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JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

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CMS7 FORM

SPECIAL COURT FOR SIERRA LEONE

BEFORE THE APPEALS CHAMBER

CASE NO. SCSL-2004-16-AR73(B)

Before:	Justice Raja Fernando, Presiding Justice Geoffrey Robertson QC Justice Emmanuel Ayoola Justice George Gelaga King Justice Renate Winter
Interim Registrar:	Mr Lovemore Munlo
Dated Filed:	15 December 2005

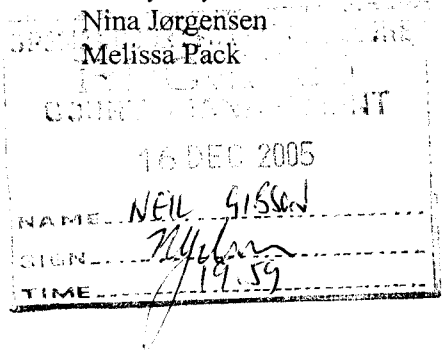
THE PROSECUTOR

against

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

AMICUS CURIAE SUBMISSION FILED UNDER RULE 74 OF THE RULES OF PROCEDURE AND EVIDENCE OF THE SPECIAL COURT FOR SIERRA LEONE ON BEHALF OF HUMAN RIGHTS WATCH

Office of the Prosecutor:
Luc Côté
Lesley Taylor
Nina Jørgensen
Melissa Pack



Defence Counsel for Alex Tamba Brima
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara
Andrew Daniels
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain

Section One:
INTRODUCTION

1 Human Rights Watch ("**HRW**") submits this Brief as an Amicus Curiae, having both information and expertise on the issues raised on this appeal and a very real interest in its outcome.[1]

2 In summary, HRW's submissions are these:

(i) There is a need to recognise and protect the role of human rights observers, researchers and investigators (together "**HROs**") in the investigation of and reporting upon human rights issues and abuses including matters relevant to the remit of the Special Court for Sierra Leone and like tribunals, as a matter of public interest.

(ii) There is a need to recognise and protect the integrity of HROs in the process of obtaining information from those who are or may be witnesses and victims and, similarly, to protect the sources of that information (where there is good reason to do so), as a matter of public interest.

(iii) There is also a public interest in protecting the ability and willingness of HROs and human rights organisations such as HRW to continue to assist in trials of matters falling within Articles 2 to 5 of the Statute of the Special Court for Sierra Leone and proceedings before like tribunals.

(iv) It is possible to balance the necessary protections and public interests referred to in paragraphs (1) to (3) above with the rights of the accused as set out in Article 17 of the Statute of the Special Court for Sierra Leone ("**the Statute**") and like provisions ensuring a fair trial.

[1] As such, HRW meets the criteria for the role of an Amicus as explained in, for example, *Hoffman v South Africa Airways* (2001) 38 WRN 147.

(v) For these reasons, Rule 70 of this Court's Rules of Procedure and Evidence (the "**Rules**") is to be construed to ensure that an HRO acting as a witness may not be compelled to answer questions if the HRO declines to answer on grounds of confidentiality or privilege, in circumstances such as those in the matter now before the Court on this Appeal.

3 In this Brief, HRW does not address the general scope of the privilege and compellability of HROs and organisations such as HRW in proceedings before courts such as the Special Court for Sierra Leone. These submissions are limited to the issue of the protection of confidentiality in circumstances where an HRO or representative of an organisation such as HRW is before the Court voluntarily as a witness and where, by express agreement or by necessary implication from the circumstances, the relevant information has been obtained confidentially and the witness has not been authorised by the source to disclose his or her identity.

Section Two:

THE STATUS AND FUNCTION OF HUMAN RIGHTS WATCH

4 HRW was founded in 1978 and is the largest human rights non-governmental organisation ("**NGO**") based in the United States. HRW's HROs conduct fact-finding investigations into human rights abuses in all regions of the world. HRW then publishes those findings in dozens of books and reports every year, generating extensive coverage in local and international media with a view to stimulating public debate, galvanizing international action to stem the tide of human rights abuse and hold abusers accountable. The hallmark and pride of HRW is the even-handedness and accuracy of its reporting. To maintain its independence and credibility, HRW does not accept financial support from any government or government-funded agency, but depends entirely on contributions from private foundations and from individuals.

5 The reports of HRW are more detailed than standard journalistic accounts of human rights violations, and rely for their comprehensive quality and integrity on first-hand accounts of survivors, perpetrators and witnesses to grave human rights violations. HRW's reports enjoy an excellent reputation for accuracy owing to their extensive use of first-hand accounts, usually based on confidential sources, and HRW's rigorous fact-checking and review.

