect should not be at liberty.

(3) Detention on remand may not be imposed if the offence can be expected to result in a fine or in light imprisonment (haefte) or if the deprivation of liberty will be disproportionate to the interference with the suspect's situation, the importance of the case and the outcome expected if the suspect is found guilty."

34. Sub-section 2 of section 762 is applicable even in the absence of any of the conditions set out in sub-section 1. Section 762(2) was first inserted in the Act in 1935, following an aggravated rape case. In the Parliamentary record concerning this amendment (Rigsdagstidende, 1934-35 Part B, col. 2159), it is stated:

"When everyone assumes that the accused is guilty and therefore anticipates serious criminal prosecution against him, it may in the circumstances be highly objectionable that people, in their business and social lives, still have to observe and endure his moving around freely. Even though his guilt and its consequences have not yet been established by final judgment, the impression may be given of a lack of seriousness and consistency in the enforcement of the law, which may be likely to confuse the concept of justice."

35. Section 762(2) was amended in 1987 in order to extend its application to certain crimes of violence which were expected to entail a minimum of sixty days' imprisonment. In reply to a criticism in an editorial in the newspaper Politiken, the Danish Minister of Justice wrote on 30 December 1986:

"In so far as it ... has been suggested that the Bill opens possibilities for the imprisonment of innocent persons, I find reason to stress that my proposed Bill makes it a condition that there is a particularly confirmed suspicion [the Minister's emphasis] that the accused has committed the crime before he can be remanded in custody. Thus there has to be a very high degree of clarity with regard to the question of guilt before the provision can be applied and this is the very means of ensuring that innocent persons are not imprisoned."

36. Solitary confinement is governed by section 770(3) of the Act, which at the relevant time read as follows:

"On application by the police the court may decide that the detainee shall be totally or partially isolated if the purpose of the detention on remand so requires."

This provision was amended on 6 June 1984.

PROCEEDINGS BEFORE THE COMMISSION

37. Mr Hauschildt first wrote to the Commission on 26 August 1980. In this and further communications registered as application no. 10486/83, he referred to Articles 3, 5, 6, 7 and 10 (art. 3, art. 5, art. 6, art. 7, art. 10) of the Convention and Article 1 of Protocol No. 4 (P4-1). As regards Article 6 (art. 6), he claimed that he did not receive a fair trial by an impartial tribunal within a reasonable time; in support of this contention, he pointed out, inter alia, that the presiding judge of the City Court and the High Court judges, who had respectively convicted him and examined his appeal, had taken before and during his trials numerous decisions regarding his detention on remand and other procedural matters.

38. On 9 October 1986 the Commission declared the application admissible as regards this last complaint but inadmissible in all other respects.

In its report adopted on 16 July 1987, the Commission expressed the opinion that there had been no

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violation of Article 6 para. 1 (art. 6-1) of the Convention (nine votes to seven). The full text of the Commission's opinion and of the collective dissenting opinion contained in the report is reproduced as an annex to this judgment.

AS TO THE LAW

I. PRELIMINARY OBJECTION OF NON-EXHAUSTION OF DOMESTIC REMEDIES

39. The Government pleaded before the Court - as they had already unsuccessfully done before the Commission - that the application was inadmissible for failure to exhaust domestic remedies (Article 26 of the Convention) (art. 26). In support of this preliminary objection, they argued that, in so far as Mr **Hauschildt** feared that Judge Larsen and the judges of the High Court lacked impartiality as a consequence of having made several pre-trial decisions in his case, he could have challenged them under sections 60(2) and 62 of the Act (see paragraph 28 above), but never did so.

40. The applicant countered by explaining that he had been advised by counsel that the Act did not permit such a course of action. This advice was based on reading section 62 of the Act in conjunction with section 60(2) and inferring therefrom that challenge of a judge relying on the fact of his having given pre-trial decisions - that is having acted in an official function other than that of trial judge - could be successfully made only on the ground that he had some "special interest in the outcome of the case" (section 60(2)). This ground, in the opinion of counsel, did not apply in the instant case.

The Government described this construction of the relevant sections of the Act as a "quite obvious misinterpretation". On their own interpretation, it would have been open to the applicant to challenge both Judge Larsen and the High Court judges on the ground that their responsibility for a number of pre-trial decisions raised doubts as to their complete impartiality. In support of this contention, they referred to a decision of 12 March 1987 by the Danish Supreme Court, where it was held that the making of orders as to detention on remand at the pre-trial stage should not per se be deemed to disqualify the judge from sitting in the subsequent trial (see paragraph 29 above).

41. It is incumbent on the Government to satisfy the Court that the remedy in question was available and effective at the relevant time - that is to say, at the opening of Mr **Hauschildt**'s trial (27 April 1981) and at the opening of the hearing on appeal (15 August 1983).

The Court cannot share the Government's view that the interpretation put on sections 60(2) and 62 of the Act by counsel for the defence was quite obviously wrong.

The Government have not alleged ascertainable facts - such as previous case-law or doctrine - which should have caused counsel for the defence to have doubts concerning his interpretation of the Act. On the contrary, they did not deny that for several years nobody had ever challenged a trial judge on the ground of his having made pre-trial decisions in the case. The latter fact suggests general acceptance of the system, or at least of the interpretation relied on by counsel for the defence. The Supreme Court's decision of 12 March 1987, whatever its relevance to the circumstances of the present case, does not alter the position as it existed at the time of Mr **Hauschildt**'s trial (see, inter alia and mutatis mutandis, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, pp. 32-33, para. 61).

It is significant, moreover, that both Judge Larsen and the President of the High Court, although aware of the apprehensions and unease harboured by Mr **Hauschildt** (see paragraphs 13 and 16 above), did not think it necessary to take any initiative themselves, notwithstanding the wording of sections 61 and 62 (see paragraph 28 above).

In the circumstances, counsel for the defence could well at the time reasonably believe that any objection on the basis of a particular judge having made several pre-trial decisions was doomed to failure.

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

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

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

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

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

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

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

On the other hand, a minority of the Commission expressed the opinion that, having regard to the circumstances of the case, Mr **Hauschildt** was entitled to entertain legitimate misgivings as to the presence of Judge Larsen on the bench of the City Court as presiding judge.

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

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

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

There thus remains the application of the objective test.

48. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are

concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see, mutatis mutandis, the De Cubber judgment previously cited, Series A no. 86, p. 14, para. 26).

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

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

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

50. As appears from sections 742 and 743 of the Act (see paragraph 31 above), in Denmark investigation and prosecution are exclusively the domain of the police and the prosecution. The judge's functions on the exercise of which the applicant's fear of lack of impartiality is based, and which relate to the pre-trial stage, are those of an independent judge who is not responsible for preparing the case for trial or deciding whether the accused should be brought to trial (sections 746, 760, 762 and 770 - see paragraphs 32, 33 and 36 above). This is in fact true of the decisions referred to by the applicant, including those concerning the continuation of his detention on remand and his solitary confinement. Those decisions were all given at the request of the police, which request was or could have been contested by the applicant, assisted by counsel (see paragraphs 23 and 24 above). Hearings on these matters are as a rule held in open court. Indeed, as to the nature of the functions which the judges involved in this case exercised before taking part in its determination, this case is distinguishable from the Piersack and the De Cubber cases (judgments previously cited) and from the Ben Yaacoub case (judgment of 27 November 1987, Series A no. 127-A, p.7, para. 9).

Moreover, the questions which the judge has to answer when taking such pre-trial decisions are not the same as those which are decisive for his final judgment. When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether prima facie the police have grounds for their suspicion; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. Suspicion and a formal finding of guilt are not to be treated as being the same (see, for example, the Lutz judgment of 25 August 1987, Series A no. 123-A, pp. 25-26, para. 62).

In the Court's view, therefore, the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality.

51. Nevertheless, special circumstances may in a given case be such as to warrant a different conclusion. In the instant case, the Court cannot but attach particular importance to the fact that in nine of the decisions continuing Mr **Hauschildt**'s detention on remand, Judge Larsen relied specifically on section 762(2) of the Act (see paragraph 20 above). Similarly, when deciding, before the opening of the trial on appeal, to prolong the applicant's detention on remand, the judges who eventually took part in deciding the case on appeal relied specifically on the same provision on a number of occasions (see paragraphs 26-27 above).

52. The application of section 762(2) of the Act requires, inter alia, that the judge be satisfied that there is a "particularly confirmed suspicion" that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is "a very high degree of clarity" as to the question of guilt (see paragraphs 34-35 above). Thus the difference between the issue the judge has to settle when applying this section and the issue he will

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have to settle when giving judgment at the trial becomes tenuous.

The Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered objectively justified.

53. The Court thus concludes that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention.

III. THE APPLICATION OF ARTICLE 50 (art. 50)

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

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

The applicant submitted that, should the Court find a violation of Article 6 (art. 6), his conviction should be quashed and any disqualifications or restrictions placed on him removed. The Court, however, is not empowered under the Convention to provide for the quashing of a judgment or to give any directions on the last-mentioned matters (see, mutatis mutandis, the Gillow judgment of 14 September 1987, Series A no. 124-C, p. 26, para. 9).

The applicant also sought compensation for damage and reimbursement of costs and expenses.

A. Damage

55. Mr Hauschildt submitted that a finding of a violation of Article 6 (art. 6) would cast doubt on his conviction and that this, in turn, would bring into question the lawfulness of each of his 1,492 days of detention on remand. Accordingly, he sought compensation comparable to that to which he would have been entitled if the trial court had found him not guilty, to be calculated on the basis of 500/1,000 Danish crowns (DKr) per day.

The applicant also contended that his health had suffered due to the 309 days he had spent in solitary confinement, that his reputation had been seriously injured and that his lengthy detention on remand had caused him a substantial loss of income.

56. In their observations of 10 October 1988 and 23 January 1989, the Government pointed to the existence of a remedy at national level, in that, under section 977(3) of the Act, Mr **Hauschildt** could ask the Special Court of Revision (Den saerlige Klageret) to refer the case back to the City Court if there were a high degree of probability that the evidence had not been properly evaluated.

The Court notes in this respect that the violation found in the present judgment (see paragraph 53 above) relates to the composition of the courts concerned and not to their assessment of the evidence. Accordingly, the remedy in question does not allow reparation for the consequences of the violation, within the meaning of Article 50 (art. 50) (see, mutatis mutandis, the De Cubber judgment of 14 September 1987, Series A no. 124-B, pp. 17-18, para. 21).

57. It will be recalled that, with regard to the judges concerned, the Court has excluded personal bias (see paragraph 47 above). What it has found is that, in the circumstances of the case, the impartiality of the relevant tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered to be objectively justified (see paragraph 52 above). This finding does not entail that his conviction was not well founded. The Court cannot speculate as to what the result of the proceedings might have been if the violation of the Convention had not occurred (see the above-mentioned De Cubber judgment, Series A no. 124-B, p. 18, para. 23). Indeed the applicant has not even attempted to argue that the result would have been more favourable to him, and moreover, given the established lack of personal bias, the Court has nothing before it that would justify such a conclusion.

The Court thus agrees with the Government and the Commission that no causal link has been

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established between the violation found and the alleged damage in question.

58. Mr Hauschildt also claimed compensation for non-pecuniary damage, on the ground that he had lost the opportunity of being tried by an impartial tribunal. The Delegate of the Commission submitted that an amount, which he did not quantify, should be awarded under this head.

The Court, however, is of the view that, in the particular circumstances of the case, its finding in the present judgment will constitute in itself adequate just satisfaction under this head.

B. Costs and expenses

59. The Delegate of the Commission viewed favourably the applicant's claim for reimbursement of costs and expenses, although he did not indicate any amount. The Government reserved their right, should it prove necessary, to set up a "counterclaim".

The Court considers, however, that it has sufficient material to take a decision on this point.

1. Proceedings outside Strasbourg

60. Mr Hauschildt sought reimbursement of the costs he had incurred:

(a) in respect of the investigation and first-instance trial in Denmark (3,061,960 DKr);

(b) in respect of several bankruptcy proceedings pending in Denmark (7,100,000 DKr); and

(c) in Switzerland and other European countries in connection with the bankruptcy of **Hauschildt** & Co (1,700,000 Swiss francs).

61. The Court is unable to accept these claims.

As to item (a), this rests on the erroneous assumption that the finding of a violation in this case operates so as to erase the applicant's conviction. As to items (b) and (c), it is not established that there is any connection between the violation found in the present judgment and the bankruptcy proceedings referred to.

2. Proceedings in Strasbourg

62. Mr Hauschildt also sought reimbursement of the following items referable to the proceedings before the Convention institutions, totalling £26,463:

(a) fees of his counsel, Mr Robertson (£11,048), and Mr Reindel (£5,770);

(b) translation fees (£1,725);

(c) fees of Ms E. Smith, who prepared for him a report on the relevant Danish legislation (£420);

(d) his own personal costs and expenses (£7,500).

63. The Court has no reason to suppose that the foregoing expenditure was not actually incurred. However, it entertains doubts as to whether part of it - especially as regards Mr **Hauschildt**'s personal costs and expenses - was necessarily incurred and as to whether all the items can be considered reasonable as to quantum.

In these circumstances, the Court is unable to award the totality of the sums claimed. Making an assessment on an equitable basis, it finds that the applicant should be reimbursed £20,000.

FOR THESE REASONS, THE COURT

1. Rejects by fourteen votes to three, as unfounded, the Government's preliminary objection of non-exhaustion of domestic remedies;

2. Holds by twelve votes to five that there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention;

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3. Holds unanimously that Denmark is to pay to the applicant, for costs and expenses £20,000 (twenty thousand pounds sterling);

4. Rejects 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 24 May 1989.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

(a) concurring opinion of Mr Ryssdal;

(b) joint dissenting opinion of Mr Thór Vilhjálmsson, Mrs Palm and Mr Gomard;

(c) joint dissenting opinion of Mr Gölcüklü and Mr Matscher;

(d) concurring opinion of Mr De Meyer.

R.R.
M.-A.E.

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CONCURRING OPINION OF JUDGE RYSSDAL

The first sentence of section 62(1) of the Administration of Justice Act entitles the parties to object to a judge hearing a case when circumstances, other than those referred to in section 60, "are capable of raising doubt about his complete impartiality". This wording would seem to indicate that Mr **Hauschildt** could have challenged Judge Larsen and the High Court judges on the ground that they had applied section 762(2) of the Act in pre-trial decisions concerning his detention on remand.

However, having regard to the specific provision in section 60(2) of the Act and to the fact that it was common practice in Denmark at the relevant time not to challenge a trial judge on the ground of his having made pre-trial decisions in the same case, I have come to the conclusion that Mr **Hauschildt** could not be expected to have objected to the judges in question. I therefore agree that the Government's plea of non-exhaustion of domestic remedies must be rejected.

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JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, PALM AND GOMARD

1. Sections 60(2) and 62 of the Administration of Justice Act ("the Act"), which are cited in full in paragraph 28 of the Court's judgment, clearly indicate - in accordance with the explanations given on pages 21 and 22 of the original proposal, dated March 1875, that led to the adoption of the Act - that normally a judge in a criminal case is not disqualified because he has had to deal with the case in another capacity before trial, but that disqualification may ensue because of special circumstances as mentioned in those sections. Consequently an appeal founded on the system itself, i.e. on the fact that judges who delivered pre-trial decisions are not normally disqualified from taking part in the trial, would undoubtedly have been unsuccessful. The relevant questions in the present case, however, are whether on a special appeal the Court of Appeal (the High Court) or the Supreme Court would have found that the impartiality of Judge Larsen or of the High Court judges was impaired because of his or their involvement in the case before the first-instance or the second-instance trial. Under the relevant provisions of the Act, the result of an appeal alleging that the first-instance judge or the second-instance judges lacked impartiality would have depended on the circumstances of the case as it stood before the City Court or later before the High Court. At that time - in 1981 and in 1983 - all relevant information could have been produced to and evaluated by the High Court or the Supreme Court. The only information available now, years later, in the case before this Court is a simple list of the number and contents of decisions made by various judges. It is not possible to arrive, solely on the basis of such a list, at a well-informed opinion on the partiality or impartiality of the trial judges.

Mr **Hauschildt** and his counsel decided at the relevant time against raising the question of impartiality. Mr **Hauschildt**'s present application is therefore, in our opinion, inadmissible because of failure to exhaust domestic remedies (Article 26 of the Convention) (art. 26).

2. If Mr **Hauschildt**'s application is not found inadmissible for failure to have recourse to an available and relevant domestic remedy as required by Article 26 (art. 26) of the Convention, the objection of partiality now raised by him has to be examined and decided in the present case.

As stated in paragraph 50 of the Court's judgment, the mere fact that a member of the trial court has also taken part as a judge in preliminary decisions in the case does not in itself justify fears as to his or her impartiality. The doubts that have been raised as to whether this is also true where the decisions have been rendered under section 762(2) of the Act are an indication that the wording of this particular provision - as it appears in the translations - may not be fortunate. This, however, does not alter the fact that the strong traditions of the judiciary and the ability of the judges, deriving from their education and training, provide the necessary effective and visible guarantee of impartiality. Judicial control of the question whether the prosecution has reasonable grounds for requesting detention on remand, solitary confinement, search and seizure, etc. is a function that is different from the court's evaluation of the evidence presented by the parties at the trial. For authorisation of detention on remand, information is not presented in the same way as evidence during the hearings before the trial court. The procedure is a summary one. Court sittings at the pre-trial stage are concluded in a matter of hours, whereas both of Mr **Hauschildt**'s trials lasted for months. After the City Court had passed judgment, that judgment became an important factor for the High Court judges in determining whether Mr **Hauschildt** should remain in custody during his de novo trial on appeal.

The role of judges at the pre-trial stage is confined to ascertaining whether the prosecution's requests satisfy the conditions set out in the relevant section(s) of the Act. This judicial control may be exercised by any judge or panel of judges belonging to the competent court. In the present case the City Court's first - and important - decision that Mr **Hauschildt** be detained on remand, that of 1 and 2 February 1980, was rendered not by Judge Larsen but by another judge (Mr Dalgas Rasmussen). Where the court proceedings last for several months, as in Mr **Hauschildt**'s case, the rule in section 767 of the Act that detention on remand cannot be authorised for more than four weeks necessitates continued decisions on

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this matter during the trial.

Judgment in Mr Hauschildt's case - as in other cases - was passed on the basis of the evidence presented and commented on by both parties at the trials, first before the City Court and later before the High Court. There is no indication whatsoever of any lack of impartiality on the part of the judges involved in Mr Hauschildt's case. There was no objective or reasonable subjective ground to fear that either Judge Larsen or the High Court judges could have had any improper motive when passing judgment. There is no indication that any of the judges involved in Mr **Hauschildt**'s case was not able - as qualified, professional judges are able - to form his opinion on the basis of the materials presented at the trial and of nothing else. Mr Hauschildt has not pointed to any ground for doubting the impartiality of the judges other than their having taken part in various decisions before and during trial, as described in paragraphs 10 et seq. of the European Court's judgment.

For these reasons, Mr **Hauschildt**'s complaint that his case was not tried by an impartial tribunal must be rejected. In our opinion, Article 6 (art. 6) of the Convention has not been violated in the present case.

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JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND MATSCHER

(Translation)

The majority of the Court rightly considered that - in a system such as that existing in Denmark, where there is no division of responsibilities between investigating judge and trial judge, with all the guarantees inherent in such a division of responsibilities - the mere fact that a trial judge or an appeal-court judge also takes certain pre-trial decisions, in particular concerning detention on remand, is not sufficient in itself to justify apprehensions as to the impartiality of the judge in question.

However, the majority reached the opposite conclusion, and found a violation of Article 6 para. 1 (art. 6-1), in this case on the ground that the trial judge and the appeal-court judges took several decisions on the continuation of the applicant's detention on remand and based those decisions specifically on section 762(2) of the Danish Administration of Justice Act, whose application requires a "particularly confirmed suspicion".

It is our view that this fact does not justify the majority's conclusion. In a legal system in which the function of investigating judge does not exist (and its existence is in no way required by the Convention), it naturally falls to the trial judge (or appeal-court judge) to take all the pre-trial measures which call for the intervention of a judge. Indeed it is of course the trial judge (or appeal-court judge) who is the most familiar with the case and who consequently is the best placed to determine the appropriateness of or the necessity for the measures envisaged, even if this assessment requires him to adopt a fairly clear-cut position on the case. This does not mean however that he may be regarded as lacking sufficient impartiality to decide the merits of the case.

Nor do we find the quantitative argument particularly convincing. In a case involving economic offences of a wide-ranging and extremely complicated nature, it will inevitably be necessary for the judge to make several interventions in the investigation and, acccordingly, to take a number of decisions concerning the extension of detention on remand.

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CONCURRING OPINION OF JUDGE DE MEYER

I fully subscribe to the operative provisions of the judgment and to most of its reasoning. I cannot, however, agree with paragraph 50.

The "pre-trial functions" relating to detention on remand or to solitary confinement which were exercised in the present case by certain judges under sections 760, 762 and 770(3) of the Danish Administration of Justice Act, as applicable at the relevant time, were not essentially different from those which were exercised by the investigating judge in the De Cubber case.

In my view, the mere fact that a trial judge has previously exercised such functions in the case which he has to try, objectively justifies legitimate fears as to his impartiality, and this applies not only to functions exercised under section 762(2), but also to functions exercised under the other provisions just referred to.

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

CHAPPELL v. THE UNITED KINGDOM JUDGMENT

CHAPPELL v. THE UNITED KINGDOM JUDGMENT

HAUSCHILDT v. DENMARK JUDGMENT

HAUSCHILDT v. DENMARK JUDGMENT

HAUSCHILDT v. DENMARK JUDGMENT
CONCURRING OPINION OF JUDGE RYSSDAL

HAUSCHILDT v. DENMARK JUDGMENT
CONCURRING OPINION OF JUDGE RYSSDAL

HAUSCHILDT v. DENMARK JUDGMENT
JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, PALM AND GOMARD

HAUSCHILDT v. DENMARK JUDGMENT
JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, PALM AND GOMARD

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The present authority exceeds 30 p. In accordance with the Practice Direction on Filing Documents before the Special Court for Sierra Leone, article 7 (E), a copy of the first page of the authority as well as a copy of the relevant section are filed.

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In the case of Bulut v. Austria (1),

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 Rules of Court B (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Matscher,
Mr C. Russo,
Mr J. De Meyer,
Mr I. Foighel,
Mr J.M. Morenilla,
Mr L. Wildhaber,
Mr D. Gotchev,
Mr P. Jambrek,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 26 October 1995 and 23 January 1996,

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

Notes by the Registrar

1. The case is numbered 59/1994/506/588. 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.

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2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

PROCEDURE

1. The case was referred to the Court on 19 December 1994 by the Government of the Republic of Austria ("the Government"), 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. 17358/90) against Austria lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by a Turkish national, Mr Mikdat Bulut, on 5 October 1990.