6 HRW conducts research in several areas which can require particularly sensitive treatment and reliance on information provided confidentially, including abuses against children and people with HIV/AIDS and crimes of sexual violence. HRW has established a body of research in these areas through its Women's Rights Division, Children's Rights Division, and HIV/AIDS Program. Victims, informants and potential witnesses providing information on these violations and abuses are especially vulnerable to stigmatization or reprisals against themselves or their families if information about them becomes known publicly.

7 The information HRW gathers is used to influence public opinion and mobilize governments, inter-governmental and other entities around the world to work toward preventing and remedying human rights violations. HRW's reports are widely cited and relied upon by governments, journalists, international organizations and others. This is an essential advocacy function in furthering the promotion and protection of human rights. Recent examples illustrating the importance of HRW's work and its impact on international public policy include:

7.1 On June 27, 2005, 439 Uzbek refugees from a massacre were airlifted to safety as a direct result of HRW reporting on the massacre and advocacy on behalf of the refugees with various governments and the United Nations;

7.2 On the heels of a July 2005 HRW report documenting the brutal ill-treatment of criminal suspects, the Nigerian government responded to public pressure and admitted that Nigerian police officers have committed killings and torture and convened a two-day human rights workshop for police;

7.3 A June 2005 HRW report highlighting two multinational gold corporations for their connection to abuses by rebel groups in north-eastern Congo prompted one company to agree to halt the purchase of "tainted gold" and the other to investigate its operations in the region. The report traced how Congolese gold smuggled to Uganda and then bought by international companies supports armed groups responsible for committing horrific human rights abuses against Congolese civilians;

7.4 After a HRW report in 2002 on the conduct of the Israeli army at the Jenin refugee camp, a temporary injunction was issued banning the use of Palestinian "human shields" in military operations and arrest raids. The ban was made permanent by the Israeli Supreme Court in October, 2005;

7.5 On April 20, 2005, the night before HRW was to release a report in Tunisia condemning Tunisia's use of prolonged solitary confinement as punishment for leaders of a banned opposition party, the government contacted HRW researchers and announced it would move all prisoners out of solitary confinement the following day. It also granted HRW access to prisons, reversing a 14 year policy barring independent human rights organizations from prisons; and

7.6 A November 2004 HRW report on discriminatory housing policies in Utah persuaded city and county housing officials in Salt Lake City, Utah to reverse policies that denied housing to people with minor offenses (such as shoplifting), and people who had proven their capacity for successful rehabilitation.

8 Promoting accountability for serious human rights violations is an important part of HRW's mandate. In performance of this mandate, HRW has contributed support for both the development and the work of international criminal tribunals. In 2000, Human Rights Watch established the International Justice Program ("**IJP**"). This program undertakes advocacy campaigns to promote justice for serious crimes, often by advocating for the creation of international or internationalized tribunals where national courts are unable or unwilling to prosecute. Once established, the IJP urges governments and inter-governmental organizations to provide political and financial support for these processes, including political pressure to secure the arrest of suspects. HRW also critically assesses the work of international and national prosecutions for serious crimes and makes recommendations to ensure the proceedings are fair and effective. Fairness and justice for a defendant or accused person is as much a part of the mandate of HRW as ensuring the full and effective investigation and prosecution of war crimes, genocide, crimes against humanity and other matters falling within Articles 2 to 5 of the Statute.

9 The United Nations has recognised that the work of human rights organisations in general is of critical importance for the "*promotion and protection of all human rights and fundamental freedoms for all persons in all countries of the world*". The United Nations is committed to furthering the work of human rights-defending NGOs. In a Declaration on Human Rights Defenders on 9 December 1998, the General Assembly of the United Nations acknowledged:

> *"the important role of international cooperation for, and the valuable work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, including in relation to mass, flagrant, or systematic violations such as those resulting from apartheid, all forms of racial discrimination, colonialism, foreign domination or occupation, aggression or threats to national sovereignty, national unity, or territorial integrity and from the refusal to recognise the rights of peoples to self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources".*

The Declaration specifically identifies human rights defenders as having an important role in contributing to the public's awareness of these issues through education and research. HRW and its HROs fall within this category of persons.

10 In all, HRW is an acknowledged source of carefully researched and soundly based factual material and expert analysis. Specifically, in the investigation and prosecution of matters falling within Articles 2 to 5 of the Statute, HRW's information and evidence given by its HROs, has been accepted as having probative value although it necessarily contains expert (analysis or opinion) and hearsay testimony.[2]

[2] See paragraph 18 in Section Three below.

Section Three:

THE IMPORTANCE OF THE ISSUE BEFORE THE COURT TO HUMAN RIGHTS WATCH

11 Much of the information obtained by HRW HROs in the field is, and is promised at the time to remain, confidential. To research alleged abuse, HRW sends its staff to talk directly with victims and witnesses of human rights violations, often in environments characterized by disregard for rule of law and therefore fraught with risk for those who agree to speak with or assist HRW staff. Individuals associated with HRW, as well as those known to have given information to it in connection with its reports have been detained, assaulted and threatened with death in connection with HRW's work. For obvious reasons, sources generally agree to communicate with HRW's researchers only on condition that their identities must be kept confidential. To be able to use that information requires the consent of the informant in question. However often that consent is provided, it is usually provided on a no-names basis.

12 There is a clear public interest in ensuring that HRW continues to be in a position to promise this confidentiality and deliver on its promise. So far as Witness TF1-150 is concerned, he operated under the mandate of UNOMSIL (later becoming UNAMSIL).[3] The relevant UN Security Council resolution established UNOMSIL to perform, *inter alia*, the following tasks:

> *"To report on violations of International Humanitarian Law and Human Rights in Sierra Leone, and, in consultation with the relevant United Nations Agencies, to assist the Government of Sierra Leone in its efforts to address the country's human rights needs."*

13 HRW also notes that the Prosecution has relied upon the Training Manual on Human Rights Monitoring published by the Office of the High Commissioner for

[3] UN Security Counsel Resolution 1181 (1998).

Human Rights (the "**OHCHR**"), which stresses the need for HROs to "*respect the confidentiality of information*" given to them and, in particular, to respect the confidentiality attaching to the identities of sources.[4] This is a critical element of the work of an HRO.

14 The position of HROs working for HRW and similar "non-mandated" human rights organisations is analogous to that of UN mandated HROs. The role of HROs is generally comparable whether operating under mandate or on behalf of and with the authority of organisations such as HRW. There is no rational basis or other requirement to distinguish between the rights and privileges of "mandated" or "non-mandated" HROs. Support for this can be found in the General Assembly's Declaration on Human Rights Defenders[5], cited above, recognising the general category of "*individuals, groups and associations*" without qualification as to juridical basis.

15 Similarly, a more recent report of the UN Commission on Human Rights stressed the importance of the work of human rights organisations generally:

> *"As mentioned in her first report to the Commission, the Special Representative would like to stress the importance of collaborating with NGOs. The Special Representative would like to reiterate that the role of non-governmental organizations in furthering the promotion and the protection of the rights of human rights defenders is crucial. Indeed, it is those organizations which spearhead these concerns and are forcefully advocating, monitoring and lobbying for human rights. In this regard, the information provided by NGOs on allegations of violations against human rights defenders around the world is essential for the good functioning of this mandate."*[6]

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4 Attachment 2 to the Prosecution Appeal. The Defence seek to diminish the relevance of the Manual by noting that it was published after the events in the instant case took place. It is submitted that the Manual and the principles it contains remain good evidence of best practice for the work of HROs working for the OHCHR and for human rights organisations generally.

5 9 December 1998, G.A. 53/144.

6 *Promotion and Protection of Human Rights Defenders,* Economic and Social Council, 58th Session (2002), paragraph 17.

16 The privilege not to be compelled to disclose by name sources of information and to maintain confidentiality facilitates the work of the HRO and protects the informant from counter-measures, in many cases being the exposure of informants and their families to murder, physical attack or imprisonment. Consequently, HRW takes great pains to protect its informants by withholding names and giving assurances of confidentiality when circumstances require. If this privilege and protection were to be broken, the flow of information would be seriously impaired, undermining the ability of HRW and like organisations to perform their vital functions. It would also hinder HRW's ability to co-operate with relevant authorities in the investigation and prosecution of serious human rights abuses and war crimes. As stated above, HRW and like organisations take great care in asserting the confidentiality of their sources and do not refuse to disclose such sources where they are duly authorised to do so.

17 If confidentiality cannot be maintained when the HRO or another representative of his or her organisation gives evidence, the consequences will be extremely serious. Firstly, if sources are disclosed the safety of those sources and their families may be immediately jeopardized. Secondly, HRW's ability to gather and publish accurate and detailed material will be compromised, since assurances of confidentiality would be seen to be overridden by compulsion to make disclosure in court. Thirdly, HRW and similar organisations would likely feel compelled to cease or diminish co-operation with relevant tribunals, investigators and prosecutors.