The Government's application referred to Article 48 (art. 48) and its object was to obtain a decision as to whether the facts of the case disclosed a breach of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant designated the lawyer who would represent him (Rule 31).

The Turkish Government, who had been informed by the Registrar of their right to intervene (Article 48 (b) of the Convention and Rule 35 para. 3 (b) of Rules of Court B) (art. 48-b), did not indicate any intention of so doing.

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 January 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr C. Russo, Mr J. De Meyer, Mr I. Foighel, Mr J.M. Morenilla,

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Mr L. Wildhaber, Mr D. Gotchev and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 11 August 1995. In a letter of 2 August 1995 the Government had informed the Court that they did not wish to submit a written memorial. The Secretary to the Commission subsequently informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 4 October 1995 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 October 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr W. Okresek, Head of the International
Affairs Division, Constitutional Service,
Federal Chancellery, Agent,
Ms I. Gartner, Federal Ministry of Justice, Counsel,
Ms E. Bertagnoli, Human Rights Division,
International Law Department, Federal Ministry
of Foreign Affairs, Adviser;

(b) for the Commission

Mr M.P. Pellonpää, Delegate;

(c) for the applicant

Mr W.L. Weh, Rechtsanwalt, Counsel.

The Court heard addresses by Mr Pellonpää, Mr Weh, Mr Okresek and Ms Gartner and also replies to its questions.

AS TO THE FACTS

I. Circumstances of the case

7. Mr Mikdat Bulut, the applicant, is a waiter. He was born in 1969 and lives in Innsbruck.

8. In 1990 he faced charges of attempting to bribe staff of the Innsbruck Employment Agency. He had offered money to two civil servants as an inducement to issue him false certificates.

9. On 6 March 1990, before the trial at the Innsbruck Regional Court (Landesgericht) had begun, the presiding judge, Mr Werus, sent a note to Mr Heiss, the applicant's lawyer at the time, informing him that one of the members of the court, Judge Schaumburger, had taken part in the questioning of two witnesses during the preliminary investigation. Mr Heiss was asked to inform the court by 16 March 1990 whether he wanted to challenge Judge Schaumburger on that ground. Mr Heiss did not reply.

10. The trial took place on 23 March 1990. Before the court began to hear evidence, the presiding judge again mentioned that Mr Schaumburger had acted as investigating judge for part of the preliminary proceedings. The record of the trial states that the parties waived the right to raise this point as a ground of nullity ("Auf Geltendmachung dieses Umstandes als Nichtigkeitsgrund wird allseits verzichtet").

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11. In a statutory declaration (eidesstättige Erklärung) submitted during the proceedings before the European Commission of Human Rights, Mr Heiss stated that he had answered the question whether he was prepared to waive the right to raise the point as a ground of nullity by saying that, in his view, it was not possible to waive the right to raise questions relating to the disqualification of a judge. He considered that it was only possible to waive a challenge to a judge if it was for partiality. In a document which was likewise submitted to the Commission Mr Werus stated that the waiver had been made as recorded. He added that he remembered Mr Heiss adding words to the effect that he did not consider the waiver to be valid.

12. The applicant was found guilty as charged and fined 25,200 Austrian schillings (ATS), suspended for three years.

13. Mr Bulut filed an appeal on grounds of nullity (Nichtigkeitsbeschwerde) and an appeal (Berufung) against sentence to the Supreme Court (Oberster Gerichtshof). In his appeal on grounds of nullity under Article 281 para. 1 (1) of the Code of Criminal Procedure (Strafprozeßordnung - see paragraph 19 below) the applicant alleged that he had been heard by a judge who was disqualified from sitting by law (ex lege). He further alleged breaches of Article 281 para. 1 (4), (5) and (9)(a). In connection with sub-paragraph (4) (see paragraph 19 below), the applicant complained that the trial court should have tested the witnesses' ability to recognise the applicant's voice over the telephone. Under sub-paragraph (5) (see paragraph 19 below) he further complained, inter alia, that the trial court had found two witnesses completely credible and had found that inconsistencies in their stories were easily explained as mistakes of memory. He alleged that the contradictions were fundamental and that there should have been a confrontation between the two witnesses and the applicant's brother, who had for a while been suspected of the offence. The prosecution also appealed against sentence.

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14. On 29 June 1990, the Attorney-General (Generalprokurator) filed the following observations ("croquis") with the Supreme Court:

> "In the view of the Attorney-General's Office, the appeal lodged by the accused, Mr Mikdat Bulut, meets the criteria for a decision under Article 285d of the Code of Criminal Procedure. A copy of the decision is requested."

These observations were not disclosed to the defence.

15. On 7 August 1990 the Supreme Court rejected the applicant's appeal under Article 285d para. 1 of the Code of Criminal Procedure (see paragraph 20 below). After confirming that a disqualified judge had taken part in the trial, the Supreme Court referred to the waiver entered in the record of the trial, and noted that Article 281 para. 1 (1) required a ground of nullity relating to Articles 67 and 68 of the Code of Criminal Procedure (see paragraph 18 below) first to have been raised at the trial itself. In respect of the grounds of nullity under Article 281 para. 1 (5), the Supreme Court found that the complaints were an attempt to challenge the assessment of the evidence made by the trial judges and as such inadmissible and insufficient to constitute a ground of nullity. Notwithstanding the applicant's assertion to the contrary, the Supreme Court also found that there had in fact been a confrontation between the two witnesses and the applicant's brother. The appeal on grounds of nullity was rejected. The Supreme Court remitted the applicant's appeal against sentence to the Innsbruck Court of Appeal (Oberlandesgericht).

16. On 3 October 1990, after a hearing, the Innsbruck Court of Appeal increased the applicant's sentence to nine months' imprisonment, suspended for three years.

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II. Relevant domestic law and practice

17. By Article 90 para. 1 of the Federal Constitution,

> "Hearings by trial courts in civil and criminal cases shall be oral and public. Exceptions may be prescribed by law."

18. Article 68 para. 2 of the Code of Criminal Procedure provides that a person shall be disqualified (ausgeschlossen) from participating in a trial if he has acted as investigating judge in the same case.

19. Article 281 para. 1 of the Code of Criminal Procedure lays down the specific circumstances in which an appeal on grounds of nullity may be made, including:

> "1. if the court was not properly constituted, ... or if a judge took part in the decision who was disqualified (under Articles 67 and 68), unless the ground of nullity was known to the appellant before or during the trial and was not raised by him at the beginning of the trial or as soon as he became aware of it;
>
> ...
>
> 4. if during the trial no decision was given on an application by the appellant or in an interlocutory decision rejecting an application or objection by him the court disregarded or incorrectly applied laws or rules of procedure with which compliance is required by the very nature of a procedure which affords safeguards to the prosecution and the defence;
>
> 5. if the judgment of the trial court in respect of decisive facts is unclear, incomplete or self-contradictory; ...

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..."

20. Article 285d para. 1 of the Code of Criminal Procedure provides:

> "During the private deliberations, an appeal on grounds of nullity may be rejected immediately:
>
> 1. if it ought to have been rejected by the court at first instance under Article 285a ...;
>
> 2. if it is based on the grounds of nullity enumerated in Article 281 para. 1 (1-8 and 11) and if the Supreme Court unanimously finds that the complaint should be dismissed as manifestly ill-founded without any need for further deliberation."

21. Following the Brandstetter v. Austria judgment of 28 August 1991 (Series A no. 211) and since 1 September 1993, Article 35 para. 2 of the Code of Criminal Procedure reads as follows:

> "If the public prosecutor at an appellate court submits observations on an appeal on grounds of nullity ..., the appellate court shall communicate those observations to the accused (person concerned), advising him that he may submit comments on them within a reasonable period of time that it shall determine. Such communication may be dispensed with if the prosecutor confines himself to opposing the appeal without adducing any argument, if he merely supports the accused or if the accused's appeal is upheld."

PROCEEDINGS BEFORE THE COMMISSION

22. Mr Bulut applied to the Commission on 5 October 1990. He

relied on Article 6 para. 1 (art. 6-1) of the Convention, complaining that the trial court had included a judge disqualified from sitting by law. He further complained that no hearing had been held in the Supreme Court, that the Attorney-General had submitted to the Supreme Court observations which had not been made available to the defence and that the Supreme Court had divulged the name of the judge rapporteur to the Attorney-General contrary to the relevant legal provisions.

23. The Commission declared the application (no. 17358/90) admissible on 2 April 1993. In its report of 8 September 1994 (Article 31) (art. 31), it expressed the opinion that:

(a) there had been no violation on account of Judge Schaumburger's participation in the trial (twenty-five votes to one), or on account of the Supreme Court's failure to hold a hearing (unanimously), or on account of the fact that the name of the judge rapporteur was communicated to the Attorney-General (unanimously);

(b) there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention on account of the Attorney-General's submission to the Supreme Court of observations of which the applicant was not aware (twenty-five votes to one).

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 (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

24. At the hearing the Agent of the Government requested the Court to hold that there had been no violation of Article 6 (art. 6) of the Convention.

The applicant invited the Court to hold that the Convention had been breached on three accounts: Judge Schaumburger's participation in the trial; the Supreme Court's failure to hold a hearing and the Attorney-General's passing of undisclosed observations to the Supreme Court.

AS TO THE LAW

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

25. The applicant alleged a breach of Article 6 para. 1 (art. 6-1) of the Convention, which, in so far as relevant, provides:

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

The Court will deal with each of the applicant's three individual complaints. They concern the participation in the trial of a judge who had previously participated in the preliminary investigation; the Supreme Court's failure to hold a hearing and the submission of observations by the Attorney-General ("croquis") of which the applicant was not aware and on which he did not have an opportunity to comment.

The applicant's further complaint that the Supreme Court had divulged the name of the judge rapporteur to the Attorney-General, contrary to the relevant domestic legal

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provisions, which was declared admissible by the Commission (see paragraph 23 above), was abandoned before the Court, which sees no reason to entertain it of its own motion.

A. Participation of Judge Schaumburger in the trial

26. The applicant submitted that Article 68 para. 2 of the Code of Criminal Procedure (see paragraph 18 above) clearly provided that a judge who had acted in the preliminary investigation of a case was disqualified from taking part in the trial. Since this ground of disqualification was mandatory, no discretion being conferred on the accused, no "waiver" could lawfully be made. At all events, in the instant case, notwithstanding the contents of the record of the trial (see paragraph 10 above), the defence lawyer did not waive the right to raise the issue of Judge Schaumburger's participation in the trial as a ground of nullity. On the contrary, he expressly stated that such a waiver would be legally impossible. In conclusion, the applicant submitted that he had been tried by a court that was neither "impartial" nor "established by law" within the meaning of Article 6 (art. 6) of the Convention and Article 68 para. 2 of the Code of Criminal Procedure.

27. In the Government's submission, Article 68 para. 2 did not constitute a ground for automatic disqualification. It should be read together with Article 281 para. 1 (1) of the Code of Criminal Procedure (see paragraph 19 above), which provided that the participation of a disqualified judge in the trial only rendered the judgment null and void if it was challenged by the defendant immediately after he learned about it. In the present case, the presiding judge had informed the defence before the trial that one of the members of the court had taken part in the investigation proceedings. He had then invited the applicant's lawyer to say whether he wished to challenge that judge on that account. The applicant's lawyer had not replied (see paragraph 9 above). At the hearing, before the court began to take evidence, the presiding judge had again enquired whether the

parties had any objection to Judge Schaumburger's participation. The record of the trial showed that the parties had waived their right to raise this point as a ground of nullity (see paragraph 10 above). No request was filed for an amendment or rectification of the record of the trial.

Contrary to what occurred in the case of Pfeifer and Plankl v. Austria (judgment of 25 February 1992, Series A no. 227, pp. 16-17, paras. 35-39), in which the Court took the view that the waiver was invalid, the offer of waiver in the present case, as the record of the trial shows, was accepted by experienced legal counsel in an unequivocal manner.

28. The Commission, while finding the stringency with which Austrian law precluded an investigating judge from participating in a trial to be in line with Article 6 (art. 6) of the Convention, noted that the presence of an investigating judge at the trial was not so undesirable that an accused should not be permitted to accept that judge's participation, provided that the accused was able to consent on the basis of all the relevant information and without undue pressure. Otherwise, the Commission agreed with the main thrust of the Government's arguments and found that the applicant was entitled to, and validly did, waive his right to challenge Judge Schaumburger.

29. As regards the question whether the trial court was a tribunal "established by law", the Court notes at the outset that there appears to be an inconsistency between Article 68 para. 2, under which an investigating judge is disqualified from participating in the trial by the automatic operation of law, and Article 281 para. 1 (1), in which the same situation only gives rise to a ground of nullity. However, it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, mutatis mutandis, the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A, p. 18, para. 43). In the instant case the Court observes that both the Innsbruck Regional Court and the Supreme

Court interpreted the law as meaning that a waiver could lawfully be made (see paragraph 15 above). The Court sees no reason to call into question the resolution of this issue by the Austrian courts.

30. Regardless of whether a waiver was made or not, the Court has still to decide, from the standpoint of the Convention, whether the participation of Judge Schaumburger in the trial after taking part in the questioning of witnesses at the pre-trial stage could cast doubt on the impartiality of the trial court.

31. When the impartiality of a tribunal for the purposes of Article 6 para. 1 (art. 6-1) is being determined, regard must be had not only to the personal conviction of a particular judge in a given case - the subjective approach - but also whether he afforded sufficient guarantees to exclude any legitimate doubt in this respect - the objective approach (see, among many other authorities, the Piersack v. Belgium judgment of 1 October 1982, Series A no. 53, p. 14, para. 30).

32. There has been no suggestion in the present case of any prejudice or bias on the part of Judge Schaumburger. It follows that the Court cannot but presume his personal impartiality (see the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, p. 25, para. 58).

There thus remains the application of the objective test.

33. In the instant case the fear that the trial court might not be impartial was based on the fact that one of its members had questioned witnesses during the preliminary investigation. Undoubtedly, this kind of situation may give rise to misgivings on the part of the accused as to the impartiality of the judge. However, whether these misgivings should be treated as objectively justified depends on the circumstances of each particular case; the mere fact that a trial judge has also dealt

with the case at the pre-trial stage cannot be held as in itself justifying fears as to his impartiality (see, mutatis mutandis, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, pp. 21-22, paras. 49-50, and the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, p. 15, para. 33).

34. In contrast to the facts of the Hauschildt case (cited above), it has not been suggested that Judge Schaumburger was responsible for preparing the case for trial or for deciding whether the accused should be brought to trial. In fact, it has not been established that he had to take any procedural decisions at all. His role was limited in time and consisted of questioning two witnesses. It did not entail any assessment of the evidence by him nor did it require him to reach any kind of conclusion as to the applicant's involvement.

In this limited context, the applicant's fear that the Innsbruck Regional Court lacked impartiality cannot be regarded as objectively justified (see, mutatis mutandis, the Nortier judgment cited above, p. 16, para. 37). In any event, it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained from doing so.

There has therefore been no violation of Article 6 para. 1 (art. 6-1) of the Convention as far as the applicant's first complaint is concerned.

B. No hearing in the Supreme Court

35. The applicant also complained that there had been no adversarial hearing before the Supreme Court. He submitted that the grounds of nullity under Article 281 para. 1 (4) and (5) of the Code of Criminal Procedure (see paragraph 19 above) went essentially to questions concerning the ascertainment of various

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THIRD SECTION

CASE OF MOREL v. FRANCE

(Application no. 34130/96)

JUDGMENT

STRASBOURG

6 June 2000

FINAL

18/10/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

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In the case of Morel v. France,

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

Mr W. FUHRMANN, *President*,
Mr J.-P. COSTA,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 23 November 1999 and 16 May 2000,

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

PROCEDURE

1. The case originated in an application (no. 34130/96) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Hubert **Morel** ("the applicant"), on 20 July 1996.

2. The applicant was represented before the Court by Mr M. Puechavy. The French Government ("the Government") were represented by their Agent, Mr R. Abraham.

3. The applicant alleged, in particular, that his right to a fair hearing before an impartial court, as guaranteed by Article 6 § 1 of the Convention, had been infringed in that the insolvency judge's report to the Commercial Court and the documents annexed thereto had not been disclosed to him and the insolvency judge had sat on the bench that heard the case.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 6 July 1999, the Chamber declared the application partly admissible[1].

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

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 November 1999.

There appeared before the Court:

(a) *for the Government*
Mr R. ABRAHAM, Head of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mrs M. DUBROCARD, Deputy Head of the Human
Rights Office, Department of Legal Affairs,
Ministry of Foreign Affairs,
Mr O. DOUVRELEUR, Deputy Head of the Commercial Law,
Land Law and Civil Judicial Cooperation Office,
Ministry of Justice, *Counsel*;

(b) *for the applicant*
Mr M. PUECHAVY, of the Paris Bar, *Counsel*.

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The applicant also attended the hearing.

The Court heard addresses by Mr Puechavy and Mr Abraham and their answers to questions from Judge Tulkens.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant formed five construction companies to build catering and accommodation facilities at the request of the Olympic Games Organisation Committee ("the OGOC"). He was the manager of the companies. He held 99% of the shares in one of the companies, which was the sole shareholder in the other four. He also acted as guarantor of virtually all the companies' debts.

10. As the works were not completed within the agreed period, the OGOC suspended payment for them. On 24 February 1992 the applicant lodged a declaration of insolvency on behalf of the companies with the registry of the Nanterre Commercial Court.

11. On 25 February 1992 the Nanterre Commercial Court made an order for the judicial reorganisation of the applicant's five companies. It named Mr A. as the insolvency judge, and also appointed a deputy insolvency judge, a judicial administrator and a creditors' representative. It ordered a six-month observation period during which the judicial administrator was to draw up a report on the companies' finances and labour force with his recommendations as to whether the companies should continue or cease trading. The observation period was renewed twice.

12. During the observation period, the insolvency judge made various orders, namely: orders for the appointment of an expert on management supervision (11 March 1992), a valuer (6 April 1992) and an accountant (22 April 1992); orders declaring claims time-barred (two orders were made on 13 October 1992 and others on 16 November 1992, 17 February 1993, 10 and 30 March 1993, 5 May 1993, 1 June 1993 and 25 March 1994); orders for the restitution of equipment (on 8 September, 14 December 1992 and 30 March 1993); an order authorising the applicant's intervention in the management of the hotels (on 15 September 1992); an order dismissing applications for the restitution of equipment (16 November 1992); orders for an action to be brought against one of the other contracting parties and for other measures (on the same date) and for the restitution of equipment (30 March 1993); orders dismissing thirteen members of staff (7 April 1992) and a further member of staff (8 September 1992); and lastly an order for the freezing of accounts (8 September 1992).

13. On 23 September 1993 the judicial administrator asked the Commercial Court to decide whether to accept the applicant's proposals for its recovery through continued trade.

14. The applicant appeared at the hearing and gave evidence as the manager of the companies concerned. The judicial administrator and the creditors' representative also made oral submissions. The judicial administrator presented a report in which he explained to the Commercial Court the history of the dealings which had led to the applicant's filing in insolvency. He then related to the court events during the observation period. He stressed that the applicant's recovery plan had been accepted by a majority of the creditors. He raised doubts over certain issues and said that it was for the applicant to dispel those doubts by putting up financial and professional guarantees.

15. The Commercial Court decided (on application by State Counsel's Office) that before approving the applicant's proposed recovery plan, it needed to be satisfied that the companies' continued economic activity would be permanent. For that purpose, it needed financial and professional guarantees from the applicant. It therefore asked him to produce certain additional documents so that it could be sure that the guarantees existed. The applicant lodged an additional file in response to that request. In the light of the new file lodged by the applicant, the administrator filed a supplemental report.

16. On 26 October 1993 the Commercial Court terminated the observation period and put the five companies into compulsory liquidation. It held that the proposed recovery plan was not accompanied by

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sufficiently reliable guarantees to ensure that the companies could continue as a going concern. The judgment contained, *inter alia*, the following passages:

> "Consequently the Court must find that the proposed plan is not accompanied by the guarantees required to ensure its future economic activity in a difficult sector.
>
> Pursuant to the provisions of sections 1, 36 and 146 of Law no. 85-98 of 25 January 1985, it therefore orders the compulsory liquidation of the aforementioned companies in accordance with the provisions of Chapter III of that statute and holds as follows.
>
> FOR THESE REASONS
>
> The Court, sitting in public and as a court of first instance,
>
> Having examined the insolvency judge's report,
>
> Having examined the judicial administrator's report ...
>
> Terminates the observation period ..."

17. The Commercial Court reassigned the case to the insolvency judge, decreed that the administrator's mission had been completed and appointed the creditors' representative as liquidator of the companies. The insolvency judge sat on the bench that delivered that judgment in his capacity as President of the Chamber. He was assisted by the Vice-President of the Commercial Court and another judge.

18. In a judgment of 31 January 1994, the Versailles Court of Appeal upheld the Commercial Court's judgment in its entirety. It delivered its decision after examining the applicant's recovery plan, the judicial administrator's report and the liquidator's submissions. The applicant attended the hearing and made oral observations.

On 7 April 1994 the applicant appealed to the Court of Cassation. He put forward two grounds of appeal based on Article 6 of the Convention. On 23 January 1996 the Court of Cassation dismissed the appeal. The applicant had argued that the Commercial Court had not been impartial because the insolvency judge had sat on the bench of the Commercial Court that had ordered the companies' liquidation after playing an active role in the period of observation of the companies. The Court of Cassation met the argument as follows:

> "... the fact that, in accordance with Article 24 of the decree of 27 December 1985, the insolvency judge sat on the bench that made the order for compulsory liquidation is not contrary to the provisions of Article 6 § 1 of the European Convention on Human Rights; that ground of appeal is unfounded; ..."

The applicant's second ground of appeal read as follows:

> "... the insolvency judge's report and accompanying documents were not communicated to the appellants. In that regard the hearing was not fair for the purposes of Article 6 § 1 of the Convention and the rights of the defence were not respected within the meaning of Article 16 of the New Code of Civil Procedure. A hearing can only be said to be fair – again for the purposes of the European Convention – if equality of arms is ensured, in other words, if each party is aware of all the matters on which the court will rely in coming to its decision. Among those matters, the insolvency judge's report plays a paramount role in helping the court to reach its decision. However, it is deemed privileged information to which the debtor is unable to have access (it is not communicated, does not appear in the official case file which may be communicated and is not read out at the hearing). Nor, consequently, may he contest it. The principle of a fair hearing is thus infringed for the purposes of the Convention and the rights of the defence under the New Code of Civil Procedure denied.

The Court of Cassation answered that argument as follows:

> "... Article 111 of the decree of 27 December 1985 provides that the insolvency judge's report may be presented orally; that provision is not contrary to Article 6 of the European Convention on Human Rights. Accordingly, since the applicant has not submitted that the insolvency judge did not present his report orally, this ground of appeal cannot succeed ..."