18 HRW has worked closely with the international tribunals for the former Yugoslavia and Rwanda ("**ICTY**" and "**ICTR**" respectively). At the ICTY, HRW has worked extensively with investigators and prosecutors and has testified in cases before the tribunal. Six of the seven counts on which the tribunal finally indicted Slobodan Milosevic in 1999 were cases that HRW had documented in Kosovo. In Rwanda, HRW provided extensive evidence of human rights abuses and other assistance to the ICTR and has provided expert testimony in several

cases before the tribunal. HRW has also provided assistance to the Office of the Prosecutor of the Special Court for Sierra Leone and the International Criminal Court and has provided evidence in war crimes cases in national courts.

Section Four:

THE CONSTRUCTION OF RULE 70

19 HRW supports the Prosecution Appeal on the qualification of this witness under Rule 70 of the Rules. In HRW's submission the construction put forward by the Defendants and seemingly adopted by the majority of Trial Chamber II[7] is to be rejected. That construction is inconsistent with persuasive authority and inconsistent with the appropriate purposive construction of Rule 70 set out below. The construction supported by HRW gives real content and purpose to the Rule; the Defendants' does not.

20 It is important to organisations like HRW that the underlying purpose of Rule 70 is maintained. As observed in the *Talic*[8] decision, Rule 70 is critical because it is "*almost impossible to envisage this Tribunal, of which the Prosecution is an integral organ, being able to fulfil its functions*" without it.

21 Rule 70 is in a form widely used as a rule of procedure in like Tribunals to protect confidentiality in testimony[9]. HRW submits that this Court must consider and should give due weight to decisions of other Tribunals on similar, if not identical, Rules. This is necessary to ensure that clear and appropriate guidelines can be given to HROs who may be potential witnesses on the operation of Rule 70 and like rules.

22 Rule 70 is designed to protect witnesses such as Witness TF-150. As explained by the Appeals Chamber in *Milosevic*[10], "*the purpose of Rule 70 (B) to (G) is to*

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7 At paragraph 19.

8 *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9, 11 December 2002, paragraph 40.

9 These Rules are similar, if not identical, to the Rules adopted in other international criminal tribunals, including ICTY and ICTR.

10 *Prosecutor v Milosevic* IT-02-54-AR 73.3 Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002.

encourage States, organisations, and individuals to share sensitive information with the Tribunal". The restrictive construction proposed by the Defendants does not further this purpose and is not supported by the wording of the Rule itself.

23 HRW submits that the construction of Rule 70 should be *permissive* and not restrictive. The language of the Rule supports and does not contradict the application of the Rule to the circumstances of Witness TF-150. The Trial Chamber should construe the Rule as permitting the evidence to be heard and weighing the value of it rather than insisting upon disclosure and so dissuading the witness from attending or rejecting the testimony as inadmissible. HRW believes that this construction is consistent with the language and underlying purpose of Rule 70.

24 In this case, the Decision provides little guidance as to why the restrictive construction of Rule 70 was adopted and guidance from persuasive authority ignored. HRW adopts the response of the Prosecution on the construction issue generally.[11] HRW submits that an overly semantic interpretation has been adopted and one that placed unfounded reliance on subsection (B) of Rule 70. There is no imperative in the language of Rule 70(B) or the language of Rule 70 generally to require Rule 70(D) to be read as being subject to Rule 70(B).

25 There is no imperative in the language of Rule 70(D) to limit the availability of Rule 70(D) to a particular kind of informant/witness merely by referencing back to Rule 70(B). Similarly, there is no support to be gained for the Defendants' construction by seeking to rely on other Rules concerning the conduct of proceedings. This approach is fundamentally wrong: the Rules should not be construed so narrowly as to exclude the operation of established public interest exceptions such as those discussed below. It cannot be accepted that Rule 70 was drafted so as to limit the category of witnesses (such as HROs) who might be able to assert the privilege to keep sources confidential to a particular subgroup

[11] Prosecution Appeal, paragraphs 12-13.

and to exclude other witnesses presenting exactly the same materials from the assertion of that privilege when no such distinction is drawn by other rule systems or in general national and international legal practice and jurisprudence.

26 HRW adopts the other arguments advanced by the Prosecution on the approach taken by the Trial Chamber on the interpretation of Rule 70. It is of critical importance to HRW and like organisations that the approach taken by international tribunals to Rule 70 and similar provisions in other rules of evidence and procedure is consistent and clear.