The applicant also raised a ground of appeal based on the fact that the Court of Appeal had failed either to summons the other party to a contract to appear or to take evidence from it. The Court of Cassation dismissed that ground of appeal, holding:

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"... other contracting parties are only required to be summonsed to appear before the court of appeal when assignment of the contract as part of a plan for the sale of the undertaking is envisaged. There is no provision requiring other contracting parties to be summonsed to appear when an order for compulsory liquidation is made. This ground of appeal is therefore unfounded ..."

Concurrently, on 27 February 1995 the applicant lodged an application with the President of the Commercial Court for an order for the communication of the insolvency judge's report. On 15 March 1995 the President of the Nanterre Commercial Court dismissed the application, holding:

"... the insolvency judge's report is clothed in the secrecy of the deliberations and cannot be communicated to anyone."

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. **Law no. 85-98 of 25 January 1985 on the judicial reorganisation and liquidation of undertakings and its implementing Decree no. 85-1388 of 27 December 1985**[2]

Purpose of judicial reorganisation and liquidation proceedings

Section 1 – "This Act institutes a new procedure of judicial reorganisation proceedings with the aim of preserving undertakings, maintaining their activities and employment and clearing their debts."

Judicial reorganisation shall take place in accordance with a plan approved in a judicial decision at the end of an observation period. The plan shall provide for the continuation or the sale of the activity of the undertaking. When neither alternative appears possible, the undertaking shall be put into compulsory liquidation."

Section 8 – "When an order for judicial reorganisation is made an observation period shall commence so that a report can be prepared on the company's finances and labour force and proposals made for the continuation or sale of the undertaking. If neither alternative appears possible, the court shall make an order for compulsory liquidation."

Section 10 – "In the insolvency order the court shall designate the insolvency judge [from a list compiled by the president of judges with at least two years' experience] and two court officers, namely the administrator and the creditors' representative. It shall invite the works council or, if none, the staff delegates or, if none, the members of staff to appoint a staff representative from the undertaking ..."

Functions of the insolvency judge during the observation period

Section 14 – "The insolvency judge shall be responsible for ensuring that the case proceeds expeditiously and that all relevant interests are protected."

Section 20 – "The administrator shall receive from the insolvency judge all information and documents that are relevant to the performance of his or her and the experts' duties."

Powers of the insolvency judge during the observation period

Power to supervise the company's situation

Section 13 – "The administrator and the creditors' representative shall keep the insolvency judge and State Counsel's Office informed of the progress of proceedings. The insolvency judge and State Counsel's Office may at any time require communication of any pleading or document related to the procedure.

Notwithstanding any statutory provision to the contrary, State Counsel's Office shall communicate to the insolvency judge at the latter's request or on its own initiative all information he holds that may be of relevance to the proceedings."

Section 19 – "Notwithstanding any statutory or regulatory provision to the contrary, the insolvency judge may procure communication to him by the auditors, staff members and representatives, public authorities and bodies, pension and social-security funds, lending institutions and the departments responsible for centralising banking risks and defaults in payment information apt to give him precise details of the undertaking's economic and financial circumstances."

Section 29 – "During the observation period the insolvency judge may order that letters addressed to the debtor shall be remitted to the administrator ..."

Power to intervene in the management of the undertaking

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Article 25 of the decree – "The insolvency judge shall make an order when deciding applications, challenges and claims within his jurisdiction or grievances concerning acts of the administrator, the creditors' representative, the commissioner responsible for the execution of the plan, the liquidator or the staff representative.

Should the insolvency judge fail to make an order within a reasonable time, the court may hear the case on its own initiative or at the request of a party.

Orders of the insolvency judge shall be lodged with the registry forthwith and communicated to the court officers. An appeal shall lie against them [to the court].

The court may on its own initiative quash or vary an order within the same period."

Section 27 – "The insolvency judge may order an inventory of the assets of the undertaking and the affixation of seals."

Article 28 of the decree – "The insolvency judge shall give authority to the administrator or the debtor to pay over to the creditors' representative the sums which the latter requires to discharge his obligations."

Section 30 – "The insolvency judge shall fix the remuneration for the duties performed by the head of the undertaking or the company management ..."

Section 33 – "The judgment setting the proceedings in motion shall automatically entail a ban on the payment of any debts that arose before the insolvency judgment.

The insolvency judge may authorise the head of the undertaking or the administrator to dispose of property other than in the ordinary course of the business of the undertaking, to grant a mortgage or a pledge, or to compromise or settle.

The insolvency judge may also authorise such persons to pay debts that arose before the judgment or to release a lien or property that is the subject of a valid retention of title clause provided such release is justified in that it permits the company to continue to trade.

Any document entered into or payment made in breach of the provisions of this section shall be set aside on application by any interested party lodged within three years from the execution of the document or payment of the debt. For registrable documents, time shall start to run from the date of registration."

Section 34 – "In the absence of agreement, the insolvency judge shall decide by order whether proposals by the debtor or administrator to the creditors for substituting security with equivalent security shall be implemented."

Section 39 *in fine* – "The insolvency judge may authorise the debtor or, as the case may be, the administrator, to sell movable assets in rented property that is liable to deteriorate rapidly or depreciate imminently, whose upkeep would be costly or realisation will not jeopardise the existence of the business or the preservation of sufficient security for the landlord."

Section 45 – "Where during the period of observation redundancies are urgent, inevitable and essential, the insolvency judge may authorise the administrator to effect the dismissals ..."

Section 53 – "Creditors failing to lodge a proof within the periods laid down by decree of the *Conseil d'Etat* shall not be entitled to any share or dividend unless the insolvency judge grants them an extension of time after they have satisfied him that they were not responsible for the failure ..."

Decision-making power

Section 101 – "In the light of proposals by the creditors' representative, the insolvency judge shall decide to accept or reject proofs or shall note that proceedings are under way or that the dispute is not within his jurisdiction ..."

Section 156 – "The insolvency judge shall order the sale by auction or by private agreement of the remaining property belonging to the undertaking ..."

Section 173 – "No application to set aside, whether by the other party to a contract or a third party, and no ordinary appeal or appeal on points of law shall lie against:

...

2. Judgments delivered by the Commercial Court on appeal against an order of the insolvency judge ..."

Sundry prerogatives

Section 12 – "The court may, on its own initiative, on a proposal by the insolvency judge or at the request of State Counsel's Office, replace the administrator, an expert or the creditors' representative ..."

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Section 15 – "Either one or two supervisors chosen from among the creditors may be appointed by order of the insolvency judge ..."

Court's decision on the plan for the continuation or sale of the undertaking

Judgment deciding on the plan

Section 61 – "After hearing the debtor, the administrator, the creditors' representative and the representatives of the works council or, if none, the staff delegates or duly summonsing them to appear, the court shall deliver its judgment in the light of the administrator's plan and shall order either reorganisation or liquidation ..."

Section 36 is contained in the part of the Act relating to the pursuit of the undertaking's activity. The Act provides that the activity of the undertaking shall continue during the observation period subject to the provisions of Section 36, which reads as follows:

"At any stage, the court may, at the request of the administrator, the creditor's representative, the debtor, State Counsel's Office or on its own initiative and in the light of the insolvency judge's report, order the cessation of all or part of the activity or compulsory liquidation."

The court shall deliver its judgment in private after hearing the debtor, the administrator, the creditors' representative and the representatives of the works council or, if none, the staff delegates or after duly summonsing them to appear."

20. **Judgment of 11 September 1997 of the Grenoble Court of Appeal, Hapian v. Hidoux, *Recueil Dalloz* 1998, J. 128**

The Court of Appeal said:

"The insolvency judge has the role of supervising the administration and compulsory liquidation while also exercising an investigative role; his presence in the trial Chamber is an exception to the principle that the investigation and trial stages should be kept separate."

The facts, however, were concerned with another aspect of the procedure, namely the making of a personal bankruptcy order against the manager of a company that had been put into liquidation. The same judge had sat as president and insolvency judge in two sets of proceedings in which first the company's judicial reorganisation and then its compulsory liquidation had been ordered. He had subsequently served a summons on the manager of the company to appear before the commercial court (the summons contained a recommendation that the manager should be declared personally bankrupt) and presided over that court, which made an order declaring the manager personally bankrupt. The Court of Appeal quashed the judgment of the commercial court on the ground that there had been a violation of Article 6 § 1 of the Convention. It found that the fact that the insolvency judge had sat on the bench that heard the case was inconsistent with the principle that the investigation and trial stages should be kept separate and could legitimise the appellant's concerns regarding the objective impartiality of the court that had delivered the impugned decision (*Recueil Dalloz* 1998, *jurisprudence*, pp. 128 et seq.). The Court of Appeal relied essentially on the role of appearances and expressly followed the judgments in Delcourt v. Belgium of 17 January 1970, Series A no. 11, p. 17, § 31, and De Cubber v. Belgium of 26 October 1984, Series A no. 86, p. 14, § 26.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

21. With regard to the proceedings before the Commercial Court the applicant alleged a violation of Article 6 § 1 of the Convention in so far as it guaranteed the right to a fair hearing by an impartial tribunal. The Government contested that argument.

22. Article 6 § 1 provides, *inter alia*:

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"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Alleged unfairness of the proceedings before the Commercial Court

1. Arguments of the parties

23. In his written observations, the applicant noted that in its judgment the Commercial Court had included the insolvency judge's report in the list of documents it had seen. He concluded that the report in question, which section 36 of the Law of 25 January 1985 made mandatory, was in written form, as otherwise the Commercial Court would have used the term "heard". The Court of Cassation had not established that the report did not exist. The applicant also referred to the order dated 15 March 1993 of the President of the Nanterre Commercial Court, who was familiar with the procedure in that court and could not have confused the report which the insolvency judge had submitted at the hearing with the remarks he had exchanged with his colleagues at that hearing. The applicant therefore maintained that the insolvency judge had in the instant case submitted a written report to the Commercial Court.

He complained that the document which had been lodged with the judges had not been communicated to the parties, in breach of the right to adversarial proceedings in accordance with the principle of equality of arms. Adversarial proceedings implied that a court should not base its decision on evidence that had not been made available to each of the parties and equality of arms required each party to be afforded an opportunity to present his case under conditions that guaranteed a balance between the parties to the cause (see, among other authorities, the Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19, § 33, and the Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, p. 22, § 56).

In his pleadings at the hearing, the applicant's lawyer said that since a recovery plan had been put before the court, section 61 of the Law of 25 January 1985 was applicable.

24. The Government pointed out that the insolvency judge might have to draw up two very different types of reports in compulsory liquidation proceedings. The first type was a report under section 36 of the Law of 25 January 1985 that was required if it was at the insolvency judge's request that the commercial court had to decide whether to make an order for the undertaking to cease trading or to be liquidated. In such cases, the report was a procedural document that was communicated to the parties. That type of report was not relevant in the instant case as the application to the court had been made by the judicial administrator pursuant to section 61 of the Law of 1985 cited above. The applicant had not alleged that that report had not been communicated to him for comment.

25. Where – as in the instant case – the court was exercising jurisdiction on an application by the judicial administrator, the insolvency judge explained to the other members of the court all the measures he had taken during the observation period and gave them his opinion on the final decision which the court should take. There was no formal procedure for making that report and in practice it was usually done orally. Although in the present case the Commercial Court had expressly used the term "seen" in its judgment when referring to the report, that did not necessarily mean that a written document had been read.

In the Government's submission, the insolvency judge's report in the latter type of case could be regarded as privileged from disclosure as forming part of the deliberations, since the insolvency judge's role in deliberations with his colleagues was similar to that of a judge rapporteur in a collegiate court. In its Reinhardt and Slimane-Kaïd v. France judgment (31 March 1998, *Reports of Judgments and Decisions* 1998-II, pp. 665-66, § 105), the Court had already ruled that the legal analysis of a case and the opinion of the advocate-general on the merits of an appeal to the Court of Cassation were "legitimately privileged from disclosure as forming part of the deliberations". Moreover, since the report had not been communicated to any of the parties to the proceedings in the instant case, there had been no failure to maintain equality of arms between them.

26. The Government indicated for the first time at the hearing in answer to a question put by the Court that the judgment of 26 October 1993 contained a typographical error, a fact which the applicant's

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lawyer did not contest. The references to section 36 of the Law of 25 January 1985 were incorrect, the applicable provision in fact being section 61 of the Law as, the Government maintained, became apparent when the judgment was read as a whole, since it stated that the Commercial Court had obtained jurisdiction at the end of the observation period when the judicial administrator had asked it to adjudicate on the proposed recovery plan, a procedure prescribed by section 61, not section 36.

2. The Court's assessment

27. The Court reiterates that the right to adversarial proceedings "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision" (see the Lobo Machado v. Portugal judgment of 20 February 1996, *Reports* 1996-I, pp. 206-07, § 31).

The principle of equality of arms "– one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent" (see the Nideröst-Huber v. Switzerland judgment of 18 February 1997, *Reports* 1997-I, p. 107, § 23).

28. The Court notes that for the first time at the hearing before it both the Government and the applicant said that, contrary to what was stated in the judgment, the Commercial Court had followed the procedure governed by section 61 of the Law of 25 January 1985, and not the section 36 procedure (see paragraph 16 above). That could be seen from the reasoning of the judgment taken as a whole.

29. The Court notes that the reasoning set out in the judgment shows that the cause before the Commercial Court proceeded as follows: an application was made by the judicial administrator for the court to rule on the applicant's proposed recovery plan; the Commercial Court examined the recovery plan, heard submissions from the judicial administrator and the creditors' representative and reached its decision in the light of the administrator's report. Those facts were not contested by the parties.

30. The Court notes that those events support the submission made at the hearing that the judgment was delivered pursuant to section 61 of the Law of 25 January 1985. It is thus satisfied that the reference in the judgment to section 36 of the Law of 1985 is a typographical error made when the document was drawn up (see, *mutatis mutandis*, *Douiyeb v. the Netherlands* [GC], no. 31464/96, § 52, 4 August 1999, unreported), a fact which the parties do not contest.

31. The procedure under section 61 does not provide for a written report to be lodged by the insolvency judge (see paragraph 19 above), unlike the procedure under section 36. The Court concludes from that that the reference in the judgment to the Commercial Court having seen the report was also an error.

The case file shows that the applicant's complaint of a violation of Article 6 was based on those references in the judgment.

32. From the information available to the Court, it is therefore apparent that the applicant's complaint is based on erroneous references in the Commercial Court's judgment.

33. In those special circumstances, the Court holds that there are no grounds for finding a violation of Article 6 § 1 in so far as it guarantees the right to a fair hearing and to equality of arms.

B. Alleged lack of impartiality by the insolvency judge in the Commercial Court

1. The parties' submissions

34. The applicant questioned the subjective impartiality of the insolvency judge. In doing so, he pointed to matters set out in the Commercial Court's judgment.

He relied on the failure to communicate the insolvency judge's report, errors in the facts in the judgment and omissions in the reasoning regarding certain matters relating to the companies, difficulties encountered during the course of the observation period and the substantial indebtedness of the companies concerned. He added that relations between one of the companies and the insolvency judge had been conflictual.

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The applicant said that the Commercial Court had failed to rectify errors in the administrator's report and to hear adversarial argument about the criticism that had been made of candidates wishing to pursue the companies' activity and about the erroneous assessment of their professional capabilities.

He added that no action had been taken against third parties guilty of criminal acts committed to the detriment of his companies.

35. In the applicant's submission, his concerns were justified by the following objective factors.

Article 26 of the decree of 27 December 1985 laid down that, on pain of the judgment being declared null and void, the insolvency judge could not sit when the court was acting on its own initiative or was hearing an appeal against one of its own orders. The applicant maintained that it was inconsistent for the insolvency judge to be allowed to sit in certain cases but not in others, since the case file in insolvency proceedings was indivisible.

Under the Law of 25 January 1985 (see paragraph 19 above), the insolvency judge had very wide powers during the period when the companies were under observation. Thus, during that stage of the proceedings, he played an active role in the companies' management and had powers of information and investigation enabling him to run the companies.

In the instant case, the insolvency judge had made thirty orders in spheres ranging from dismissal to the attachment of accounts and the sale of movable and immovable property. On a number of points the applicant had disagreed with the insolvency judge and may therefore have formed the impression that he was appearing before an opponent. Further, a number of the insolvency judge's decisions indicated the position he would take in the trial court.

That suggested to the applicant that an insolvency judge subsequently exerted a decisive influence over a commercial court's decision on a company's future.

That influence was increased by his reports to his colleagues, on which no adversarial argument from the parties was heard. Nor did his colleagues take any active part in the commercial court's decision. It was for that reason that certain French commercial courts refused to allow the insolvency judge to take part in the deliberations of the trial court.

The Court of Cassation, sitting as a full court, had in a decision of 5 February 1999 confirmed the necessity of separating the functions of the rapporteur from those of members of the Stock Exchange Regulatory Authority (*Commission des opérations de bourse*). One of the findings in that judgment was that the rapporteur was responsible for conducting an investigation into the facts with the assistance of the administrative services and for making any relevant inquiries. Moreover, the Grenoble Court of Appeal had held in a judgment of 11 September 1997 (*Dalloz* 1998, J. 128) that the fact that an insolvency judge had sat on a trial bench infringed the principle that the investigation and trial stages should be kept separate.

36. The Government noted that individual judges were presumed to be impartial unless there was evidence to the contrary. Unlike the applicant, they considered that the judgment was couched in neutral terms and did not suggest any bias against the applicant. They therefore submitted that the applicant's concerns were not objectively justified.

37. Furthermore, the Government said that the manner in which the proceedings had been conducted had guaranteed the insolvency judge's neutrality, as the case had come before the Commercial Court at the request of the judicial administrator, not the insolvency judge, under section 61 of the Law of 1985 cited above. The Commercial Court was asked to rule on the applicant's proposed recovery plan. It was only because the plan did not appear viable that the court had decided to order the companies' liquidation. The court had been careful to request additional information from the applicant before reaching its decision.

38. When performing their duties during the observation period, insolvency judges did not have any preconceived ideas on the issues they would have to decide before the commercial court.

That was because during the observation period insolvency judges were responsible for managing and supervising the activities of companies in difficulty. Their aim was to manage the various conflicting interests without jeopardising the direct functioning of the company. For that purpose they were empowered to make orders, against which an appeal lay to the commercial court.

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In the instant case, most of the orders made by the insolvency judge had concerned procedural issues. Only two orders (authorising redundancies) had directly concerned the economic exploitation of the applicant's companies.

However, the Government considered that those orders had had no effect on the insolvency judge's capacity at the hearing before the Commercial Court to consider the issue at hand without prejudging it.

39. When sitting in the commercial court the insolvency judge's role was to account to his colleagues for the tasks which he had performed during the observation period. His opinion did not bind the other two judges called upon to decide whether the undertaking was viable. Thus, the commercial court was the sole judge and its judgment was unconnected with the various steps taken by the insolvency judge during the observation period.

In the instant case, it had been the judicial administrator who had questioned the viability of the undertaking. He had pointed out that the applicant's proposed recovery plan contained areas of uncertainty which the applicant had to resolve. The Commercial Court had given the applicant time to produce all the guarantees necessary for his plan to be approved. In subsequently deciding to order the companies' liquidation, the Commercial Court had relied on objective factors relating to the lack of financial guarantees, the recent balance sheets of the companies and further information about their financial means.

The Government submitted in conclusion that there was no evidence of any lack of impartiality on the part of the insolvency judge.

2. *The Court's assessment*

40. There are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1: the first consists in seeking to determine the personal conviction of a particular judge in a given case; the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, the Gautrin and Others v. France judgment of 20 May 1998, *Reports* 1998-III, pp. 1030-31, § 58).

41. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, the Padovani v. Italy judgment of 26 February 1993, Series A no. 257-B, p. 20, § 26).

However, despite the applicant's submissions (see paragraph 34 above), the Court is not satisfied that there is evidence establishing that the insolvency judge acted with any personal prejudice.

42. As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see the Gautrin and Others judgment cited above, ibid.).

43. In the instant case, the concerns regarding the insolvency judge's impartiality stemmed from the fact that he had taken various measures concerning the companies during the observation period and subsequently presided over the court that had decided the companies' fate.

44. The Court accepts that that situation could raise doubts in the applicant's mind about the impartiality of the Commercial Court. However, it has to decide whether those doubts were objectively justified.

45. In that connection, the Court notes that the answer to that question depends on the circumstances of the case. For that reason, it cannot be bound by the decisions cited by the applicant; moreover, one of those decisions concerned a different sphere (see paragraph 35 above) while the other dealt with an aspect of insolvency proceedings that was different from that under consideration in the present case (see paragraph 20 above).

Furthermore, the mere fact that a judge has already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his impartiality. What matters is the scope and nature of the

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measures taken by the judge before the trial. Likewise, the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged. What is important is for that analysis to be carried out when judgment is delivered and to be based on the evidence produced and argument heard at the hearing (see, among other authorities, *mutatis mutandis*, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 22, § 50; the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, p. 15, § 33; and the Saraiva de Carvalho v. Portugal judgment of 22 April 1994, Series A no. 286-B, p. 38, § 35).

46. In the light of those principles, the Court considers that the applicant's concerns cannot be justified in themselves by the fact that the insolvency judge took certain decisions during the observation period (orders concerning the management of the companies, dismissals and interim measures). His knowledge of the case file was not in itself decisive either. As regards the influence which the applicant alleged the insolvency judge had on the bench, it is not in issue here.

47. All the Court has to decide is whether, having regard to the nature and extent of his functions during the observation period and of the measures adopted, the insolvency judge displayed any bias regarding the decision to be taken by the Commercial Court. Such would have been the case if the issues dealt with by the insolvency judge during the observation period were analogous to those on which he ruled as a member of the trial court (see the Saraiva de Carvalho judgment cited above, p. 39, § 38).

48. There is nothing in the case file to suggest that that was the case here. The case file shows that the insolvency judge made orders dealing with questions relating to the companies' economic and financial survival and staff management during the observation period. Under the applicable domestic law, his role was to ensure that the proceedings advanced rapidly and that relevant interests were protected.

When the Commercial Court presided over by the insolvency judge subsequently acquired jurisdiction under section 61 of the Law of 25 January 1985 (that is to say, contrary to the applicant's submission, without a written report from him), it was required to assess the mid- to long-term viability of the applicant's plan for the companies' continued trading at the end of the observation period. In that connection, the Commercial Court had to examine the financial guarantees and other evidence produced by the applicant at the hearing and the circumstances of the companies at that time (as regards such matters as staff and immovable property, and the fact that they were trading in a difficult sector). It also relied on information supplied by the administrator.

The Commercial Court's assessment was based on evidence that was produced and was the subject of argument at the hearing. That is attested by the fact that the Commercial Court did not finally decide the case until it had requested and obtained from the applicant additional documents proving the credibility of the guarantees he had produced.