Section Five:

THE ACKNOWLEDGEMENT OF THE PRIVILEGE OF CONFIDENTIALITY IN SIMILAR SITUATIONS

27 There is a general consistency in the acknowledgement of the right of reporters, researchers and observers including HROs to maintain the confidentiality of informants or sources in appropriate circumstances. The right not to disclose sources, unless authorised to do so, is a privilege asserted by these persons as witnesses. It is possible to recognise a general application of public policy in the acknowledgement and protection of this privilege as a matter of public interest. There is set out below a summary of how other Courts and Tribunals approach the issue of maintaining the confidentiality of sources during witness testimony. This analysis covers (1) ad hoc and international criminal tribunals; (2) Courts in the United States ("**U.S.**"); and (3) the general approach taken by Courts in England and Europe generally.

(1) Ad Hoc and War Crimes Tribunals

28 As examples of the acknowledgement of this privilege of confidentiality, war correspondents are to be considered as entirely comparable with HROs. Although the Prosecution has dealt with the *Talic*[12] case, we will mention it briefly because there is manifestly a similar public interest in protecting the work of HROs.

29 In light of the description given above of the work undertaken by HRW, and as discussed in further detail below, an even greater public interest attaches to such work than to the work of war correspondents operating in similar environments.

[12] Prosecution Appeal, paragraphs 28-36.

30 In *Talic*, the court found that war correspondents do serve a public interest, derived from the fundamental right of freedom of opinion and expression and the public interest in ensuring the free flow of information to the public of news generally relating to war zones and human rights violations.

31 Although elements of this case can be distinguished from the position of HROs working in similar locations (the right to freedom of expression, for example), it is submitted that there is still sufficient similarity to allow the court to apply the reasoning in *Talic* to the case presently under appeal, as a minimum standard of protection for HROs. In particular, the court is referred to the importance placed by the United Nations on the reporting function of HROs as cited above.[13]

32 The standard applied to war correspondents should be seen as a ***minimum*** level of protection for these reasons. HROs perform work which has a greater content and significance than that of foreign correspondents reporting from the same kinds of locations (e.g., war zones, countries with oppressive regimes etc.). The reasons for this are summarised in Sections Two and Three above. HROs carry out their work so that accurate and reliable information can be made available in support of the objectives referred to in those sections. As stated above, HRW reports are more detailed than normal journalistic reportage of human rights violations.[14] They are often founded on extensive first hand accounts of survivors, perpetrators and witnesses to grave human rights violations so that HROs should be entitled to assert at least the same privilege to protect confidential sources.

33 It was the importance of the subject-matter on which war correspondents report that the court found persuasive in the *Talic* case. There, it was noted that war correspondents serve an important public function "*in bringing to the attention of*

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13 See above, paragraph 9.

14 See above, paragraph 5.

the international community the horrors and reality of conflict". The court went on to remark that "*the information uncovered by war correspondents has on more than one occasion provided important leads for the investigators of this tribunal*".[15]

34 (It should be noted that HROs conducting the kind of research considered in the case under appeal fall within the definition of "*journalists*" used by The Council of Europe. The Council has adopted a broad definition of "*journalist*" for the purposes of establishing the privilege of journalists "*not to disclose their sources of information*".[16] For these purposes, the following definitions apply:

> "*(a) the term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;*
>
> (b) *the term "information" means any statement of fact, opinion or idea in the form of text, sound and/or picture".*)

35 The fact that the *Talic* decision does not directly address the rights of the accused is not fatal to its consideration in this case. It was decided in *Talic* that the public interest attaching to the work of war correspondents had to be weighed against the need for all relevant evidence to be put before the court. If the submissions made by Defence Counsel in the present case were to be accepted, that is, that the rights of the accused may be prejudiced by non-disclosure of confidential sources, the court must still proceed and weigh this potential prejudice against the importance of preserving the public interest addressed above. This leads to a balancing exercise similar to that conducted by the court in the *Talic* case.

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[15] *Talic* decision at paragraph 36.

[16] Recommendation No. R(2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (adopted 8 March 2000).

(2) Legal Position in the USA

36 A similar balancing test has been applied by courts in the U.S. addressing the tension between the public interest in protecting the confidentiality of journalists' sources and the right of a defendant to cross-examine witnesses. The latter is based on the Sixth Amendment to the U.S. Constitution, part of the so-called Bill of Rights, which provides that criminal defendants have the right "*to be confronted with the witnesses against them.*" This "*confrontation clause*" is a fundamental aspect of the U.S. justice system.