The Court notes, therefore, that the insolvency judge had to deal with two quite separate issues. Although, as a result of his role during the observation period, he had acquired special knowledge of the companies' circumstances (one of the factors to which the Commercial Court had regard in its decision), nonetheless he could not have formed a view at that juncture on the plan proposed by the applicant at the hearing before the court for the continuation of the activity, while the viability of that plan was assessed by the Commercial Court in the light of the guarantees furnished and examined at the hearing (see, *mutatis mutandis*, the judgments cited above: Saraiva de Carvalho, p. 39, § 38 *in fine*, and, *a contrario*, Hauschildt).

49. The Court, therefore, does not find in the present case any objective grounds for believing that the nature and extent of the insolvency judge's duties during the observation period (which were intended to ensure the day to day management of the companies) gave rise to any prejudice on the – separate – issue which the Commercial Court had to decide regarding the viability of the applicant's plan for the companies continued trading at the end of the observation period and of the financial guarantees produced at the hearing.

50. In the light of the special circumstances of the present case, the Court finds that the applicant's

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concerns were not objectively justified.

Consequently, there has been no violation of Article 6 § 1 to the extent that it guarantees the right to an impartial tribunal.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of the right to a fair hearing as guaranteed by Article 6 § 1 of the Convention;

2. *Holds* that there has been no violation of the right to an impartial tribunal as guaranteed by Article 6 § 1 of the Convention;

Done in French, and notified in writing on 6 June 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ W. FURHMANN
Registrar President

1. *Note by the Registry*. The Court's decision is obtainable from the Registry.

1. *Note by the Registry*. Sections relate to Law no. 85-98 of 25 January 1985 and Articles to Decree no. 85-1388 of 27 December 1985.

MOREL v. FRANCE JUDGMENT

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DEUXIÈME SECTION

AFFAIRE ROJAS MORALES c. ITALIE

(*Requête n° 39676/98*)

ARRÊT

STRASBOURG

16 novembre 2000

DÉFINITIF

16/02/2001

Cet arrêt deviendra définitif dans les conditions définies à l'article 44 § 2 de la Convention. Il peut subir des retouches de forme avant la parution de sa version définitive dans le recueil officiel contenant un choix d'arrêts et de décisions de la Cour.

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En l'affaire Rojas Morales c. Italie,

La Cour européenne des Droits de l'Homme (deuxième section), siégeant en une chambre composée de :

MM. C.L. Rozakis, *président*,
B. Conforti,
G. Bonello,
P. Lorenzen,
M. Fischbach,
M^me^ M. Tsatsa-Nikolovska,
MM. E. Levits, *juges*,
et de M. E. Fribergh, *greffier de section*,

Après en avoir délibéré en chambre du conseil les 6 juillet 1999 et 26 octobre 2000,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (n° 39676/98) dirigée contre l'Italie et dont un ressortissant chilien, M. Carlos Rojas Morales (« le requérant »), avait saisi la Commission européenne des Droits de l'Homme (« la Commission ») le 28 avril 1997 en vertu de l'ancien article 25 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. Le requérant est représenté par M^e^ Michele Catalano, avocat au barreau de Milan. Le gouvernement italien (« le Gouvernement ») est représenté par son agent, M. U. Leanza et son coagent, M. V. Esposito.

3. Le requérant alléguait en particulier que le tribunal de Milan, appelé à se prononcer sur les accusations portées contre lui, n'était pas un tribunal impartial au sens de l'article 6 § 1 de la Convention.

4. La requête a été transmise à la Cour le 1^er^ novembre 1998, date d'entrée en vigueur du Protocole n° 11 à la Convention (article 5 § 2 du Protocole n° 11).

5. La requête a été attribuée à la deuxième section de la Cour (article 52 § 1 du règlement). Au sein de celle-ci, la chambre chargée d'examiner l'affaire (article 27 § 1 de la Convention) a été constituée conformément à l'article 26 § 1 du règlement.

6. Par une décision du 6 juillet 1999, la chambre a déclaré la requête partiellement recevable.

7. Le requérant a déposé des observations écrites sur le fond de l'affaire, mais non le Gouvernement (article 59 § 1 du règlement).

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

A. L'ARRESTATION DU REQUÉRANT ET LA PROCÉDURE À L'ENCONTRE DE M. A.

8. Le 10 juin 1987, le juge d'instruction de Milan décerna un mandat d'arrêt à l'encontre du requérant, accusé de faire partie d'une association de malfaiteurs ayant pour but le trafic international de stupéfiants entre l'Amérique latine et l'Italie. Toutefois, ce mandat ne put être exécuté car le requérant avait quitté l'Italie pour l'Argentine. A une date non précisée, l'Italie demanda aux autorités argentines l'extradition du requérant.

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9. Entre-temps, le 25 mars 1987, le requérant avait été arrêté à Buenos Aires (République d'Argentine) car il avait été trouvé en possession de six kilogrammes de cocaïne. Il avait ensuite été placé en détention provisoire.

10. Le 1er décembre 1987, le requérant fut interrogé en Argentine par le juge d'instruction de Milan.

11. Le 8 octobre 1990, le requérant et plusieurs autres personnes furent renvoyés en jugement devant le tribunal de Milan. Toutefois, compte tenu du fait que les autorités argentines n'avaient pas encore fait droit à la demande d'extradition et que le requérant était détenu en dehors du territoire italien, la procédure le concernant fut séparée de celles relatives à ses coïnculpés.

12. Par un jugement du 6 juillet 1993, le tribunal de Milan - présidé par Mme M., et dont faisait partie Mme B. - condamna l'un des coïnculpés du requérant - M. A. - à une peine de sept ans d'emprisonnement et 30 000 000 lires d'amende. Certains passages de cette décision concernent le requérant et se lisent comme suit : « La base commune de ces décisions [concernant d'autres coïnculpés] est le constat de l'existence d'une association de malfaiteurs ayant pour but un trafic de stupéfiants entre l'Amérique du Sud et l'Italie, à laquelle participaient de nombreux ressortissants latino-américains, dont certains (A., P., M., **Rojas** et G.) faisaient fonctions d'organisateurs (page 2) » ; « (...) Les investigations préliminaires ont permis d'éclaircir les différents rôles des accusés. L'on a notamment établi que le rôle de promoteur et d'organisateur revenait à M. **Rojas** Morales (...) (page 4) » ; « L'organisation des importations [de cocaïne] fut préparée par **Rojas** Morales Carlos (...), qui, cependant, fit un usage très limité de la ligne téléphonique dont il disposait à l'auberge R. où il résidait, soupçonnant, peut-être, que ladite ligne était sous écoute (page 7) » ; « L'examen des nombreuses conversations téléphoniques (...) sur la ligne de M. **Rojas** permet de conclure que les quatre voyages de M. P. à Milan avaient pour but l'importation de stupéfiants (page 8) » ; « (...) il échet d'observer que les deux kilogrammes de cocaïne retrouvés chez M. R. à Buenos Aires étaient probablement destinés à M. **Rojas**, en Italie (page 9) » ; « Les écoutes téléphoniques démontrent que M. **Rojas** Morales (...) jouait un rôle tout à fait prédominant à l'intérieur de l'organisation criminelle. En effet, M. **Rojas** gardait tout contact avec les fournisseurs boliviens (...) et se chargeait, ensuite, de vendre la drogue à M. M., qui s'occupait de la distribuer dans la région de Milan (...) M. A. gardait des relations étroites avec tous les participants à l'associations de malfaiteurs. En particulier avec M. M., M. **Rojas**, M. P. (page 10) ».

B. LA CONDAMNATION DU REQUÉRANT ET SON RECOURS EN RÉCUSATION

13. Les autorités argentines ayant fait droit à la demande d'extradition, le 3 octobre 1992 le requérant fut extradé en Italie, où il fut placé en détention provisoire.

14. Par un jugement du 16 février 1993, le tribunal de Milan, suivant la procédure abrégée (« *giudizio abbreviato* ») prévue par les articles 438 et suivants du code de procédure pénale (ci-après indiqué comme le « CPP »), condamna le requérant à une peine de quatorze ans d'emprisonnement et 140 000 000 lires d'amende.

15. Le 24 mars 1993, le requérant interjeta appel devant la cour d'appel de Milan.

16. Par un arrêt du 18 novembre 1994, dont le texte fut déposé au greffe le 24 novembre 1994, la cour d'appel annula le jugement de première instance au motif que le requérant n'avait pas lui-même demandé l'adoption de la procédure abrégée, comme le veut l'article 438 § 3 du CPP. Cette décision acquit l'autorité de la chose jugée le 4 janvier 1995. Le procès de première instance devant être par conséquent renouvelé, à une date non précisée le requérant fut à nouveau renvoyé en jugement devant le tribunal de Milan.

17. Le 30 mai 1995, le requérant introduisit devant la cour d'appel de Milan un recours en récusation à l'encontre de Mmes M. et B., respectivement président et juge du tribunal de Milan. Il alléguait notamment que ces deux magistrats s'étaient exprimées sur sa culpabilité dans le jugement du 6 juillet 1993 rendu à l'encontre de M. A. et estimait qu'elles avaient indûment manifesté leur opinion quant aux faits objet de l'accusation (article 37 § 1 b) du CPP).

18. Par une ordonnance du 5 juin 1995, la cour d'appel déclara le recours en récusation irrecevable.

Elle rappela que le jugement du 6 juillet 1993 concernait une autre personne et que les différents comportements des coïnculpés devaient être jugés séparément. Le fait que M. A. et le requérant étaient accusés de la même infraction pénale ne comportait pas « identité de l'objet du jugement ». Dès lors, les appréciations contenues dans la décision rendue à l'encontre de M. A. ne pouvaient être considérées comme des manifestations indues de l'opinion des juges quant à la culpabilité du requérant.

19. Le 23 juin 1995, le requérant se pourvut en cassation. Par un arrêt du 28 février 1996, la Cour de cassation débouta le requérant de son pourvoi. Elle fit observer que l'accusation d'association de malfaiteurs impliquait, de par sa nature même, que le jugement à l'encontre de l'un des coïnculpés pouvait contenir des références au rôle des autres accusés ; cependant seules les appréciations indues, c'est-à-dire non nécessaires aux fins de la décision de la cause, pouvaient être censurées comme étant des opinions personnelles du juge, tombant sous le coup de l'article 37 § 1 b) du CPP.

20. Entre-temps, à l'audience du 13 juin 1995 devant le tribunal de Milan, le requérant avait demandé à Mmes M. et B. de s'abstenir de toute décision le concernant, pour les raisons exposées dans son recours en récusation. Toutefois, le tribunal n'avait pas fait droit à cette demande.

21. Par un jugement du 4 juillet 1995, dont le texte fut déposé au greffe le 26 juillet 1995, le tribunal de Milan, présidé par Mme M. et dont faisait partie Mme B., condamna le requérant à une peine de vingt et un ans d'emprisonnement et 210 000 000 lires d'amende. Le tribunal indiqua que la responsabilité du requérant ressortait principalement des écoutes téléphoniques, dont le contenu permettait d'établir la répartition des tâches au sein de l'association de malfaiteurs et de reconstruire certains épisodes d'importation de stupéfiants. Ces éléments étaient corroborés par les déclarations de certains autres membres de l'association et par le fait que le requérant, qui avait longtemps résidé en Italie sans y exercer aucune activité lucrative légale, avait un niveau de vie très élevé.

C. L'APPEL ET LE POURVOI EN CASSATION DU REQUÉRANT

22. Le 6 juillet 1995, le requérant interjeta appel devant la cour d'appel de Milan. Dans un mémoire daté du 2 mai 1996, le conseil du requérant, se référant aux arguments développés dans le recours en récusation, demanda l'annulation du jugement de première instance pour manque d'impartialité du tribunal.

23. Par un arrêt du 28 mai 1996, dont le texte fut déposé au greffe le 2 juin 1996, la cour d'appel réduisit la peine infligée au requérant à vingt ans d'emprisonnement et 200 000 000 lires d'amende. En ce qui concerne notamment le mémoire du 2 mai 1996, la cour observa que l'incompatibilité des juges de première instance n'entraînait pas la nullité de la décision attaquée, les raisons d'incompatibilité pouvant être invoquées seulement dans le cadre d'un recours en récusation. Or, le requérant avait déjà introduit un tel recours, qui avait été rejeté par la Cour de cassation le 28 février 1996. D'autre part, les doléances du requérant étaient manifestement dépourvues de fondement, étant donné qu'aux termes de la loi italienne et de la jurisprudence de la Cour de cassation, seule la participation d'un juge à plusieurs instances de la même procédure aurait pu poser un problème d'incompatibilité.

24. Le 13 juin 1996, le requérant se pourvut en cassation.

25. Par un arrêt du 29 novembre 1996, dont le texte fut déposé au greffe le 30 janvier 1997, la Cour de cassation débouta le requérant de son pourvoi, considérant que la cour d'appel avait motivé de façon logique et correcte tous les points controversés.

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

26. Le requérant se plaint d'un manque d'impartialité du tribunal de Milan. Il invoque l'article 6 § 1 de la Convention, qui, en ses parties pertinentes, se lit comme suit :

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« Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal indépendant et impartial (...) qui décidera (...) du bien-fondé de toute accusation en matière pénale dirigée contre elle. (...)

27. Le requérant allègue que Mmes M. et B., respectivement président et juge du tribunal de Milan, avaient déjà exprimé leur opinion quant à sa culpabilité lors du procès dirigé contre M. A.

28. Le Gouvernement observe d'emblée que par un arrêt rendu en 1996 (n° 371), la Cour constitutionnelle a déclaré que les dispositions pertinentes du CPP étaient inconstitutionnelles dans la mesure où elles ne prévoyaient pas l'incompatibilité du juge ayant participé à une décision rendue à l'encontre d'autres personnes, et dans laquelle la position de l'accusé avait été prise en compte et évaluée. Cependant, le Gouvernement estime que la législation antérieure à 1996 et applicable au requérant ne saurait être considérée comme incompatible avec la Convention, compte tenu du fait qu'au sein de la Cour européenne elle-même le président de la Chambre et le juge ayant siégé au titre de l'Etat partie intéressé peuvent participer aux délibérations de la Grande Chambre (article 27 § 3 de la Convention).

29. Le requérant considère que les passages pertinentes du jugement du 6 juillet 1993 reflètent le sentiment qu'il est coupable et décrivent son rôle comme celui de « chef » de l'association de malfaiteurs, justifiant ainsi des doutes quant à l'impartialité - objective et subjective - des magistrats concernés.

30. La Cour rappelle qu'aux fins de l'article 6 § 1, l'impartialité doit s'apprécier selon une démarche subjective, essayant de déterminer la conviction et le comportement personnels de tel juge en telle occasion, et aussi selon une démarche objective amenant à s'assurer qu'il offrait des garanties suffisantes pour exclure à cet égard tout doute légitime (voir, entre autres, les arrêts Hauschildt c. Danemark du 24 mai 1989, série A n° 154, p. 21, § 46, et Thomann c. Suisse du 10 juin 1996, *Recueil* 1996-III, p. 815, § 30).

31. Quant à la première, la Cour n'a relevé aucun élément susceptible de mettre en doute l'impartialité personnelle des juges concernés.

32. Quant à la seconde, elle conduit à se demander si, indépendamment de la conduite du juge, certains faits vérifiables autorisent à suspecter l'impartialité de ce dernier. En la matière même les apparences peuvent revêtir de l'importance. Il y va de la confiance que les tribunaux d'une société démocratique se doivent d'inspirer au justiciable. Il en résulte que pour se prononcer sur l'existence, dans une affaire donnée, d'une raison légitime de redouter d'un juge un défaut d'impartialité, l'optique de l'accusé entre en ligne de compte mais ne joue pas un rôle décisif. L'élément déterminant consiste à savoir si l'on peut considérer les appréhensions de l'intéressé comme objectivement justifiées (voir l'arrêt Ferrantelli et Santangelo c. Italie du 7 août 1996, *Recueil* 1996-III, pp. 951-952, § 58).

33. La Cour note qu'en l'occurrence la crainte d'un manque d'impartialité tient du fait que le jugement du tribunal de Milan du 6 juillet 1993, prononcé à l'encontre de M. A., contenait de nombreuses références au requérant et à son rôle au sein de l'organisation criminelle de laquelle il était soupçonné faire partie. En particulier, plusieurs passages se réfèrent au requérant comme étant l'organisateur ou le promoteur d'un trafic de stupéfiants entre l'Italie et l'Amérique latine (voir paragraphe 12 ci-dessus). Deux des juges ayant prononcé le jugement du 6 juillet 1993 - notamment Mmes M. et B. - ont ensuite été appelées à décider sur le bien-fondé des accusations portées à l'encontre du requérant, qui concernaient, au moins en partie, les mêmes faits qui étaient à la base de la condamnation de M. A.

34. La Cour considère que ces éléments suffisent pour considérer comme objectivement justifiées les craintes du requérant à l'égard de l'impartialité du tribunal de Milan.

35. Par conséquent, il y a eu violation de l'article 6 § 1.

2. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

36. Aux termes de l'article 41 de la Convention,

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« Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. DOMMAGE

37. Le requérant sollicite le versement d'une somme à titre de préjudice moral. Il a demandé 250 000 000 lires italiennes.
38. Le Gouvernement estime que le simple constat de la violation de la Convention fournirait en soi une satisfaction équitable suffisante aux sens de l'article 41.
39. Même si la Cour ne saurait spéculer sur le résultat auquel la procédure litigieuse aurait abouti si l'infraction à la Convention n'avait pas eu lieu, elle considère que le requérant a subi une véritable perte d'opportunité (voir l'arrêt Pélissier et Sassi c. France du 25 mars 1999, à paraître dans le recueil officiel de la Cour, § 80). Elle juge en outre que le requérant a subi un tort moral certain. Eu égard aux circonstances de la cause et statuant sur une base équitable comme le veut l'article 41 de la Convention, elle décide de lui octroyer la somme de 10 000 000 lires italiennes.

B. FRAIS ET DÉPENS

40. Sans fournir aucun détail des frais encourus, le requérant sollicite le versement de 40 000 000 lires italiennes, cette somme couvrant tant la procédure devant les juridictions nationales que la procédure devant les organes de la Convention.
41. Le Gouvernement s'en remet à la sagesse de la Cour.
42. Selon la jurisprudence constante de la Cour, l'allocation des frais et dépenses exposé par le requérant ne peut intervenir que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux (voir l'arrêt Belziuk c. Pologne du 25 mars 1998, *Recueil* 1998-II, p. 573, § 49). Cependant, il n'en demeure pas moins que le requérant, avant de s'adresser aux organes de la Convention, a épuisé toutes les voies de recours qui lui étaient ouvertes en droit italien, soulevant la question du manque d'impartialité du tribunal dans le trois degrés de juridiction et dans son recours en récusation. La Cour accepte par conséquent que l'intéressé a encouru des dépenses pour faire corriger la violation de la Convention tant dans l'ordre juridique interne qu'au niveau européen. Compte tenu des éléments en sa possession et de sa pratique en la matière, elle considère raisonnable de lui accorder la somme de 10 000 000 lires italiennes, moins le montant versé par le Conseil de l'Europe au titre de l'assistance judiciaire, à savoir 3 300 francs français.

C. INTÉRÊTS MORATOIRES

43. Selon les informations dont dispose la Cour, le taux d'intérêt légal applicable en l'Italie à la date d'adoption du présent arrêt était de 2,5 % l'an.

PAR CES MOTIFS, LA COUR, À L'UNANIMITÉ,

1. *Dit* qu'il y a eu violation de l'article 6 § 1 de la Convention ;

2. *Dit*
a) que l'Etat défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, les sommes suivantes : 10 000 000 (dix millions) lires italiennes pour dommage moral et 10 000 000 (dix millions) lires pour frais et dépens, moins le montant versé par le Conseil de l'Europe dans le cadre de l'assistance

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judiciaire ;
b) que ces montants seront à majorer d'un intérêt simple de 2,5 % l'an à compter de l'expiration dudit délai et jusqu'au versement ;

3. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 16 novembre 2000 en application de l'article 77 §§ 2 et 3 du règlement de la Cour.

Erik FRIBERGH Christos ROZAKIS
Greffier Président

ARRÊT ROJAS MORALES c. ITALIE

ARRÊT ROJAS MORALES c. ITALIE

National Case Law

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Liteky v. U.S.
510 U.S. 540, 114 S.Ct. 1147
U.S.Ga.,1994.
March 07, 1994 (Approx. 1 page)
510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474, 62 USLW 4161

Briefs and Other Related Documents
Supreme Court of the United States
John Patrick LITEKY, Charles Joseph Liteky and Roy Lawrence Bourgeois, Petitioners,
v.
UNITED STATES.
No. 92-6921.
Argued Nov. 3, 1993.
Decided March 7, 1994.

Defendants were convicted in the United States District Court for the Middle District of Georgia, J. Robert Elliott, J., of willfully injuring federal property, and they appealed. The Court of Appeals for the Eleventh Circuit affirmed, 973 F.2d 910, and certiorari was granted. The United States Supreme Court, Justice Scalia, held that: (1) extrajudicial source doctrine applies to recusal motions under the bias and prejudice provision of the disqualification statute; (2) extrajudicial source for the bias is not a necessary condition for recusal nor sufficient condition for recusal; (3) bias and prejudice connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate; and (4) judge's conduct at prior trial involving one defendant and during the trial of defendants did not show bias and prejudice.
Affirmed.

Justice Kennedy filed an opinion concurring in the judgment in which Justices Blackmun, Stevens and Souter joined.
West Headnotes

973 F.2d 910 (CA11 1992) affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, THOMAS, and GINSBURG, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, in which BLACKMUN, STEVENS, and SOUTER, JJ., joined, post, p. 1158.

Peter J. Thompson, Washington, DC, appointed by this Court, for petitioners.

Thomas G. Hungar, Washington, DC, for respondent.

For U.S. Supreme Court briefs, see:1993 WL 387331 (Pet.Brief)1993 WL 384814 (Resp.Brief)

Justice SCALIA delivered the opinion of the Court.

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Section 455(a) of Title 28 of the United States Code requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This case presents the question whether required recusal under this provision is subject to the limitation that has come to be known as the "extrajudicial source" doctrine.

*542 I

In the 1991 trial at issue here, petitioners were charged with willful destruction of property of the United States in violation of 18 U.S.C. § 1361. The indictment alleged that they had committed acts of vandalism, including the spilling of human blood on walls and various objects, at the Fort Benning Military Reservation. Before trial petitioners moved to disqualify the District Judge pursuant to 28 U.S.C. § 455(a). The motion relied on events that had occurred during and immediately after an earlier trial, involving**1151 petitioner Bourgeois, before the same District Judge.

In the 1983 bench trial, Bourgeois, a Catholic priest of the Maryknoll order, had been tried and convicted of various misdemeanors committed during a protest action, also on the federal enclave of Fort Benning. Petitioners claimed that recusal was required in the present case because the judge had displayed "impatience, disregard for the defense and animosity" toward Bourgeois, Bourgeois' codefendants, and their beliefs. The alleged evidence of that included the following words and acts by the judge: stating at the outset of the trial that its purpose was to try a criminal case and not to provide a political forum; observing after Bourgeois' opening statement (which described the purpose of his protest) that the statement ought to have been directed toward the anticipated evidentiary showing; limiting defense counsel's cross-examination; questioning witnesses; periodically cautioning defense counsel to confine his questions to issues material to trial; similarly admonishing witnesses to keep answers responsive to actual questions directed to material issues; admonishing Bourgeois that closing argument was not a time for "making a speech" in a "political forum"; and giving Bourgeois what petitioners considered to be an excessive sentence. The final asserted ground for disqualification-and the one that counsel for petitioners described at oral argument as the most serious-was the judge's interruption of the closing argument of one of Bourgeois' codefendants, *543 instructing him to cease the introduction of new facts, and to restrict himself to discussion of evidence already presented.

The District Judge denied petitioners' disqualification motion, stating that matters arising from judicial proceedings were not a proper basis for recusal. At the outset of the trial, Bourgeois' counsel informed the judge that he intended to focus his defense on the political motivation for petitioners' actions, which was to protest United States Government involvement in El Salvador. The judge said that he would allow petitioners to state their political purposes in opening argument and to testify about them as well, but that he would not allow long speeches or discussions concerning Government policy. When, in the course of opening argument, Bourgeois' counsel began to explain the circumstances surrounding certain events in El Salvador, the prosecutor objected, and the judge stated that he would not allow discussion about events in El Salvador. He then

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instructed defense counsel to limit his remarks to what he expected the evidence to show. At the close of the prosecution's case, Bourgeois renewed his disqualification motion, adding as grounds for it the District Judge's "admonishing [him] in front of the jury" regarding the opening statement, and the District Judge's unspecified "admonishing [of] others," in particular Bourgeois' two pro se codefendants. The motion was again denied. Petitioners were convicted of the offense charged.

Petitioners appealed, claiming that the District Judge violated 28 U.S.C. § 455(a) in refusing to recuse himself. The Eleventh Circuit affirmed the convictions, agreeing with the District Court that "matters arising out of the course of judicial proceedings are not a proper basis for recusal." 973 F.2d 910 (1992). We granted certiorari. 508 U.S. 939, 113 S.Ct. 2412, 124 L.Ed.2d 636 (1993).

II

[1] KC Required judicial recusal for bias did not exist in England at the time of Blackstone. 3 W. Blackstone, Commentaries *544 *361. Since 1792, federal statutes have compelled district judges to recuse themselves when they have an interest in the suit, or have been counsel to a party. See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278. In 1821, the basis of recusal was expanded to include all judicial relationship or connection with a party that would in the judge's opinion make it improper to sit. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. Not until 1911, however, was a provision enacted requiring district-judge recusal for bias in general. In its current form, codified at 28 U.S.C. § 144, that provision reads as follows:

**1152 "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Under § 144 and its predecessor, there came to be generally applied in the courts of appeals a doctrine, more standard in its formulation than clear in its application, requiring-to take its classic formulation found in an oft-cited opinion by Justice Douglas for this Court-that "[t]he alleged bias and prejudice to be disqualifying [under § 144] must stem from an extrajudicial source." United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). We say that the doctrine was less than entirely clear in its application for *545 several reasons. First, Grinnell (the only opinion of ours to recite the doctrine) clearly meant by "extrajudicial source" a source outside the judicial proceeding at hand-which would include as extrajudicial sources earlier judicial

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proceedings conducted by the same judge (as are at issue here).FN1 Yet many, perhaps most, Courts of Appeals considered knowledge (and the resulting attitudes) that a judge properly acquired in an earlier proceeding not to be "extrajudicial." See, e.g., Lyons v. United States, 325 F.2d 370, 376 (CA9), cert. denied, 377 U.S. 969, 84 S.Ct. 1650, 12 L.Ed.2d 738 (1964); Craven v. United States, 22 F.2d 605, 607-608 (CA1 1927). Secondly, the doctrine was often quoted as justifying the refusal to consider trial rulings as the basis for § 144 recusal. See, e.g., Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1387-1388 (CA9 1988); Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1301 (CADC), cert. denied, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988). But trial rulings have a judicial expression rather than a judicial source. They may well be based upon extrajudicial knowledge or motives. Cf. In re International Business Machines Corp., 618 F.2d 923, 928, n. 6 (CA2 1980). And finally, even in cases in which the "source" of the bias or prejudice was clearly the proceedings themselves (for example, testimony introduced or an event occurring at trial which produced unsuppressible judicial animosity), the supposed doctrine would not necessarily be applied. See, e.g., Davis v. Board of School Comm'rs of Mobile County, 517 F.2d 1044, 1051 (CA5 1975) (doctrine has "pervasive bias" exception), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *546 Rice v. McKenzie, 581 F.2d 1114, 1118 (CA4 1978) (doctrine "has always had limitations").

FN1. That is clear when the language from Grinnell excerpted above is expanded to include its entire context: "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481. Any adverse attitudes that [the district judge in the present case] evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make." 384 U.S., at 583, 86 S.Ct., at 1710. The cited case, Berger, had found recusal required on the basis of judicial remarks made in an earlier proceeding.

Whatever the precise contours of the "extrajudicial source" doctrine (a subject to which we will revert shortly), it is the contention of petitioners that the doctrine has no application to § 455(a). Most Courts of Appeals to consider the matter have rejected this contention, see United States v. Barry, 961 F.2d 260, 263 (CADC 1992); United States v. Sammons, 918 F.2d 592, 599 (CA6 1990); McWhorter v. Birmingham, 906 F.2d 674, 678 (CA11 1990); United States v. Mitchell, 886 F.2d 667, 671 (CA4 1989); **1153 United States v. Merkt, 794 F.2d 950, 960 (CA5 1986), cert. denied, 480 U.S. 946, 107 S.Ct. 1603, 94 L.Ed.2d 789 (1987); Johnson v. Trueblood, 629 F.2d 287, 290-291 (CA3 1980), cert. denied, 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 200 (1981); United States v. Sibla, 624 F.2d 864, 869 (CA9 1980). Some, however, have agreed with it, see United States v. Chantal, 902 F.2d 1018, 1023-1024 (CA1 1990); cf. United States v. Coven, 662 F.2d 162, 168-169 (CA2 1981) (semble), cert. denied, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982). To understand the arguments pro and con it is necessary to appreciate the major changes in prior law effected by the revision of § 455 in 1974.

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[2] Before 1974, § 455 was nothing more than the then-current version of the 1821 prohibition against a judge's presiding who has an interest in the case or a relationship to a party. It read, quite simply:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." 28 U.S.C. § 455 (1970 ed.).

The 1974 revision made massive changes, so that § 455 now reads as follows:

*547 "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

"(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

"(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

"(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

"(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

"(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

"(ii) Is acting as a lawyer in the proceeding;

"(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

"(iv) Is to the judge's knowledge likely to be a material witness in the proceeding."

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*548 Almost all of the revision (paragraphs (b)(2) through (b)(5)) merely rendered objective and spelled out in detail the "interest" and "relationship" grounds of recusal that had previously been covered by § 455. But the other two paragraphs of the revision brought into § 455 elements of general "bias and prejudice" recusal that had previously been addressed only by § 144. Specifically, paragraph (b)(1) entirely duplicated the grounds of recusal set forth in § 144 ("bias or prejudice"), but (1) made them applicable to all justices, judges, and magistrates (and not just district judges), and (2) placed the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit.

[3] KC Subsection (a), the provision at issue here, was an entirely new "catchall" recusal provision, covering both "interest or relationship" and "bias or prejudice" grounds, see **1154 Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)-but requiring them all to be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever "impartiality might reasonably be questioned."

What effect these changes had upon the "extrajudicial source" doctrine-whether they in effect render it obsolete, of continuing relevance only to § 144, which seems to be properly invocable only when § 455(a) can be invoked anyway-depends upon what the basis for that doctrine was. Petitioners suggest that it consisted of the limitation of § 144 to " personal bias or prejudice," bias or prejudice officially acquired being different from "personal" bias or prejudice. And, petitioners point out, while § 455(b)(1) retains the phrase "personal bias or prejudice," § 455(a) proscribes all partiality, not merely the "personal" sort.

It is true that a number of Courts of Appeals have relied upon the word "personal" in restricting § 144 to extrajudicial sources, see, e.g., *549 Craven v. United States, 22 F.2d 605, 607-608 (CA1 1927); Ferrari v. United States, 169 F.2d 353, 355 (CA9 1948). And several cases have cited the absence of that word as a reason for excluding that restriction from § 455(a), see United States v. Coven, supra, at 168, cert. denied, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982); Panzardi-Alvarez v. United States, 879 F.2d 975, 983-984, and n. 6 (CA1), cert. denied, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1045 (1989). It seems to us, however, that that mistakes the basis for the "extrajudicial source" doctrine. Petitioners' suggestion that we relied upon the word "personal" in our Grinnell opinion is simply in error. The only reason Grinnell gave for its "extrajudicial source" holding was citation of our opinion almost half a century earlier in Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921). But that case, and the case which it in turn cited, Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379 (1913), relied not upon the word "personal" in § 144, but upon its provision requiring the recusal affidavit to be filed 10 days before the beginning of the court term. That requirement was the reason we found it obvious in Berger that the affidavit "must be based upon facts antedating the trial, not those occurring during the trial," 255 U.S., at

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34, 41 S.Ct., at 233; and the reason we said in American Steel Barrel that the recusal statute "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, ... but to prevent his future action in the pending cause," 230 U.S., at 44, 33 S.Ct., at 1010.

In our view, the proper (though unexpressed) rationale for Grinnell, and the basis of the modern "extrajudicial source" doctrine, is not the statutory term "personal"-for several reasons. First and foremost, that explanation is simply not the semantic success it pretends to be. Bias and prejudice seem to us not divided into the "personal" kind, which is offensive, and the official kind, which is perfectly all right. As generally used, these are pejorative terms, describing dispositions that are never appropriate. It is common to speak of "personal bias" or "personal prejudice" without meaning the adjective to do anything except emphasize the *550 idiosyncratic nature of bias and prejudice, and certainly without implying that there is some other "nonpersonal," benign category of those mental states. In a similar vein, one speaks of an individual's "personal preference," without implying that he could also have a "nonpersonal preference." Secondly, interpreting the term "personal" to create a complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd. Imagine, for example, a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect, and acquires a passionate hatred for all its adherents. This would be "official" rather than "personal" bias, and would provide no basis for the judge's recusing himself.

1155 [4] KC **It seems to us that the origin of the "extrajudicial source" doctrine, and the key to understanding its flexible scope (or the so-called "exceptions" to it), is simply the pejorative connotation of the words "bias or prejudice." Not all unfavorable disposition towards an individual (or his case) is properly described by those terms. One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). The "extrajudicial source" doctrine is one application of this pejorativeness requirement to the terms "bias" and "prejudice" as they are used in §§ 144 and 455(b)(1) with specific reference to the work of judges.

[5] KC [6] KC [7] KC The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant,*551 who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it:

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"Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." In re J.P. Linahan, Inc., 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

[8] KC [9] KC It is wrong in theory, though it may not be too far off the mark as a practical matter, to suggest, as many opinions have, that "extrajudicial source" is the only basis for establishing disqualifying bias or prejudice. **It is the only common basis, but not the exclusive one, since it is not the exclusive reason a predisposition can be wrongful or inappropriate.** A favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. (That explains what some courts have called the "pervasive bias" exception to the "extrajudicial source" doctrine. See, e.g., Davis v. Board of School Comm'rs of Mobile County, 517 F.2d 1044, 1051 (CA5 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).)

[10] KC With this understanding of the "extrajudicial source" limitation in §§ 144 and 455(b)(1), we turn to the question whether it appears in § 455(a) as well. Petitioners' argument for the negative based upon the mere absence of the *552 word "personal" is, for the reasons described above, not persuasive. Petitioners also rely upon the categorical nature of § 455's language: Recusal is required whenever there exists a genuine question concerning a judge's impartiality, and not merely when the question arises from an extrajudicial source. A similar "plain-language" argument could be made, however, with regard to §§ 144 and 455(b)(1): They apply whenever bias or prejudice exists, and not merely when it derives from an extrajudicial source. As we have described, the latter argument is invalid because the pejorative connotation of the terms "bias" and "prejudice" demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable. We **1156 think there is an equivalent pejorative connotation, with equivalent consequences, to the term "partiality." See American Heritage Dictionary 1319 (3d ed. 1992) ("partiality" defined as "[f]avorable prejudice or bias"). A prospective juror in an insurance-claim case may be stricken as partial if he always votes for insurance companies; but not if he always votes for the party whom the terms of the contract support. "Partiality" does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate. Impartiality is not gullibility. Moreover, even if the pejorative connotation of "partiality" were not enough to import the "extrajudicial source" doctrine into § 455(a), the "reasonableness" limitation (recusal is required only if the judge's impartiality "might reasonably be questioned") would have the same effect. To demand the sort of "child-like innocence" that elimination of the "extrajudicial source" limitation would require is not reasonable.

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[11] Declining to find in the language of § 455(a) a limitation which (petitioners acknowledge) is contained in the language of § 455(b)(1) would cause the statute, in a significant sense, to contradict itself. As we have described, § 455(a) expands the protection of § 455(b), but duplicates some of its protection as well-not only with regard to bias and prejudice but also with regard to interest and relationship. Within the *553 area of overlap, it is unreasonable to interpret § 455(a) (unless the language requires it) as implicitly eliminating a limitation explicitly set forth in § 455(b). It would obviously be wrong, for example, to hold that "impartiality could reasonably be questioned" simply because one of the parties is in the fourth degree of relationship to the judge. Section 455(b)(5), which addresses the matter of relationship specifically, ends the disability at the third degree of relationship, and that should obviously govern for purposes of § 455(a) as well. Similarly, § 455(b)(1), which addresses the matter of personal bias and prejudice specifically, contains the "extrajudicial source" limitation-and that limitation (since nothing in the text contradicts it) should govern for purposes of § 455(a) as well.FN2

FN2. Justice KENNEDY asserts that what we have said in this paragraph contradicts the proposition, established in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), that "subsections (a) and (b), while addressing many of the same underlying circumstances, are autonomous in operation." Post, at 1163. Liljeberg established no such thing. It established that subsection (a) requires recusal in some circumstances where subsection (b) does not-but that is something quite different from "autonomy," which in the context in which Justice KENNEDY uses it means that the one subsection is to be interpreted and applied without reference to the other. It is correct that subsection (a) has a "broader reach" than subsection (b), post, at 1163, but the provisions obviously have some ground in common as well, and should not be applied inconsistently there. Liljeberg concerned a respect in which subsection (a) did go beyond (b). Since subsection (a) deals with the objective appearance of partiality, any limitations contained in (b) that consist of a subjective-knowledge requirement are obviously inapplicable. Subsection (a) also goes beyond (b) in another important respect: It covers all aspects of partiality, and not merely those specifically addressed in subsection (b). However, when one of those aspects addressed in (b) is at issue, it is poor statutory construction to interpret (a) as nullifying the limitations (b) provides, except to the extent the text requires. Thus, as we have said, under subsection (a) as under (b)(5), fourth degree of kinship will not do.
What is at issue in the present case is an aspect of "partiality" already addressed in (b), personal bias or prejudice. The "objective appearance" principle of subsection (a) makes irrelevant the subjective limitation of (b)(1): The judge does not have to be subjectively biased or prejudiced, so long as he appears to be so. But nothing in subsection (a) eliminates the longstanding limitation of (b)(1), that "personal bias or prejudice" does not consist of a disposition that fails to satisfy the "extrajudicial source" doctrine. The objective appearance of an adverse disposition attributable to information acquired in a prior trial is not an objective appearance of personal bias or prejudice, and hence not an objective appearance of improper partiality.

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[12] *554 Petitioners suggest that applying the "extrajudicial source" limitation to § 455(a) will cause disqualification of a trial judge to be more easily obtainable upon remand of a case by an appellate court than upon direct motion. We do not see why that necessarily follows; and if it does, why it is necessarily bad. Federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes **1157 alone, but on the appellate courts' statutory power to "require such further proceedings to be had as may be just under the circumstances," 28 U.S.C. § 2106. That may permit a different standard, and there may be pragmatic reasons for a different standard. We do not say so-but merely say that the standards applied on remand are irrelevant to the question before us here.

[13] [14] For all these reasons, we think that the "extrajudicial source" doctrine, as we have described it, applies to § 455(a). As we have described it, however, there is not much doctrine to the doctrine. **The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a necessary condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice.** Nor is it a sufficient condition for "bias or prejudice" recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice. Since neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be *555 better to speak of the existence of a significant (and often determinative) "extrajudicial source" factor, than of an "extrajudicial source" doctrine, in recusal jurisprudence.

[15] [16] [17] [18] The facts of the present case do not require us to describe the consequences of that factor in complete detail. It is enough for present purposes to say the following: **First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion**. See United States v. Grinnell Corp., 384 U.S., at 583, 86 S.Ct., at 1710. **In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved.** Almost invariably, they are proper grounds for appeal, not for recusal. Second, **opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.** An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been

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made by the District Judge in c a World War I espionage case against German-American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are reeking with disloyalty." Id., at 28 (internal quotation marks omitted). Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance,*556 and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration-even a stern and short-tempered judge's ordinary efforts at courtroom administration-remain immune.

III

[19] Applying the principles we have discussed to the facts of the present case is not difficult. None of the grounds petitioners assert required disqualification. As we have described, petitioners' first recusal motion was based on rulings made, and statements uttered, by the District Judge during and after the 1983 trial; and petitioner Bourgeois' second recusal motion was founded on the judge's admonishment of Bourgeois' **1158 counsel and codefendants. In their briefs here, petitioners have referred to additional manifestations of alleged bias in the District Judge's conduct of the trial below, including the questions he put to certain witnesses, his alleged "anti-defendant tone," his cutting off of testimony said to be relevant to defendants' state of mind, and his post-trial refusal to allow petitioners to appeal in forma pauperis.FN3

FN3. Petitioners' brief also complains of the District Judge's refusal in the 1983 trial to call petitioner Bourgeois "Father," asserting that this "subtly manifested animosity toward Father Bourgeois." Brief for Petitioners 30. As we have discussed, when intrajudicial behavior is at issue, manifestations of animosity must be much more than subtle to establish bias.

All of these grounds are inadequate under the principles we have described above: They consist of judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses. All occurred in the course of judicial proceedings, and neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.

The judgment of the Court of Appeals is

Affirmed.

*557 Justice KENNEDY, with whom Justice BLACKMUN, Justice STEVENS, and Justice SOUTER join, concurring in the judgment.

The Court's ultimate holding that petitioners did not assert sufficient grounds to disqualify the District Judge is unexceptionable. Nevertheless, I confine my concurrence to the judgment, for the Court's opinion announces a mistaken, unfortunate precedent in

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two respects. First, it accords nearly dispositive weight to the source of a judge's alleged partiality, to the point of stating that disqualification for intrajudicial partiality is not required unless it would make a fair hearing impossible. Second, the Court weakens the principal disqualification statute in the federal system, 28 U.S.C. § 455, by holding-contrary to our most recent interpretation of the statute in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)-that the broad protections afforded by subsection (a) are qualified by limitations explicit in the specific prohibitions of subsection (b).

I

We took this case to decide whether the reach of § 455(a) is limited by the so-called extrajudicial source rule. I agree with the Court insofar as it recognizes that there is no per se rule requiring that the alleged partiality arise from an extrajudicial source. In my view, however, the Court places undue emphasis upon the source of the challenged mindset in determining whether disqualification is mandated by § 455(a).

A

Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." For present purposes, it should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a *558 judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

The statute does not refer to the source of the disqualifying partiality. And placing too much emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry. One of the very objects of law is the impartiality of its judges in fact and appearance. So in one sense it could be said that any disqualifying state of mind must originate from a source outside law itself. That metaphysical inquiry, however, is beside the point. The relevant consideration**1159 under § 455(a) is the appearance of partiality, see Liljeberg, supra, at 860, 108 S.Ct., at 2202-03, not where it originated or how it was disclosed. If, for instance, a judge presiding over a retrial should state, based upon facts adduced and opinions formed during the original cause, an intent to ensure that one side or the other shall prevail, there can be little doubt that he or she must recuse. Cf. Rugenstein v. Ottenheimer, 78 Or. 371, 372, 152 P. 215, 216 (1915) (reversing for judge's failure to disqualify himself on retrial, where judge had stated: " 'This case may be tried again, and it will be tried before me. I will see to that. And I will see that the woman gets another verdict and judgment that will stand' ").

I agree, then, with the Court's rejection of the per se rule applied by the Court of Appeals, which provides that "matters arising out of the course of judicial proceedings are not a

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proper basis for recusal" under § 455(a). 973 F.2d 910 (CA11 1992). But the Court proceeds to discern in the statute an extrajudicial source interpretive doctrine, under which the source of an alleged deep-seated predisposition is a primary factor in the analysis. The Court's candid struggle to find a persuasive rationale for this approach demonstrates that prior attempts along those lines have fallen *559 somewhat short of the mark. This, I submit, is due to the fact that the doctrine crept into the jurisprudence more by accident than design.

The term "extrajudicial source," though not the interpretive doctrine bearing its name, has appeared in only one of our previous cases: United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Respondents in Grinnell alleged that the trial judge had a personal bias against them, and sought his disqualification and a new trial under 28 U.S.C. § 144. That statute, like § 455(b)(1), requires disqualification for "bias or prejudice." In denying respondents' claim, the Court stated that "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." 384 U.S., at 583, 86 S.Ct., at 1710.

Although Grinnell's articulation of the extrajudicial source rule has a categorical aspect about it, the decision, on closer examination, proves not to erect a per se barrier. After reciting what appeared to be an absolute rule, the Court proceeded to make a few additional points: that certain in-court statements by the judge "reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for"; that during the trial the judge "repeatedly stated that he had not made up his mind on the merits"; and that another of the judge's challenged statements did not "manifes[t] a closed mind on the merits of the case," but rather was "a terse way" of reiterating a prior ruling. Ibid. Had we meant the extrajudicial source doctrine to be dispositive under § 144, those further remarks would have been unnecessary.

More to the point, Grinnell provides little justification for its announcement of the extrajudicial source rule, relying only upon a citation to Berger v. United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921). The cited passage from Berger, it turns out, does not bear the weight Grinnell places on it, but stands for the more limited proposition that the alleged bias "must be *560 based upon something other than rulings in the case." 255 U.S., at 31, 41 S.Ct., at 232 Berger, in turn, relies upon an earlier case advancing the same narrow proposition, Ex parte American Steel Barrel Co., 230 U.S. 35, 44, 33 S.Ct. 1007, 1010, 57 L.Ed. 1379 (1913) (predecessor of § 144 "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise"). There is a real difference, of course, between a rule providing that bias must arise from an extrajudicial source and one providing that judicial rulings alone cannot sustain a challenge for bias. Grinnell, therefore, provides a less than satisfactory rationale for reading the extrajudicial source doctrine into § 144 or the disqualification statutes at issue here. It should come as little surprise, then, **1160 that the Court does not enlist Grinnell to support its adoption of the doctrine.