37 Nevertheless, U.S. Courts have recognized that this right must have its limits. "'[A defendant] *is entitled only to an opportunity for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.*'" [17] The limits on a defendant's rights under the "*confrontation clause*" are particularly acute when the defendant's attempts at cross-examination conflict with the witness' rights, such as those where the witness claims a privilege. Privileged communications – such as those between a client and her attorney – may be inviolate even under cross-examination. See the *Rainone* case[18] (holding that "*[a] trial judge does not violate the Constitution when he limits the scope of cross-examination for a good reason, and . . . desire to protect the attorney-client privilege [is considered] a good reason*").

38 A number of U.S. courts have recognized a privilege for journalists' confidential sources.[19] In the *Criden* case,[20] for example, where a defendant sought to

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17 *Delaware* v *Fensterer*, 474 U.S. 15 at 20 (1985). See also *Delaware v Van Arsdall*, 475 U.S. 673 at 679 (1986) (holding that reasonable limits may be placed on the right to cross-examine "*based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant*").

18 *United States* v *Rainone*, 32 F.3d 1203 at 1207 (7th Cir. 1994).

19 See, e.g., *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980) (holding that "*journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases*"). In addition, the courts in eighteen states of the U.S. have recognized a journalists' privilege, and thirty-one states have adopted so-called "shield laws" which offer journalists express protection against being required to reveal confidential sources.

cross-examine a journalist regarding her source's state of mind and the journalist resisted, the Court ruled that a balancing between the "*confrontation clause*" and the journalist's privilege was required.[21] The *Criden* court observed that journalists enjoyed special protection under the First Amendment to the U.S. Constitution, which protects the freedom of the press, because of journalists' role as "'*surrogates for the public*'" in actualizing the "*national commitment to an unfettered exchange of ideas . . .*" and because "*there is a general expectation in certain sectors of society that information flows more freely from anonymous sources.*"[22] Perhaps most importantly, the *Criden* court also recognized that the "*reporter's privilege also attempts to protect the source from retribution . . . [since] the danger of retaliation against a private citizen who reports criminal activities is obvious.*"[23]

39 The acknowledgment of this privilege in the Tribunal cases, of course, establishes that it does not have to have a constitutional or statutory base.

40 HROs, of course, also are "*surrogates*" for the public, but in a much more fundamental way than journalists as an HRO's function is to seek to bring world attention to human rights abuses and the suffering of ravaged communities and to promote justice for victims and those accused of war crimes.

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20 *United States* v *Criden*, 633 F.2d 346 (3rd Cir. 1981).

21 The journalist's privilege in this context has been recognized by a number of U.S. federal courts of appeal but not by the U.S. Supreme Court. The Supreme Court last ruled on the issue of a journalist's privilege more than 30 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972), where it held that the First Amendment did not protect a journalist from testifying before a grand jury, circumstances very different from a public trial, since "*the grand jury context presents an unusual setting where privacy and secrecy are the norm.*" In re Sealed Case, 199 F.3d 522, 526 (D.C. Cir. 2000). Subsequent to *Branzburg*, a number of U.S. appellate courts (which are cited below), as well as trial courts, virtually all relying on the concurring opinion of Justice Powell in *Branzburg*, have held that the "confrontation clause" rights of a criminal defendant must be balanced against a journalist's privilege.

22 *Criden*, 633 F.2d at 355 – 356 (citation omitted).

23 Ibid at 356.

41 HRW does not suggest that the balancing of the societal interest in the protection of HROs' sources with the rights of the accused is a simple matter. Indeed, HRW is deeply committed to the proposition that those accused of war crimes must be assured a fair trial and acknowledges the importance of Article 17 of the Statute, an analog in this section of the brief to the right to a fair trial and the "*confrontation clause*" of the U.S. Constitution. The *Criden* ruling, fortunately, is instructive in trying to find that balance. That court ruled that, in order to override the journalist's privilege, the defendant must demonstrate that: (1) he had attempted to obtain the information from other sources; (2) the only possible way to obtain the information is from the journalist; and (3) the requested information is "*crucial to the claim.*"[24]

42 Of the U.S. federal appeals courts which have considered a case where a criminal defendant sought to compel disclosure of confidential information from a reporter over a claim of journalist's privilege, all have recognized that a balancing of the competing interests is required. By way of example, see the *LaRouche* case[25] (holding that the legitimate First Amendment concerns of journalists must be balanced against the defendants' interests); the *Caporale* case[26] (holding that "*information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources*"); the *Burke* case[27] (holding that in both civil and criminal cases, "*it is clear that to protect the important interests of reporters and the public in preserving the*

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[24] Ibid at 358 – 359. In the *Criden* case, defendants sought information regarding the motivation of a federal agent in order to support their motion to dismiss for prosecutorial misconduct. The information requested from the journalist went directly to this issue, and as such, was considered "*crucial to the claim.*" Ibid at 359.