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The Court adverts to, but does not ratify, ante, at 1154, an alternative rationale: the requirement in § 144 that a litigant's recusal affidavit "be filed not less than 10 days before the beginning of the term at which the proceeding is to be heard," unless "good cause [is] shown for failure to file it within such time." If a litigant seeking disqualification must file an affidavit 10 days before the beginning of the term, the argument goes, the alleged bias cannot arise from events occurring or facts adduced during the litigation. See Berger, supra, 255 U.S. at 34-35, 41 S.Ct. at 233-34. That rationale fails as well. The 10-day rule has been an anachronism since 1963, when Congress abolished formal terms of court for United States district courts. See 28 U.S.C. § 138. In any event, the rule always had an exception for good cause. And even if the 10-day requirement could justify reading the extrajudicial source rule into § 144, it would not suffice as to § 455(a) or § 455(b)(1), which have no analogous requirement.

The Court is correct to reject yet another view, which has gained currency in several Courts of Appeals, that the term "personal" in §§ 144 and 455(b)(1) provides a textual home for the extrajudicial source doctrine. Ante, at 1153-1155.

*561 Given the flaws with prior attempts to justify the doctrine, the Court advances a new rationale: The doctrine arises from the pejorative connotation of the term "bias or prejudice" in §§ 144 and 455(b)(1) and the converse of the term "impartiality" in § 455(a). Ante, at 1155, 1156. This rationale, as the Court acknowledges, does not amount to much. It is beyond dispute that challenged opinions or predispositions arising from outside the courtroom need not be disqualifying. See, e.g., United States v. Conforte, 624 F.2d 869, 878-881 (CA9), cert. denied, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). Likewise, prejudiced opinions based upon matters disclosed at trial may rise to the level where recusal is required. See, e.g., United States v. Holland, 655 F.2d 44 (CA5 1981); Nicodemus v. Chrysler Corp., 596 F.2d 152, 155-157, and n. 10 (CA6 1979). From this, the Court is correct to conclude that an allegation concerning some extrajudicial matter is neither a necessary nor a sufficient condition for disqualification under any of the recusal statutes. Ante, at 1157. The Court nonetheless proceeds, without much explanation, to find "a significant (and often determinative) 'extrajudicial source' factor " in those statutes. Ibid. (emphasis in original).

This last step warrants further attention. I recognize along with the Court that, as an empirical matter, doubts about a judge's impartiality seldom have merit when the challenged mindset arises as a result of some judicial proceeding. The dichotomy between extrajudicial and intrajudicial sources, then, has some slight utility; it provides a convenient shorthand to explain how courts have confronted the disqualification issue in circumstances that recur with some frequency.

To take a common example, litigants (like petitioners here) often seek disqualification based upon a judge's prior participation, in a judicial capacity, in some related litigation. Those allegations are meritless in most instances, and their prompt rejection is important so the case can proceed. Judges, if faithful to their oath, approach every aspect of *562 each case with a neutral and objective disposition. They understand their duty to render

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decisions upon a proper record and to disregard earlier judicial contacts with a case or party.

Some may argue that a judge will feel the "motivation to vindicate a prior conclusion" when confronted with a question for the second or third time, for instance, upon trial after a remand. Ratner, Disqualification of Judges for Prior Judicial Actions, 3 How.L.J. 228, 229-230 (1957). Still, we accept the notion that the "conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect." **1161 In re J.P. Linahan, Inc., 138 F.2d 650, 652 (CA2 1943). The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office. As a matter of sound administration, moreover, it may be necessary and prudent to permit judges to preside over successive causes involving the same parties or issues. See Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 4(a) ("The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant"). The public character of the prior and present proceedings tends to reinforce the resolve of the judge to weigh with care the propriety of his or her decision to hear the case.

Out of this reconciliation of principle and practice comes the recognition that a judge's prior judicial experience and contacts need not, and often do not, give rise to reasonable questions concerning impartiality.

B

There is no justification, however, for a strict rule dismissing allegations of intrajudicial partiality, or the appearance *563 thereof, in every case. A judge may find it difficult to put aside views formed during some earlier proceeding. In that instance we would expect the judge to heed the judicial oath and step down, but that does not always occur. If through obduracy, honest mistake, or simple inability to attain self-knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source. As I noted above, the central inquiry under § 455(a) is the appearance of partiality, not its place of origin.

I must part, then, from the Court's adoption of a standard that places all but dispositive weight upon the source of the alleged disqualification. The Court holds that opinions arising during the course of judicial proceedings require disqualification under § 455(a) only if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." Ante, at 1157. **That standard is not a fair interpretation of the statute, and is quite insufficient to serve and protect the integrity of the courts.** In practical effect, the Court's standard will be difficult to distinguish from a per se extrajudicial source rule, the very result the Court professes to reject.

The Court's "impossibility of fair judgment" test bears little resemblance to the objective standard Congress adopted in § 455(a): whether a judge's "impartiality might reasonably

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be questioned." The statutory standard, which the Court preserves for allegations of an extrajudicial nature, asks whether there is an appearance of partiality. See Liljeberg, 486 U.S., at 860, 108 S.Ct., at 2203 ("[t]he goal of section 455(a) is to avoid even the appearance of partiality") (internal quotation marks omitted); United States v. Chantal, 902 F.2d 1018, 1023 (CA1 1990). The Court's standard, in contrast, asks whether fair judgment is impossible, and if this test demands some direct inquiry to the judge's actual, rather than apparent, state of mind, it defeats the underlying goal of § 455(a): to avoid the appearance of partiality even when no partiality exists.

*564 And in all events, the "impossibility of fair judgment" standard remains troubling due to its limited, almost preclusive character. **As I interpret it, a § 455(a) challenge would fail even if it were shown that an unfair hearing were likely, for it could be argued that a fair hearing would be possible nonetheless.** The integrity of the courts, as well as the interests of the parties and the public, are ill served by this rule. There are bound to be circumstances where a judge's demeanor or attitude would raise reasonable questions concerning impartiality but would not devolve to the point where one would think fair judgment impossible.

When the prevailing standard of conduct imposed by the law for many of society's enterprises is reasonableness, it seems most inappropriate to say that a judge is subject to disqualification only if concerns about his **1162 or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake. Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. This we cannot change. We can, however, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.

The standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case.

*565 In matters of ethics, appearance and reality often converge as one. See Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13-14, 99 L.Ed. 11 (1954) ("[J]ustice must satisfy the appearance of justice"); Ex parte McCarthy, [1924] 1 K.B. 256, 259 (1923) ("[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done"). I do not see how the appearance of fairness and neutrality can obtain if the bare possibility of a fair hearing is all that the law requires. Cf. Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980) (noting the importance of "preserv[ing] both the appearance and reality of fairness," which " 'generat[es] the feeling, so important to a popular government, that justice has been done' ") (quoting

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Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)).

Although the source of an alleged disqualification may be relevant in determining whether there is a reasonable appearance of impartiality, that determination can be explained in a straightforward manner without resort to a nearly dispositive extrajudicial source factor. I would apply the statute as written to all charges of partiality, extrajudicial or otherwise, secure in my view that district and appellate judges possess the wisdom and good sense to distinguish substantial from insufficient allegations and that our rules, as so interpreted, are sufficient to correct the occasional departure.

II

The Court's effort to discern an "often dispositive" extrajudicial source factor in § 455(a) leads it to an additional error along the way. As noted above, the Court begins by explaining that the pejorative connotation of the term "bias or prejudice" demonstrates that the source of an alleged bias is significant under §§ 144 and 455(b)(1). The Court goes on to state that "it is unreasonable to interpret § 455(a) (unless the language requires it) as implicitly eliminating a limitation explicitly set forth in § 455(b)." Ante, at 1156 (emphasis in original). That interpretation, the Court reasons, "would *566 cause the statute, in a significant sense, to contradict itself." Ibid.

We rejected that very understanding of the interplay between §§ 455(a) and (b) in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Respondent in Liljeberg sought to disqualify a district judge under § 455(a) because the judge (in his capacity as trustee of a university) had a financial interest in the litigation, albeit an interest of which he was unaware. Petitioner opposed disqualification, and asked us to interpret § 455(a) in light of § 455(b)(4), which provides for disqualification only if the judge "knows that he, individually or as a fiduciary, ... has a financial interest in the subject matter in controversy or in a party to the proceeding." According to petitioner, the explicit knowledge requirement in § 455(b)(4) **1163 indicated that Congress intended a similar requirement to govern § 455(a). See Liljeberg, 486 U.S., at 859, n. 8, 108 S.Ct., at 2202, n. 8. Otherwise, petitioner contended, the knowledge requirement in § 455(b)(4) would be meaningless. Ibid.

In holding for respondent, we emphasized that there were "important differences" between subsections (a) and (b), and concluded that the explicit knowledge requirement under § 455(b)(4) does not apply to disqualification motions filed under § 455(a). Id., at 859-860, and n. 8, 108 S.Ct. at 2202-03, and n. 8. Liljeberg teaches, contrary to what the Court says today, that limitations inherent in the various provisions of § 455(b) do not, by their own force, govern § 455(a) as well. The structure of § 455 makes clear that subsections (a) and (b), while addressing many of the same underlying circumstances, are autonomous in operation. Section 455(b) commences with the charge that a judge "shall also disqualify himself in the following circumstances"; Congress' inclusion of the word "also" indicates that subsections (a) and (b) have independent force. Section 455(e),

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which permits parties to waive grounds for disqualification arising under § 455(a), but not § 455(b), provides further specific textual confirmation of the difference.

*567 The principal distinction between § 455(a) and (b) is apparent from the face of the statute. Section 455(b) delineates specific circumstances where recusal is mandated; these include instances of actual bias as well as specific instances where actual bias is assumed. See 28 U.S.C. § 455(b)(1) ("personal bias or prejudice"); § 455(b)(2) (judge "served as [a] lawyer in the matter in controversy" while in private practice); § 455(b)(3) (same while judge served in government employment); § 455(b)(4) ("financial interest" in the litigation); § 455(b)(5) (judge "within the third degree of relationship" to a party, lawyer, or material witness). Section 455(a), in contrast, addresses the appearance of partiality, guaranteeing not only that a partisan judge will not sit, but also that no reasonable person will have that suspicion. See Liljeberg, supra, at 860, 108 S.Ct., at 2202-03.

Because the appearance of partiality may arise when in fact there is none, see, e.g., Hall v. Small Business Admin., 695 F.2d 175, 179 (CA5 1983); United States v. Ritter, 540 F.2d 459, 464 (CA10), cert. denied, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976), the reach of § 455(a) is broader than that of § 455(b). One of the distinct concerns addressed by § 455(a) is that the appearance of impartiality be assured whether or not the alleged disqualifying circumstance is also addressed under § 455(b). In this respect, the statutory scheme ought to be understood as extending § 455(a) beyond the scope of § 455(b), and not confining § 455(a) in large part, as the Court would have it. See ante, at 1156, n. 2. The broader reach of § 455(a) is confirmed by the rule permitting its more comprehensive provisions, but not the absolute rules of § 455(b), to be waived. See 28 U.S.C. § 455(e). And in all events, I suspect that any attempt to demarcate an "area of overlap" (ante, at 1156) between §§ 455(a) and (b) will prove elusive in many instances.

Given the design of the statute, then, it is wrong to impose the explicit limitations of § 455(b) upon the more extensive protections afforded by § 455(a). See *568 Liljeberg, supra, 486 U.S. at 859-861, and n. 8, 108 S.Ct. at 2202-03, and n. 8. The Court's construction of the statute undercuts the protection Congress put in place when enacting § 455(a) as an independent guarantee of judicial impartiality.

III

The Court describes in all necessary detail the unimpressive allegations of partiality, and the appearance thereof, in this case. The contested rulings and comments by the trial judge were designed to ensure the orderly conduct of petitioners' trial. Nothing in those rulings or comments raises any inference of bias or partiality. I concur in the judgment.

U.S.Ga.,1994.
Liteky v. U.S.
510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474, 62 USLW 4161

Briefs and Other Related Documents (Back to top)

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• 1993 WL 757658 (Oral Argument) Oral Argument (Nov. 03, 1993)
• 1993 WL 384814 (Appellate Brief) BRIEF FOR THE UNITED STATES (Aug. 20, 1993)
• 1993 WL 387331 (Appellate Brief) PETITIONERS' BRIEF (Jul. 19, 1993)
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305 B.R. 175

Motions, Pleadings and Filings

United States District Court,
D. Delaware.
In re OWENS CORNING, et al., Debtors.
In re W.R. Grace & Co., et al., Debtors.
In re USG Corporation, a Delaware Corporation, et al., Debtors.
Nos. 00-3837 to 00-3854, 01-1139 to 01-1200, 01-2094 to 01-2104.
Feb. 2, 2004.

Background: Motions were filed for recusal of district court judge from presiding over jointly administered Chapter 11 cases of manufacturers of asbestos products.

Holdings: The District Court, Wolin, J., held that:
(1) judge's utilization, as advisors in jointly administered Chapter 11 cases of manufacturers of asbestos products, of former judge who had previously been appointed as representative for futures claimants in another asbestos-related bankruptcy case did not require judge's recusal based on alleged appearance of partiality;
(2) judge's decision, as announced without objection at initial case management conference, to use ex parte conferences as case management procedure did not require judge's recusal based on his personal knowledge of disputed evidentiary facts; and
(3) recusal motions were not timely.

Motions denied.

West Headnotes

[1] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

In evaluating whether appearance of partiality exists, such as would require judge's disqualification, court must examine entire course of judicial proceedings, rather than just isolated incidents; recusal is warranted when, from objective standpoint, a reasonable man knowing all the circumstances would harbor doubts regarding judge's impartiality. 28 U.S.C.A. § 455(a).

[2] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Appearance of partiality, such as would require judge's disqualification, does not depend solely on facts as known immediately prior to time that motion for recusal is filed. 28 U.S.C.A. § 455(a).

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[3] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of Objections. Most Cited Cases

In ruling on motion for recusal, judge need not accept movant's factual allegations as true, but may scrutinize the factual accuracy of movant's affidavits. 28 U.S.C.A. § 455.

[4] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of Objections. Most Cited Cases

In ruling on motion for recusal, judge may supplement the record and may even contradict movant's factual allegations with facts from judge's own knowledge acquired in course of proceedings. 28 U.S.C.A. § 455.

[5] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Determination as to whether a reasonable man would harbor doubts about judge's impartiality, so as to require judge's recusal based on appearance of partiality, must be made based upon all of the facts. 28 U.S.C.A. § 455(a).

[6] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k40 k. Constitutional and Statutory Provisions. Most Cited Cases

Federal statute requiring judge's recusal in any proceeding in which his impartiality might reasonably be questioned exists to protect confidence of participants and of the public in integrity of judicial system. 28 U.S.C.A. § 455(a).

[7] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

32486

Reasonable person, whose view court had to adopt in deciding whether to grant motions to recuse based on appearance of partiality in jointly administered Chapter 11 cases of manufacturers of asbestos products, did not include laypersons or attorneys not conversant with basics of mass-tort bankruptcy practice; rather, this hypothetical reasonable person was one with professional skills and experience in mass-tort bankruptcies sufficient to understand the import of facts presented. 28 U.S.C.A. § 455(a).

[8] KeyCite Notes

227 Judges
 227IV Disqualification to Act
  227k49 Bias and Prejudice
   227k49(1) k. In General. Most Cited Cases

Ultimate question, in any bias inquiry conducted by court when ruling on motion to recuse, is whether, either in appearance or actuality, judge harbors deep-seated favoritism or antagonism that would make fair judgment impossible. 28 U.S.C.A. § 455.

[9] KeyCite Notes

227 Judges
 227IV Disqualification to Act
  227k49 Bias and Prejudice
   227k49(1) k. In General. Most Cited Cases

Most critical factor for court, in ruling on motion to recuse based on appearance of partiality, is not the judicial or extrajudicial source of judge's prejudicial knowledge or bias, but judge's apparent inability to render fair judgment. 28 U.S.C.A. § 455(a).

[10] KeyCite Notes

227 Judges
 227IV Disqualification to Act
  227k49 Bias and Prejudice
   227k49(1) k. In General. Most Cited Cases

"Personal knowledge" of disputed evidentiary facts concerning the proceeding, such as will require judge's recusal, must derive from extra-judicial source; it cannot be knowledge acquired in subject judicial proceeding itself. 28 U.S.C.A. § 455(b)(1).

[11] KeyCite Notes

227 Judges
 227IV Disqualification to Act
  227k49 Bias and Prejudice
   227k49(1) k. In General. Most Cited Cases

Facts learned in off-the-record conferences with parties are not derived from "extra-judicial" source, and will not disqualify judge under "personal knowledge" prong of recusal statute. 28 U.S.C.A. § 455 (b)(1).

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[12] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Personal knowledge gained in related proceeding will not disqualify judge under "personal knowledge" prong of recusal statute. 28 U.S.C.A. § 455(b)(1).

[13] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Extra-judicial knowledge that judge gains from participating in general policy-making, or from judge's previous advocacy for a legal, constitutional or policy position, will not disqualify judge under "personal knowledge" prong of recusal statute, not even when that position is directly implicated in case before court. 28 U.S.C.A. § 455(b)(1).

[14] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Information learned from published sources will not disqualify judge under "personal knowledge" prong of recusal statute, since counsel are expected to be aware of, and to have opportunity to challenge, such sources in adversarial process. 28 U.S.C.A. § 455(b)(1).

[15] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Knowledge of garden-variety facts that judge learned merely as member of the public will not disqualify judge under "personal knowledge" prong of recusal statute. 28 U.S.C.A. § 455(b)(1).

[16] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice

32488

227k49(1) k. In General. Most Cited Cases

Disqualification must have reasonable basis; while litigants should not have to face judge if there are reasonable questions about judge's impartiality, they are also not entitled to judges of their own choice. 28 U.S.C.A. § 455.

[17] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Mere fear of impropriety is not sufficient basis for requiring judge's recusal. Bankr.Code, 28 U.S.C.A. § 455.

[18] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k39 k. Nature and Effect in General. Most Cited Cases

In connection with motion to recuse, both judge and reviewing court must be alert to possibility that those who question judge's impartiality are merely seeking to avoid consequences of expected adverse decision. Bankr.Code, 28 U.S.C.A. § 455.

[19] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k50 k. Refusal by Judge to Act. Most Cited Cases

227 Judges KeyCite Notes
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of Objections. Most Cited Cases

On motion to recuse, district court judge would not indulge presumption either in favor of, or against, recusal, but would exercise its most considered judgment, weigh arguments of both sides equally, and heed admonition that judge is as much obliged not to recuse himself where it is not called for as he is obliged to when it is. 28 U.S.C.A. § 455.

[20] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(2) k. Time of Making Objection. Most Cited Cases

32489

Generally, party seeking to disqualify judge must do so at earliest opportunity after the facts upon which recusal motion is based become known. 28 U.S.C.A. § 455.

[21] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(2) k. Time of Making Objection. Most Cited Cases

There is no formula for determining how much time can elapse between time that movant learns of facts supporting recusal motion and date his motion is filed; rather, court must look at several factors in determining whether recusal motion is timely, including: (1) whether movant has participated in substantial manner in trial or pre-trial proceedings; (2) whether grant of motion would represent waste of judicial resources; (3) whether motion was made after entry of judgment; and (4) whether movant can demonstrate good cause for his delay. 28 U.S.C.A. § 455.

[22] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(2) k. Time of Making Objection. Most Cited Cases

Requirement that recusal motion must be timely filed applies not only to motions based on alleged appearance of partiality, but to those based upon judge's actual bias or prejudice or personal knowledge of disputed evidentiary facts under separate section of recusal statute; fact that grounds specified for recusal in this section of statute were not waivable by parties did not mean that parties, having participated in judicial proceedings and perceived how judge was inclined to rule, could waste judicial resources by belatedly seeking judge's recusal. 28 U.S.C.A. § 455(a, b, e).

[23] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

District court judge's utilization, as advisors in jointly administered Chapter 11 cases of manufacturers of asbestos products, of former judge who had previously been appointed as representative for futures claimants in another asbestos-related bankruptcy case and of attorney appointed to act as special counsel to former judge in this other case, did not require judge's recusal based on alleged appearance of partiality, where these advisors at no time provided judge with substantive advice as to any legal issue reserved for court, but merely assisted judge in acquiring background information on mass-tort bankruptcies needed to understand proceedings before him, at time when none of these proceedings had matured to point that claim validity, claim valuation or equivalence was ripe for discussion. 28 U.S.C.A. § 455(a).

[24] KeyCite Notes

227 Judges

32490

227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

District court judge's decision, as announced without objection at initial case management conference in jointly administered Chapter 11 cases of manufacturers of asbestos products, to use ex parte conferences as case management procedure in order to gather sensitive, proprietary information that would not have been disclosed in public, adversarial setting, and in order to resolve what were primarily procedural or administrative matters, did not require judge's recusal based on his personal knowledge of disputed evidentiary facts, where parties seeking to obtain judge's recusal had not only failed to object to this ex parte procedure, but utilized this procedure themselves for period of roughly 22 months prior to filing recusal motions. 28 U.S.C.A. § 455(b)(1).

[25] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(2) k. Time of Making Objection. Most Cited Cases

Motions to recuse district court judge from presiding over jointly administered Chapter 11 cases of manufacturers of asbestos products based on appearance of partiality allegedly arising from judge's utilization, as advisors, of former judge who had previously been appointed as representative for futures claimants in another asbestos-related bankruptcy case, and of attorney appointed to act as special counsel to former judge in this other case, were not timely filed, where several attorneys in law firms charged with representing movants' interests had actual notice of these appointments long before recusal motions were filed, notwithstanding movant's contention that notice to one lawyer in firm was not notice to individual attorneys charged with handling his case, for purposes of assessing whether recusal was timely sought; evidence established that movant had surrounded himself with coterie of experienced and sophisticated lawyers who, through even modicum of effort, could have unearthed these prior appointments. 28 U.S.C.A. § 455(a).

[26] KeyCite Notes

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(2) k. Time of Making Objection. Most Cited Cases

Motions to recuse district court judge from presiding over jointly administered Chapter 11 cases of manufacturers of asbestos products based on personal knowledge that judge allegedly acquired by means of his numerous ex parte conferences with various participants in proceedings were not timely filed, where judge had announced without objection at initial case management conference that he intended to use such ex parte conferences as case management procedure, and where movants had themselves participated in such conferences over period of several months prior to seeking judge's recusal. 28 U.S.C.A. § 455(b)(1).

[27] KeyCite Notes

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General

32491

51k2123 k. Bankruptcy Judges. Most Cited Cases

Judges who are thrust into role of settlement and case manager for mass tort cases, such as manufacturer's asbestos-related bankruptcy case, should take activist role for benefit of case and of legal system generally, and must be willing to try new techniques.

[28] KeyCite Notes

170A Federal Civil Procedure
170AXIII Reference
170Ak1875 Grounds, Objections and Scope
170Ak1875.1 k. In General. Most Cited Cases

Motions challenging appointment of special master in mass tort cases, in which courts repeatedly utilize the relatively few persons with expertise in area, should be made early and be considered waived if they are untimely.

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OPINION

WOLIN, District Judge.
This matter has been opened before the Court upon the several motions of a number of interested parties for an Order recusing this Court from further participation in the above-captioned, jointly administered chapter 11 cases (the "Motions"). In *In re Owens Corning,* the movants are Kensington

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International Limited and Springfield Associates, L.L.C., joined by Credit Suisse First Boston ("CSFB") and *amicus* Washington Legal Foundation (with CSFB the "Owens Corning Movants"). In *In re W.R. Grace,* the movants are D.K. Acquisition Partners, L.P., Fernwood Associates, L.P., and Deutsche Bank Trust Company America the ("W.R. Grace Movants"). In *In re USG Corp.,* the movants are the debtor-in-possession and the Official Committee of Unsecured Creditors (the "USG Movants").[FN1] Respondents opposing recusal are the debtors-in-possession Owens Corning and W.R. Grace & Co., the Official Committees of Asbestos Tort Claimants in all three cases and the Representatives of Future Claimants in the *Owens Corning* and *USG* cases (no futures representative has been appointed in *W.R. Grace*).

FN1. For the convenience of the reader, the Court has provided a concordance of defined terms on the last page. Citations to (JA__) are to the joint appendix assembled by the parties per the Order of this Court for convenience of reference and to provide a consistent source of reference for further proceedings before the Court of Appeals. Finally, some familiarity with the basic terms of asbestos bankruptcy is presumed in this Opinion.

The proceedings on the Motions have been governed by the Order to this Court dated December 18, 2003, by the United States Court of Appeals for the Third Circuit to develop a factual record and issue an Opinion on the Motions by January 31, 2004. *In re Kensington Int'l Ltd.,* 353 F.3d 211 (3d Cir.2003). Reference to the Bankruptcy Court of the above-captioned chapter 11 cases has been withdrawn with respect to the Motions by the prior Orders of the Court.

There is much that is extraordinary about these proceedings and their culmination, insofar as this Court's involvement is concerned, with this Opinion. This Court has previously been afforded the opportunity to address the Court of Appeals directly pursuant to their invitation under Federal Rule of Appellate Procedure 21(b)(4). This Court has the benefit of the thinking of the Court of Appeals as expressed in its formal Opinion and in the transcript of oral argument. Rarely does a district court have the opportunity to engage in so direct a dialog with its appellate brethren. The Court considers this a salutary feature of this litigation and will avail itself of the opportunity to address directly concerns or omissions in the record identified by the Court of Appeals.

The Court has reviewed the evidentiary record, including transcripts of testimony, and heard the arguments of counsel. What follows is the Opinion of the Court, constituting its findings of fact and conclusions of law. It is neither practicable nor desirable, notwithstanding the length of this Opinion, to address each of the Movants' accusations and set forth a point-by-point rebuttal. Each has been carefully considered and discussed below in accordance with its merits. More generally, the Court has attempted to set forth for the Court of Appeals the rationale and practice of case management this Court has ***181** brought to the above-captioned chapter 11 cases, and *In re Federal-Mogul,* and *In re Armstrong World Industries* (collectively the "Five Asbestos Cases") pursuant to the mandate of Chief Judge Becker.

As the District Court emerges from the stormy waters of litigation, its course is steady and its grasp of the helm is firm. Through this simple maritime metaphor, the District Court signals its intention to continue, with the Circuit Court's approval, the stewardship of the jointly administered bankruptcy estates. The Movants say recusal is the right thing to do. The District Court disagrees. The right thing to do is to resolve all the outstanding claims, whatever their nature, and, should the facts and the law so indicate, to return the debtors to that which they do best-the conduct of their business. Careful consideration of the applicable legal standard and the context in which the Motions arise only confirm this view. Therefore, and for the reasons set forth below, the Motions will be denied.

BACKGROUND

While some of the history of the Motions has been recounted elsewhere by the Court, it is summarized here for convenient reference on appeal and for emphasis because it is relevant to the Court's disposition of the Motions. Roughly speaking, the grounds advanced for the Motions are

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twofold. First, the Movants contend that certain of the five advisors to the Court appointed by its Order of December 28, 2001, (JA2176)(the "Advisors"), are biased through their involvement in the chapter 11 case *In re G-I Holdings, Inc.,* Bankr.No. 01-30135 pending in the District of New Jersey before the Honorable Rosemary Gambardella. Other allegations of bias of the Advisors are also raised. In addition, the Movants contend that recusal is required due to certain *ex parte* communications that they claim were improper.

1. *The Procedural History of the Motions*

The Court believes that the seed from which the present controversy grew was planted in December 2002. It was represented to the Court at that time that a key issue in the Owens Corning bankruptcy was the resolution of a claim by the debtor and other potential plan proponents that the various subsidiaries of Owens Corning should be substantively consolidated for the purposes of the reorganization. It was represented at that time, and repeated since in papers filed with the Court, that substantive consolidation put certain bank creditors of Owens Corning (the "Banks") at risk for their recovery of well in excess of $1 billion in debt guaranteed by these subsidiaries. Conversely, in the course of the substantive consolidation litigation counsel have represented to the Court that the Banks' recovery may approach 100 cents on the dollar if they defeat the substantive consolidation motion, making these claimants unique among the numerous other classes of commercial and personal injury claimants who will receive only a fraction of their claims.

By Order dated December 23, 2002, this Court withdrew the reference to the Bankruptcy Court of the substantive consolidation issue and appointed the Honorable Judith K. Fitzgerald, U.S.B.J., as settlement judge and Professor Francis E. McGovern as mediator to explore the possibility of settlement. The Order also contemplated that the debtors and the other parties intended to file a proposed plan of reorganization and that the motion for substantive consolidation was a part of that plan. It is, of course, "not at all unusual for a plan proponent ... to seek a determination prior to the confirmation ***182** hearing as to the legitimacy of a particular provision of a proposed plan." *In re Stone & Webster, Inc.,* 286 B.R. 532, 542 (Bankr.D.Del.2002).

Settlement efforts failed and this Court held a bench trial lasting four weeks on the merits of the substantive consolidation motion. Meanwhile, the proposed plan had been filed. The plan proponents are the debtors-in-possession, the Official Committee of Asbestos Claimants, and the Representative of Future Claimants. The Plan Proponents and certain members of the Unsecured Creditors Committee representing pre-petition bondholders of Owens Corning, the self-styled "Designated Members of the Official Committee of Unsecured Creditors," prosecuted the substantive consolidation motion during the trial before this Court. A settlement conference was held in the courthouse shortly after the trial concluded, at the parties' request and with mutual consent. The Court entertained this settlement conference because it was represented that negotiations had progressed to the point where only a judicial "nudge" would be required to achieve a settlement. Regrettably, this nudge was unavailing.

Aware that settlement efforts were ongoing through the summer and fall, this Court has nonetheless been reviewing the extremely extensive record and the many technical financial issues and is preparing an Opinion resolving the substantive consolidation motion. That Opinion had not issued, however, when the first of the Motions was filed. This Court believes that it is safe to conclude that resolution of the substantive consolidation issue will be the single most momentous event in the life of this important bankruptcy, the successful conclusion of which will effect the fortunes of so many individual persons as well as corporate entities.

Meanwhile, in its third year, the Owens Corning bankruptcy has arrived at a critical point. The plan proponents have filed a disclosure statement and Judge Fitzgerald held a hearing on their motion to approve the disclosure statement on October 27, 2003. Of course, the plan that is the subject of the proposed disclosure statement assumes that the Court will rule in favor of the plan proponents' motion for substantive consolidation. Judge Fitzgerald has not yet ruled upon the disclosure statement and presumably will not rule until the Court's opinion on substantive consolidation is issued. She has stated on the record that, if this Court denied substantive consolidation, then the plan proponents will have to start again on a clean slate.

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As this crisis in the Owens Corning reorganization effort approached, the commercial creditors have not been idle. The initial Motion was filed by the Owens Corning Movants on October 10, 2003. These parties, led by Mr. Mark Brodsky, are affiliated entities that acquired a substantial position on the second-hand market for the debtors' bank debt. Seven days later, the Unsecured Creditors Committee itself filed a motion for the appointment of a chapter 11 trustee. On October 24, 2003, the commercial creditors moved to "re-structure" the representation of the Committee of Asbestos Claimants and Future Claimants' Representative, which re-structuring would require the disqualification of their present counsel and forfeiture of all of their fees. *Brief in Support of Motion for Structural Relief Required to Eradicate the Legal and Ethical Conflicts of Asbestos Law Firms* at 2 n. 3. It was further represented to the Court that very extensive document and deposition subpoenas had been served in connection with the Motions. At least one of the targets of these discovery demands intended to move ***183** to quash, and sought the procedural guidance of the Court on how to go forward.

Whether consciously or not, the Owens Corning Movants had chosen to bring their Motion during a week in which the undersigned judicial officer was delivering a long-scheduled and widely publicized speech at a Commercial Law League conference in San Diego, California. Nonetheless, the Court acted swiftly to take control of proceedings. The Court has a responsibility to ensure that the reorganization over which it presides is not disrupted by the actions of any particular constituency free of judicial supervision. The Court is likewise responsible to see that persons who have served the Court ably and without objection by any party are not unfairly burdened. It appeared then, and it appears now to the Court in retrospect, that the flurry of activity by the commercial creditors in general and the highly suspect timing of that activity in relation to the Owens Corning plan process gave reasonable grounds for the Court to act to prevent chaos and to impose order.

Therefore, on October 23, 2003, the Court issued an Order staying all proceedings, including discovery, until it could promulgate a more comprehensive case management order. On October 28, 2003, the Court issued its Case Management Order and Order to Show Cause Concerning Motion to Recuse Alfred M. Wolin, U.S.D.J. This Order provided that the five Advisors who were the subject of the Owens Corning motion should provide affidavits setting forth all of their activities and assistance to the Court undertaken pursuant to their appointment. All privilege or confidentiality that the Court might assert was expressly waived regarding the content of the Advisors' affidavits. Finally, the Order provided that

any interested party may show cause why the Motion to Recuse should be denied without further proceedings or, in the alternative, why further proceedings including discovery should be had on the Motion to Recuse

Notwithstanding the fact that it was public knowledge that the Court was out of the State when the Motion was filed, it is apparent that the Court had not moved quickly enough for the Movants. On the same day the Court issued its Case Management Order and Order to Show Cause and a mere five days after the Court's first Order, the Owens Corning Movants filed a petition for an emergency writ of mandamus with the Third Circuit Court of Appeals. These Movants were apparently unwilling to take at face value the Court's statement in its Order that discovery and other proceedings on the Motion would be delayed only until a case management conference had occurred and the *prima facie* validity of the Motion had been considered. Instead, they represented to the Court of Appeals that this Court had acted to obstruct discovery.

The Court of Appeals, improvidently this Court would respectfully submit, issued an Order on October 30, 2003, staying all proceedings in *In re Owens Corning,* excepting the requirement of the October 28, 2003, Order requiring the advisors to provide their affidavits. This Court is convinced that the present stage of the litigation would have been reached at least a month sooner and no party would have been prejudiced had the October 30, 2003 order not been issued. The Court of Appeals also ordered answers to be filed to the petition for mandamus.

On November 11, 2003, the W.R. Grace Movants filed their motion to recuse the Court. On November 24, 2003, the debtor USG Corporation filed its motion to recuse the Court. While lacking the

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immediacy ***184** of the crisis the Owens Corning Movants apparently perceived they were confronted with (*i.e.,* an adverse substantive consolidation ruling), it requires little imagination to see how these other Movants would believe it in their narrow self-interest to recuse the Court at this juncture.

The Court has issued an Opinion and Order in *In re USG Corporation* initiating the development of a case management order that will ultimately permit the Court to test the allegation of the tort claimants that USG Corporation is insolvent even if one only counts those asbestos claimants who are allegedly sick with asbestos-related cancers and temporarily excludes the many thousands of so-called "unimpaired" claimants over whom there is so much controversy. The tort claimants have contended that a practical course of action is for the Court to consider these claims alone through a "cancer-only" bar date and estimation proceeding, permitting the debtor to litigate its defenses. The Court will find, it is contended, that even this limited pool of claimants will swamp any remaining equity in the company, thus eliminating the need to pursue the far more arduous course of litigation urged upon the Court by the debtor.

If this is so, and the Court has no opinion, then the debtors' existing equity and in all likelihood its existing management are in peril. Yet, there are grounds to infer that the Movant USG wants the benefit of bankruptcy protection but does not want to participate in the judicial process. The USG company website reports the comments of its CEO William G. Foote on October 24, 2003, on the occasion of the announcement of the company's third-quarter 2003 earnings.[FN2]

> FN2. It is this same Mr. Foote who appeared at an *ex parte* conference with the Court and stated that he considered it his patriotic duty as an American to save his company from the asbestos tort claimants.

Earlier this year, the Judiciary Committee of the United States Senate approved the Fairness in Asbestos Injury Resolution Act of 2003, a bill intended to establish a nationally administered trust fund to compensate asbestos personal injury claimants. Since that time, various provisions of the bill have been the subject of intense discussions. *USG has been actively and directly involved in these discussions* and remains very supportive of current efforts to pass asbestos litigation reform legislation.

http://investor.usg.com/news/20031024-120895.cfm (last visited Jan. 19, 2004).

As all now know, corporate interests such as USG failed and the asbestos bill did not emerge as law from the legislative season just concluded. Its prospects in the coming electoral year are euphemistically termed "unclear." Weighed against USG's legislative prospects is the stated intent of the Court to test the merits of the cancer-only bar date concept. But, despite several conferences to work out the language of the cancer-only claim form and related documents, the Court's efforts to get the cancer-only insolvency issue *sub judice* have been thwarted to date. Clearly, USG's best hope for legislative relief is a substantial delay in the judicial arena.

It is difficult to dance with an unwilling partner. USG achieves both the needed hiatus and stalls the effort toward the cancer-only bar date if the District Court is removed. Meanwhile, it languishes in chapter 11, protected from the tort system and (if it is indeed insolvent) surviving on its creditors' money.

As with the substantive consolidation issue in *Owens Corning,* the Court has not ruled on the validity of the tort claimants' ***185** fundamental premise. It has merely begun to assemble the necessary procedural components to test that premise. Counsel for the debtor has objected strenuously to this course of action, however, and clearly do not relish the path the bankruptcy has been taking. Their motion to recuse cannot be considered in isolation from this history.

There has been little activity in the W.R. Grace bankruptcy since the settlement of a major fraudulent conveyance action in the fall of 2002. The W.R. Grace Movants are, however, similarly situated to the Owens Corning Movants in that they have acquired bank debt of the debtor for speculative purposes. All sides have conceded the overlap of issues between the several chapter 11 cases. While the

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circumstances may not be as suggestive as for the other Movants, the inference is still easily drawn that these Movants are opportunistically jumping on the band wagon to see if a change of judge will improve their fortunes.

2. *The Court of Appeals*

The Court will not review here all of the arguments made to the Court of Appeals except as may be directly relevant to this Court's management of the expedited discovery pursuant to the remand. The Court of Appeals reviewed the applicable law and the arguments of the parties, but found that "a remand allowing for discovery is necessary because the primary inquiry to which we must respond ... is 'whether a reasonable person *knowing all the circumstances* would harbor doubts concerning the judge's impartiality'-an inquiry which necessarily requires that we know all the circumstances." 353 F.3d at 223 (quoting *Jones v. Pittsburgh Nat'l Corp.,* 899 F.2d 1350, 1356 (3d Cir.1990)).

The Court of Appeals added the following paragraph:

We realize, of course, that our decision to remand this matter to Judge Wolin will result in some delay, which causes us great concern. Not only can delay have unintended (and undesirable) ramifications for the debtors-in-bankruptcy; it can have a much more personal effect on the asbestos claimants who have filed claims against the debtors-in-bankruptcy and their related entities. We nevertheless believe that a short delay so that an evidentiary record may be developed is to be preferred rather than making an ill-informed decision on allegations alone. In an attempt to reduce the delay, however, we will order that expedited discovery and Judge Wolin's ruling on the recusal motions be completed no later than January 31, 2004. While this might ordinarily be deemed too short a time for discovery, we believe that it is manageable under the district judge's guidance and supervision. Indeed, *Kensington's attorney advised us at oral argument that expedited discovery probably could be completed in two to three weeks.*

353 F.3d at 224-25 (emphasis added). The representation by Kensington's attorney referred to by the Court of Appeals occurred in the following colloquy:

THE COURT: What is expedited discovery from your standpoint?

MR. ENGLERT: ... We had proposed to take discovery of Mr. Gross, of Mr. Hamlin, and of W.R. Grace, of Mr. Gross and of Mr. Hamlin not so much about the advice that they gave Judge Wolin as about whether Judge Wolin knew of the conflict. As one of my adversaries said in response to a question by Judge Smith today, "It is now undisputed that Judge Wolin knew of the conflict." So that's pretty much by the boards from our standpoint.

***186** THE COURT: All right. So that's the extent of the discovery that you are seeking.

MR. ENGLERT: Well, we also asked for discovery from W.R. Grace because we wanted to know what role Judge Wolin played in nominating Hamlin or Gross to be futures representatives. Mr. Inselbuch's time records answer to that question to some extent. It's like a Rule 56 hearing. I don't think we need to know that in order to prevail on our mandamus petition.

THE COURT: We haven't of course decided the issue yet, but just so we can keep it in mind, what is the time frame that you're talking about?

MR. ENGLERT: We would hope that if there were any discovery, at this point we don't think that there should be, but we would hope that if there were to be discovery, it can be conducted in a matter of a very small number of weeks, two or three.

Court of Appeals Tspt. at 77-78.

Thus the Court of Appeals directed that "Among other things, discovery in this case may shed light on such matters as (I) the full extent of the consultants' activities in the Five Asbestos Cases; (ii) Messrs.

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Gross and Hamlin's activities in *G-I Holdings;* (iii) the timeliness of the Petitions for Mandamus; and (iv) the extent to which recusal, if warranted in one of the bankruptcies, must be held to extend to the other bankruptcies." 353 F.3d at 223.

3. *Discovery Proceedings Before the District Court*

Five days after the Court of Appeals issued its Opinion and Order, this Court convened a case management conference. In light of the representations previously made to the Court of Appeals and the expectations clearly spelled out in that Court's Opinion, the discovery demands made by the parties were astonishing in their breadth and oppressiveness. Anyone who had harbored the illusion that these proceedings could be conducted fairly and in good faith by counsel must inevitably have been disappointed. Indeed, this Court is satisfied that the conduct of the parties validated the approach taken by this Court in October when it initially moved to take control of the proceedings.

The Court quotes from its Opinion delivered from the bench that day:

When the Court took the bench this morning, it had every intention of setting a very short discovery schedule. The Court intended to leave it to counsel to serve their requests and, if necessary, to object as necessary. The Court's long experience with the attorneys in these cases engendered confidence that their professionalism and their respect for the mandate of the Court of Appeals would lead them to seek discovery in an orderly and focused fashion to permit, with perhaps some nudging by the Court, the parties to complete the process and permit a decision by January 31, 2004.

What the Court has learned today shows that its confidence was misplaced. *The movants here report that they have served document subpoenas on some twenty-six entities and persons, most of whom are lawfirms and many of whom represent asbestos claimants. Well over a dozen depositions are sought. None of these demands were served upon counsel opposing this Court's recusal in time for today's hearing.*

It is now apparent, and the Court so finds, that the parties before it seek to divert this discovery process to different purposes, purposes that are at odds with their own representations to the Court of Appeals, the order of that Court to assemble a record with all possible ***187** speed, or in the interest of arriving at true facts that will guide this Court or the Court of Appeals.

At best, the discovery requests are a fishing expedition. Counsel for USG was unable even to accurately identify what role the persons or entities played in the cases before the Court, much less articulate any specific relevance of the information they might possess. Doubtless counsel would appreciate the opportunity to rummage though the files of these law firms. Many have been adverse to them for years in hard fought personal injury litigation. That is not what the Court of Appeals intended to permit.

Moreover, *simply litigating the objections and motions to quash that would result from these requests would make compliance with the order of the Court of Appeals impossible. Counsel for W.R. Grace read from a document request he received from the movants. If it is representative of the other document requests served, and no-one contradicted that it was, issues of privilege alone would dominate any real attempt to discover relevant facts.*

More seriously, the obviously absurd breadth of the discovery demands raises an inference as to the movants' true aims. The Court will speak plainly. The movants here intend that this Court deny their discovery. They intend to raise this denial before the Court of Appeals in support of their inevitable renewed petition for a writ of mandamus. The Court has earned its knowledge of how the asbestos bankruptcy world works through hard, and, it believes, honorable experience. It need not pretend to itself nor to the world that counsel conduct themselves with the decorum of a church social.

And it is clear that they have not. Before the Court of Appeals, counsel for the petitioners represented that they needed two depositions and some minor document discovery. Counsel now argue[ ] that they only made this representation with respect to their structural conflict issue. Of course, this

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argument makes no sense, because their structural conflict argument was complete on the record already before the Court of Appeals. In any event, this Court has read the transcript and the opinion of the Court of Appeals, and finds that counsel has not accurately reported what happened there.

It is perfectly clear that discovery cannot go forward without the Court's active involvement and supervision. It is the Order of the Court that counsel may not propound any discovery request without the Court's specific approval. All of the discovery requests propounded to date in this matter are hereby quashed, subject to the exceptions that will be set forth on the record here. It is not the Court's wish to proceed in this manner. As previously stated, it was not this Court's intention to do so as late as this morning. Having attempted to convert the discovery to their own parochial interests, counsel cannot be further trusted to guide these proceedings.

District Court Tspt. of Dec. 23, 2003 (emphasis added).

Yet, notwithstanding the affront to both Courts involved, this Court did not restrict the parties to that discovery they claimed was necessary before the Court of Appeals. On the contrary, the Court permitted discovery substantially in excess of the scope expressly contemplated by the Court of Appeals. It is true that the higher court's deadline set a practical limit to the possible discovery that might be taken. This practical constraint was exacerbated ***188** by the fact that the contentiousness of counsel required the Court's frequent personal involvement. Simultaneous depositions were held at the courthouse under the Court's direct supervision. At least two, lengthy, on-the-record telephonic hearings were conducted by the Court to rule on emergent discovery disputes.

In sum, the pace of discovery has been furious. Eight depositions were taken for twenty hours over a two-day period. A tremendous volume of document discovery, approximating 25,000 pages, has been exchanged. The Court, in denying requests for discovery, has been guided by the principles of triage-less relevant discovery has been denied to permit more relevant discovery to be completed in the time available. Patently irrelevant and oppressive discovery has been denied on the merits, and privileges asserted by the parties have been considered and honored where appropriate. While the Court has already and will continue to express its disapprobation of the conduct of the Motions by counsel, it is clear that with their undoubted skill and experience an extra-ordinary amount has been accomplished.