[25] *United States v LaRouche*, 841 F.2d 1176, 1182 (1st Cir. 1988).

[26] *United States v Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

[27] *United States v Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983).

confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other sources"); and the *Pretzinger* case[28] (upholding a lower court's refusal to compel a journalist to disclose information regarding the identity of his informant on grounds that the journalist's privilege outweighed, in this instance, the defendant's rights).

43 In the cases cited above where the journalists' claim of privilege was overruled after the competing interests were weighed, the court found that the testimony was crucial to the defendant's case, and could mean the difference between guilt and innocence. Thus, where a HRO is asked to testify, for example, to general circumstances of a war-torn area and not as to the particular guilt or innocence of the defendant, application of a journalist-type privilege would protect the witness' confidential sources since the testimony is not "*crucial to the claim*" or "*critical*" and the identity of the sources is not necessary to the defence.

44 In this case it is said that the HRO's proffered testimony in issue on this appeal goes to "*a core issue of trial; i.e. the widespread and systematic nature of the attacks on the civilian population in Sierra Leone*",[29] this categorisation does not carry the weight of "*crucial*" or "*critical*" as used in these U.S. authorities. Neither does this testimony appear to go directly to the innocence or guilt of an individual in the sense that it is direct testimony against that individual. Moreover, if a defendant really disputes the HRO's testimony that there was widespread and systematic war crimes (which typically is not the defendant's contention), he can call other witnesses to the stand to present a different picture of the situation.

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28 *United States* v *Pretzinger*, 542 F. 2d 517 (9th Cir. 1976).

29 Recitals to the grant of Leave to Appeal dated 12 October 2005.

45 The analogy between the overwhelming public interest in protecting the confidential sources of HROs and the confidential sources of journalists is apt and appropriate. Given that there can be no dispute that a HRO must be ranked above a journalist in terms of service to the public interest, this Tribunal at least should permit a HRO to testify while protecting his confidential sources where the testimony does not go to the individual acts of the defendants -- in the same way that U.S. courts have allowed a journalist's privilege to be interposed between a criminal defendant and his right to cross-examine the journalist in appropriate circumstances.

(3) Legal Position in Europe and England

46 Journalists exercise by their very profession the right to freedom of expression now enshrined in Article 10 of the European Convention on Human Rights. Journalists have been described as "watchdogs" for the public in the manner that HROs are "watchdogs" for human rights abuses.

47 For this reason, it is imperative that journalists are able to guard the confidentiality of their sources. Indeed, it is a basic principle of journalistic ethics that journalists *must* protect confidential sources of information.[30] The need to protect confidential sources was recognised by the European Court in the case of *Goodwin v United Kingdom.*[31]

> "*Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the*

30 *NUJ Code of Conduct: Principle 7* http://media.gn.apc.org/nujcode.html; the duty requirement that HROs maintain confidentiality is entirely comparable.

31 *Goodwin v UK* (1996) 22 EHRR 123 at paragraph 39.

protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest".

48 Although Article 10 establishes a presumption in favour of journalists who wish to protect confidential sources, this presumption is rebuttable and the judge is asked to balance the interests of free speech against four conflicting interests which may require revelation of sources. Article 10 states:

> *"No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that it is necessary in the interests of justice or national security or for the prevention of disorder or crime".*[32]

49 Accordingly, revelation of a confidential journalistic source will not be satisfied by proof that it is simply "*convenient*" or "*expedient*". The source's name must really be necessary in any one of the four situations set out in Article 10. The decision in *Goodwin* (whose influence has been strengthened following the introduction of the Human Rights Act) suggests that Article 10 jurisprudence should generally "*tip the balance of competing interests in favour of the interest of democratic society in securing a free press*". However, HRW maintains that clearer guidance on the level protection of confidential sources which is appropriate to HROs is to be found by examining the more absolute privileges extended to witnesses who carry out functions which deserve and require a higher level of protection. HROs fall more clearly into the category of witnesses where the privilege is protected even more rigorously than a journalists' sources. These are examined in subsection (4) below.

50 The Belgian legislature's recent response to another Strasbourg case (*Ernst and others v Belgium*[33]) was the introduction of a new law protecting journalists from

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32 Emphasis added.

33 European Court of Human Rights, 15 July 2003.

disclosing information that may lead to the identification of sources unless disclosure will assist in the prevention of crimes that constitute a serious threat to the physical integrity or one or more persons (this includes crimes of terrorism). The information they are protected from disclosing includes the identity of sources; the nature or origin of their information; the content of documents themselves if that may lead to the informant being identified.