LEGAL STANDARD

1. *Section 455(a) and (b)(1)*

Section 455(a) of the Judiciary Code provides that a judge must disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." Section 455(b)(1) has two parts. First, it requires recusal when the judge "has a personal bias or prejudice concerning a party." Second, it requires recusal when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding."

The Court pauses to restate the basics in the interest of clarity. Both 455(a) and prong one of 455(b)(1) are concerned with the judge's bias. Section 455(a) addresses the appearance of bias. Section 455(b)(1)(prong 1) addresses actual bias. *Edelstein v. Wilentz,* 812 F.2d 128, 131 (3d Cir.1987). Prong two of section 455(b)(1) address "personal knowledge" solely and is on its face unconcerned with either the appearance or presence of bias.

It has been observed that section 455(a) and (b)(1) of Title 28 afford separate yet overlapping grounds for disqualification of a judge. *Andrade v. Chojnacki,* 338 F.3d 448, 454 (5th Cir.2003). Subsection (a) serves as a catch-all provision, covering circumstances that aren't specifically delineated by the other subsections. *Id; see also Liteky v. United States,* 510 U.S. 540, 552, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) ("section 455(a) expands the protection of § 455(b), but duplicates some of its protection as well").

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[1] Actual impartiality is irrelevant under 455(a) because the statute speaks only to the appearance of impartiality. In evaluating whether this appearance is present, the entire course of judicial proceedings are looked at, rather than isolated incidents. Thus recusal is warranted when, through an objective standpoint, "a reasonable man *knowing all the circumstances* would harbor doubts concerning the judge's impartiality." *Edelstein,* 812 F.2d at 131 (emphasis added); *see also The Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 F.3d 283, 343 (3d Cir.1998); *United States v. Antar,* 53 F.3d 568, 574 (3d Cir.1995).

Before the Court can apply the objective standard set forth in the statute and *Edelstein,* it must understand both what set of facts the "reasonable man" is to be charged with knowing and what attributes this "reasonable man" is supposed to have. The Court of Appeals has supplied the answer to the first question. *Edelstein* speaks of knowing " *all* the circumstances." ***189** 812 F.2d at 131 (emphasis added). The Court of Appeals in this very case emphasized the phrase " *knowing all the circumstances,*" 353 F.3d at 223 (emphasis in original), and remanded the matter to develop a record more substantial than that set forth in the parties' papers on the petition for mandamus.

[2] [3] [4] [5] It cannot be, therefore, that the appearance of impropriety depends on the facts as known immediately prior to the time the motion for recusal is filed. Nor must the movant's factual allegations be assumed true. "There is considerable authority for the proposition that the factual accuracy of affidavits submitted pursuant to 28 U.S.C. § 455 may be scrutinized by the court deciding the motion for recusal." *United States v. Sciarra,* 851 F.2d 621, 625 n. 12 (3d Cir.1988) (citing *United States v. Alabama,* 828 F.2d 1532, 1541 (11th Cir.1987)); *Hamm v. Members of Bd. of Regents of Florida,* 708 F.2d 647, 651 (11th Cir.1983); *In re International Bus. Machs. Corp.,* 618 F.2d 923, 927-29 (2d Cir.1980); *Hinman v. Rogers,* 831 F.2d 937, 939 (10th Cir.1987); *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1019 n. 6 (5th Cir.1981); *see also* 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure,* §§ 3542, 3550 (1984). Indeed, a judge may supplement the record and even contradict such allegations with facts from the judge's own knowledge acquired in the course of the proceedings. *Cooney v. Booth,* 262 F.Supp.2d 494, 504 (E.D.Pa.2003). The Court concludes that it must make its "reasonable man" determination based upon all of the facts now assembled before the Court.

A less obvious question, and one which counsel have indicated is not completely settled, is who the "reasonable man" may be. Is the reasonable person an experienced asbestos bankruptcy attorney or a non-lawyer member of the public? Counsel for the Owens Corning Movants conceded that the viewpoint of the "man on the street" cannot be the legal standard. Gross Dep. at 235, line 16-18 (JA4264) (colloquy with the Court). But the Court need not definitively answer this question today. Sufficient guidance appears in the purpose of the statute itself.

[6] It is a truism that Section 455(a) exists to protect the confidence of the participants and the public in the integrity of the judicial system. In a case of this kind, however, the issues are complex, inter-related and highly technical. Direct representation of individual interests is attenuated though layers of more and more specialized counsel and then committees of counsel, intended to provide coherence to the positions of a myriad, like-situated parties. Many, perhaps most, critical events are a product of inter-party leverage and independent of any input from the Court. FN3

FN3. Resolution of allocation of compensation between current and future asbestos claimants and between the asbestos claimants and a debtor's other creditors is rarely a product of court intervention and has not been in any of the Five Asbestos Cases to date.

For these reasons, the Court will rule out the non-professional public from the potential candidates for the post of reasonable person. It is likewise not appropriate in this case to consider the understanding of the non-specialized bar. Confidence in the integrity of the large-scale asbestos chapter 11 process will live or die in the precincts of those who actually practice it. Few others can be expected to expend

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the effort to understand this frequently bizarre and arcane legal world.[FN4]

FN4. A presentation by a panel of experts at the most recent Third Circuit Conference underscores this statement.

***190** The Court would not for a moment diverge from the proposition that the ultimate goal is the public's confidence in the integrity of the process, a proposition to be given particular consideration where so many individual personal injury claims are at stake. But where proceedings are by their nature inscrutable to outsiders, the wider world must rely upon those persons actually involved to report on those proceedings' capacity to produce a fair result. It would be a pointless exercise and do no material good to judge the appearance of impropriety based on the standard of those who are unlikely ever to look or to understand if they did look.

[7] The Court will not, however, narrow the concept of the reasonable person further. An objective standard must include more that just the most sophisticated practitioner or the subjective opinions of those actually involved with the proceedings. The Court finds only that the reasonable person in the context of this motion does not include laypersons or attorneys not conversant with the basics of mass-tort bankruptcy practice. On the other hand, no more will be required. The reasonable person is merely one with the professional skills and experience in mass-tort bankruptcies sufficient to understand the import of the facts presented.

The Court acknowledges the caution of the Court of Appeals in *In re School Asbestos Litig.,* 977 F.2d 764, 782 (3d Cir.1992), that the recusal statute is tuned to the concerns of "people who have not served on the bench" and who "are often all too willing to indulge suspicions and doubts concerning the integrity of judges." The *School Asbestos* Court was writing of the level of sensitivity with which appearance of impropriety must be judged, not the complexity or technical nature in which those facts might arise. In *School Asbestos,* the appearance of impropriety of the judge appearing at a plaintiff-funded conference was simple enough for anyone to grasp. This Court does not suggest that a less sensitive threshold for recusal should obtain in mass-tort asbestos bankruptcies, only that the hypothetical reasonable person whose sensitivities might be offended should possess sufficient expertise to understand the situation presented.

[8] The Supreme Court has made clear that the ultimate question in any bias inquiry is whether, either in appearance or actuality, the judge harbors "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky,* 510 U.S. at 555, 114 S.Ct. 1147. Forming judgments about the positions of parties in litigation is, of course, the heart of a judicial officer's role. " 'If the judge did not form judgment of the actors in those court-house dramas called trials, he could never render decisions.' " *Id.* at 551, 114 S.Ct. 1147 (quoting *In re J.P. Linahan, Inc.,* 138 F.2d 650, 654 (2d Cir.1943)). Historically, the law differentiated between judicial opinions properly acquired and illegitimate bias by holding that the term "bias" covered those judicial views derived from information gained outside the proceedings before the Court, the so-called extra-judicial source doctrine.

[9] Although previous jurisprudence applying the federal recusal statutes had found that an extra-judicial source of information was a *sine qua non* of recusal, the Supreme Court found in *Liteky,* 510 U.S. at 554-55, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) that an extra-judicial source was merely a significant factor in judging the presence of a disqualifying bias under section 455(a). The Third Circuit has confirmed that the extra-judicial source is not outcome determinative. *SEC v. Antar,* 71 F.3d 97, 101 (3d Cir.1995). "The most critical factor is not the source of the judge's prejudicial knowledge or bias, but ***191** rather the judge's [apparent] 'inability to render fair judgment.' " *Id.* at 102 (quoting *Liteky,* 510 U.S. at 551, 114 S.Ct. 1147).

The Movants argue under section 455(a) that this Court should recuse itself for an appearance of bias. This appearance is alleged to result from advice the Court is supposed to have received from

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advisors with an interest in the outcome of the litigation and from extra-judicial information received from *ex parte* communications with the parties. No party claims that this Court has exhibited actual bias or prejudice concerning a party. Therefore, with respect to section 455(b)(1), the Movants rely solely on the second prong condemning "personal knowledge of disputed evidentiary facts concerning the proceeding."

On its face, section 455(b) creates a more rigid regime. In contrast to section 455(a), section 455(b)(1) posits judicial knowledge as a stand-alone factor; its plain language requires recusal *whenever* the judge acquires "personal knowledge of a disputed evidentiary facts concerning the proceeding." There is no objective "reasonableness" standard in the statute. Plainly, actual knowledge controls, not the reasonable appearance thereof. In addition, as Movants have emphasized, grounds for recusal under section 455(b) cannot be waived. 28 U.S.C. § 455(e).

[10] Yet it is immediately apparent that the facade is not as seamless as it appears. First of all, the proscribed "personal knowledge" must derive from an extra-judicial source. Whether this is a function of the adjective "personal" [FN5] or simply a matter of logic, it cannot be that knowledge acquired in the subject judicial proceeding itself would disqualify the judge.

FN5. In *Liteky,* Justice Scalia found that the word "personal" lacked content when used in connection with "bias" in section 455(b)(1). 510 U.S. at 449-50, 114 S.Ct. 981. This Court believes that "personal" has more bite when used in connection with "knowledge," even though consistency in statutory interpretation would hold that "personal bias" and "personal knowledge" are similarly imprecise. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.,* 991 F.2d 1249, 1255 (7th Cir.1993) (concluding " '[p]ersonal' knowledge of evidentiary facts means 'extrajudicial' "). For the reasons expressed in the text, the Court need not rely on the adjective in finding an extra-judicial source limitation to the proscribed knowledge.

[11] [12] Application of this rule requires an understanding of where the boundary lies between a judicial and an extra-judicial source. Facts learned in off-the-record conferences with the parties are not derived from an extra-judicial source under this rule. *United States v. Bailey,* 175 F.3d 966, 969 (11th Cir.1999); *see also* United States v. Page, 828 F.2d 1476, 1480-81 (10th Cir.1987) (prosecutor's *ex parte* chain-of-custody letter not extra-judicial source of information in context of dispute over *Brady* material). It is settled that personal knowledge gained in a related proceeding will not disqualify the judge under section 455(b)(1). *Clifford v. United States,* 136 F.3d 144, 148-49 (D.C.Cir.1998), *In re Grand Jury 95-1,* 118 F.3d 1433, 1438 (10th Cir.1997).

The cases have construed the "disputed evidentiary fact" element narrowly, looking to whether a specific, disputed fact at issue in the case was within the judge's prior, non-judicially acquired knowledge. *See, e.g., United States v. DeTemple,* 162 F.3d 279, 285 (4th Cir.1998) (prior knowledge of defendant's single debt acquired in judge's previous representation of the defendant as attorney did not constitute knowledge of defendant's financial condition); ***192** *Diamondstone v. Macaluso,* 148 F.3d 113, 121 (2d Cir.1998) (judge's knowledge of litigant's participation in peace demonstration only "tangentially relevant" to civil rights claim arising from refusal to produce auto insurance card). In *United States v. Boyd,* 208 F.3d 638, 646 (7th Cir.2000), *vacated on Apprendi grounds,* 531 U.S. 1135, 121 S.Ct. 1072, 148 L.Ed.2d 949 (2001), the judge properly refused recusal despite knowledge of the subject conspiracy gained as director of state police where he had no extra-judicial knowledge of the particular defendant's connection to the conspiracy.

[13] The general tenor of the case law holds that extra-judicial knowledge gained through participation in general policy-making will not disqualify a judge from hearing a particular case under the personal knowledge prong of 455(b)(1).

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Supreme Court judges have refused to disqualify themselves from passing on legislation or regulations even when, as legislators, they were instrumental in drafting the law. Both Justices Black and Frankfurter participated in cases interpreting groundbreaking labor reform legislation that they had been instrumental in drafting. Similarly, Chief Justice Vinson sat in cases involving tax legislation that he had drafted as a member of Congress. Justice Jackson "participated in a case raising exactly the same issue that he had decided as Attorney General (in a way opposite to that in which the Court decided it)." Chief Justice Hughes wrote the opinion overruling *Adkins v. Children's Hospital of D.C.*, [261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923)] in spite of having written a book that seriously criticized that decision.

Wessman v. Boston Sch. Comm., 979 F.Supp. 915, 917 (D.Mass.1997) (citing and quoting *Laird v. Tatum*, 409 U.S. 824, 830, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972)) (Rehnquist, J., Mem.) (further citations omitted); *see also Mistretta v. United States*, 488 U.S. 361, 406-07, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) ("That federal judges participate in the promulgation of Guidelines does not affect their or other judges' ability impartially to adjudicate sentencing issues."); *Laird*, 409 U.S. at 835, 93 S.Ct. 7 ("Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."); *United States v. Voccola*, 99 F.3d 37, 41-43 (1st Cir.1996) (judge's participation in a commission investigating fraud in financial institutions did not mandate recusal in case where defendant was accused of such fraud); *Ivy v. Diamond Shamrock Chems. Co.* (*In re "Agent Orange" Product Liab. Litig.*), 996 F.2d 1425, 1438-39 (2d Cir.1993) (fact that judge was the manager of a settlement fund, the validity of which was at issue in the litigation, did not mandate recusal); *Schurz Communications, Inc. v. Fed. Communications Comm'n*, 982 F.2d 1057, 1061 (7th Cir.1992) (judge not required to recuse himself where, as law professor, he had given an affidavit in a previous case concerning the same general question at issue in case before him as judge); *United States v. Glick*, 946 F.2d 335, 336-37 (4th Cir.1991) (fact that judge was Chairman of the United States Sentencing Commission does not preclude judge from hearing case in which sentencing guidelines were at issue); *United States v. Payne*, 944 F.2d 1458, 1476-77 (9th Cir.1991) (recusal not required where judge had previously served on Attorney General's Commission on Pornography and case before him involved sexual abuse of child); *In re Wyoming Tight Sands Antitrust Cases*, 726 F.Supp. 288, 291-92 (D.Kan.1989) (holding that judge's previous testimony before the Federal Power Commission did not mandate recusal in case involving similar issue ***193** on which judge testified). Indeed, "Courts have uniformly rejected the notion that a judge's previous advocacy for a legal, constitutional, or policy position is a bar to adjudicating a case, even when that position is directly implicated in the case before the court." *Carter v. West Pub. Co.*, 1999 WL 994997, *9 (11th Cir.1999) (Tjoflat, C.J., supplementing *pro forma* order).

[14] KC [15] KC It is observed that information learned from published sources is not subject to the personal knowledge ban, because counsel are expected to be aware of and to have the opportunity to challenge such sources in the adversarial process. *See Liteky*, 510 U.S. at 554, 114 S.Ct. 1147 ("*some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice.") However, quite apart from published sources, cases hold that knowledge of garden-variety facts that have not been published or otherwise disseminated will similarly not disqualify if the judge learned them merely as a member of the public. For example, the knowledge gained by a judge who, as a member of the public, attended the trial of the defendant's fellow gang-member did not require recusal. *In re Hatcher*, 150 F.3d 631, 635 (7th Cir.1998). The judge "learned nothing about the Gangster Disciple conspiracy that any member of the public could not also have learned by attending the trial or reading a good newspaper account of its progress." *Id.; see also Diamondstone*, 148 F.3d at 120 (lower court denied recusal in part because knowledge of litigant's participation in peace vigils open to any passing member of public).

[16] KC [17] KC [18] KC Most fundamentally, disqualification " 'must have a reasonable basis' " and while " '[l]itigants ought not [to] have to face a judge where there is a reasonable question of impartiality,' " they are also "not entitled to judges of their own choice." *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir.1993) (quoting 93d Cong., 2d Sess. 5 (1974) House Report

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reprinted in 1974 U.S.C.C.A.N. at 6351, 6355 (hereinafter "House Report")) (alteration in original). A mere fear of impropriety is not enough. *United States v. Walker,* 920 F.2d 513, 517 (8th Cir.1990). Both the judge and the reviewing court " 'must be alert to avoid the possibility that those who would question [the judge's] impartiality are in fact seeking to avoid the consequences of [an] expected adverse decision.' " *Alexander,* 10 F.3d at 162 (quoting House Report at 6355).

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Other Documents

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SPECIAL COURT FOR SIERRA LEONE

Office of Press and Public Affairs
Information and Background on the Prosecutor vs. Charles Ghankay Taylor

Chronology

3 March 2003 The Special Court Prosecutor signs a 17-count indictment (later reduced to 11 counts) alleging war crimes, crimes against humanity, and other serious violations of international humanitarian law. The indictment is confirmed by the Trial Chamber on 7 March 2003, but ordered kept under seal.

4 June 2003 The Prosecutor unseals the indictment during Taylor's first trip out of Liberia since the signing of the indictment.

4 August 2003 Taylor goes into exile in Calabar, Nigeria.

1 May 2004 The Appeals Chamber rules on a motion brought by Taylor's lawyer, the late Terrence Terry, challenging the Court's jurisdiction over Mr. Taylor on the basis of sovereign immunity and extra-territoriality. The Judges ruled that the Special Court is an international court, not part of Sierra Leone's judiciary, and that a head of state does not enjoy immunity from prosecution before an international court. The motion is dismissed.

17 January 2005 The Judges of Trial Chamber II – Justice Teresa Doherty (Northern Ireland), Justice Julia Sebutinde (Uganda) and Justice Richard Lussick (Samoa) – are sworn in. They begin hearing evidence in the trial of The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC accused). Trial Chamber II is later assigned the trial of The Prosecutor vs. Charles Ghankay Taylor.

11 November 2005 UN Security Council Resolution 1638 gives the United Nations Mission in Liberia (UNMIL) the power to detain Charles Taylor should he return to Liberia, and to transfer him to the Special Court.

16 March 2006 A Judge of the Special Court for Sierra Leone approves an amended indictment of 11 counts.

29 March 2006 Charles Taylor is transferred to the Special Court by the Government of Nigeria, acting on a request by Liberian President Ellen Johnson-Sirleaf

29 March 2006 The President of the Special Court, taking note of concerns expressed by regional leaders, formally requests that Charles Taylor be tried at The Hague by a Trial Chamber of the Special Court.

3 April 2006 The Initial Appearance of Charles Taylor takes place before Justice Richard Lussick, Presiding Judge of Trial Chamber II. He pleads 'not guilty' to all 11 counts in the indictment.

16 June 2006 UN Security Council Resolution 1688 provides the legal basis for Charles Taylor to be tried at The Hague.

19 June 2006 The President of the Special Court orders a change of venue for the Taylor proceedings, allowing the trial to take place in The Hague.

20 June 2006 Charles Taylor is transferred from Freetown to The Hague.

21 July 2006 A Status Conference in the case of The Prosecutor vs. Charles Ghankay Taylor, took place in The Hague before Justice Richard Lussick, the Presiding Judge of the Special Court's Trial Chamber II.

22 September 2006 A second Status Conference takes place at The Hague before Justice Julia Sebutinde. A tentative start date for the trial is set for April 2.

23 January 2007 The Trial Chamber partly grants a Defence motion asking for the trial start date to be pushed back to September. The Chamber sets the date as June 4. The Defence immediately files a motion asking leave to appeal.

In its "Joint decision on Defence motions on adequate facilities and adequate time for the preparation of Mr. Taylor's defence", the Trial Chamber denies a Defence motion seeking an order to direct the Registrar "to provide offices or financial support for offices in both The Hague, the Netherlands, and Monrovia, Liberia", but grants a motion asking for additional time. The Chamber sets the start date for the trial as June 4. The Defence immediately files a motion asking leave to appeal.

26 January 2007 A third Status Conference takes place at The Hague before Justice Teresa Doherty.

15 February 2007 The Trial Chamber dismisses a Defence motion asking leave to appeal the June 4 trial date on the grounds that the Defence has failed to show either "exceptional circumstances" or "irreparable prejudice".

30 March 2007 The Trial Chamber dismisses a Prosecution motion asking that a practice direction be issued, or technology be put in place, that could allow certain witnesses to testify by video link. The Chamber decides that since no video-link facilities presently exist, "it is premature to issue any practice directions on procedures of the kind sought by the Prosecution". In their deliberations, the Chamber notes that "in our view, the Rules clearly reflect a preference for witnesses to give evidence directly in Court".

25 April 2007 The Trial Chamber, in its decision on a Defence motion to reconsider the date for the start of trial, reaffirms June 4 as the start date for the Prosecution's opening arguments, but decides the trial will then be adjourned until June 25, when the Prosecution case will resume. The Defence, which had asked for the trial to start in September, files a motion asking leave to appeal.

7 May 2007 A Pre-Trial Conference takes place at The Hague before all three Judges of Trial Chamber II.

11 May 2007 Justice El Hadji Malick Sow of Senegal is sworn in as alternate Judge of Trial Chamber II.

4 June 2007 The Prosecution presents its opening arguments.

25 June 2007 The Prosecution resumes its case.

A Summary of the Charges

[Note: *The full amended indictment can be accessed at http://www.sc-sl.org/Taylor.html*]

The Accused

Charles Ghankay Taylor, the former President of Liberia, was indicted on 7 March 2003 on a 17-count indictment for crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (commonly known as war crimes), and other serious violations of international humanitarian law. The indictment was ordered kept under seal. The Prosecutor unsealed the indictment on 4 June 2003, during Taylor's first trip out of Liberia since the signing of the indictment. On 16 March 2006 a Judge of the Special Court approved an amended indictment reducing the number of counts to 11.

The Charges

Charles Taylor faces an 11-count indictment for crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.

*1 = Crimes Against Humanity
*2 = Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (war crimes)
*3 = Other serious violation of international humanitarian law

Terrorizing the civilian population and collective punishments

1. Acts of terrorism. *2

Unlawful killings

2. Murder *1
3. Violence to life, health and physical or mental well-being of persons, in particular murder *2

Sexual violence

4. Rape *1
5. Sexual slavery and any other form of sexual violence *1
6. Outrages upon personal dignity *2

Physical violence

7. Violence to life, health and physical or mental well-being of persons, in particular cruel treatment *2
8. Other inhumane acts *1

Use of child soldiers

9. Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities *3

Abductions and forced labour

10. Enslavement *1

Looting

11. Pillage *2