51 The *Ernst* case is an indicator of the growing worldwide recognition of the fundamental importance of the protection of journalists' sources. Indeed, a recent submission on behalf of various media organisations in Australia proposed adopting the Belgian example. The impact of ECHR jurisprudence is becoming ever more extensive in its reach[34].

(4) Other Examples of the Privilege of Confidentiality

52 In relation to **police informants**, public interest immunity is a long established principle and is close to absolute. In public, prosecution witnesses may not be asked, and should not be allowed to disclose, the names of informers or the nature of the information given. The rationale behind the rule was explained by Lawton LJ in *Hennessey*[35]. He said:

> *"The courts appreciate the need to protect the identity of informers, not only for their own safety but to ensure that the supply of information about criminal activities does not dry up".*

53 This was echoed by the Canadian Court in the case of *R v Leipert*[36], where it was stated that "*informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement*".

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34 Submissions: Review of the Uniform Evidence Acts – Non Disclosure of Confidential Sources by Journalists, dated 30 September 2005.

35 *Hennessey* (1978) 68 Cr App R 419 at page 425.

36 *R v Leipert* [1997] 1 S.C.R.

54 On considering whether or not to conduct a balancing exercise between the public interest asserted and the interest of the due administration of criminal justice in relation to a claim to public interest immunity, it was held by Phillips J in the English case of *Clowes*[37] that the concept of such an exercise between the nature of public interest on the one hand and the degree and potential consequences of the risk of a miscarriage of justice on the other was not an easy one. He would not readily accept, however, that proportionality between the two was never of relevance.

55 In fact, the Australian Court confirmed in *R v Smith* that the public interest in preserving confidentiality in relation to police informers outweighs any countervailing public interest.[38] The rationale behind this decision was that, without such a rule, sources of information would disappear thereby hindering the detection of crime.

56 In relation to **social and health care workers**, it has been held in the English House of Lords that a local authority is entitled to privilege from disclosing the names of its informants in relation to child neglect or ill-treatment in the same way and on the same basis as police informants[39]. Accordingly, the identity of the informer may not be disclosed, whether by discovery, interrogatories, or questions at trial, as the public interests served by preserving the anonymity of both classes of informants is analogous. Lord Edmund-Davies stated that where a confidential relationship existed and disclosure would be in breach of some ethical or social value involving the public interest, the court had a discretion to uphold a refusal to disclose relevant evidence provided it considered that on balance the public interest would be better served by excluding such evidence.

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37 *Clowes* [1993] 3 All ER 440.

38 86 A Crim R 308, at page 311.

39 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.

57 Similarities can clearly be drawn with the situation where individuals who have witnessed human rights abuses are confiding in HROs. There is an expectation of confidence between the HRO and the information source, without which the HROs would be unable to carry out their role effectively. As discussed above, HRW investigations often involve victims of sexual violence or children or people with HIV/AIDS who provide testimony to researchers on the basis of a confidential relationship. The provision of information to HROs would effectively materially cease or diminish (with severe consequences), if informants were to feel that their confidence could be broken.

Section Six:

LACK OF PREJUDICE TO THE ACCUSED IN EVIDENCE OF THIS KIND

58 HRW is not aware in detail of the evidence which Witness TFI-150 may give in the instant case.[40] However, it is noteworthy that there appears to be no issue about the probative value of the testimony of Witness TFI-150.[41] HRW wishes to demonstrate that the existence of a privilege for Witness TFI-150 to protect confidential sources, and by extension to HROs in other organisations such as HRW, does not prejudice the accused or prevent a fair trial from taking place. It is acknowledged to be consistent with the rights of the accused to admit such evidence. The issue is what weight should be given to the testimony.

59 Rule 89(C) of the Rules affords the Trial Chamber a broad discretion to admit any evidence which it deems to be relevant and of probative value. Where hearsay evidence is admitted, the Trial Chamber has then to decide what weight that evidence should be given.

60 If evidence is admitted (because it is relevant and probative), the Trial Chamber has to exercise its discretion in deciding what weight the evidence should be given. This will be done taking all material considerations into account. Factors which will inform the decision will include (a) whether the evidence is factual or expert in nature, (b) the degree to which the evidence is crucial to the issue of individual guilt, (c) the existence and nature of any privilege the witness may have, (d) the ability of the Defendants to call evidence in response and (e) the apparent reliability of the evidence sought to be adduced. This "weighing" stage takes place after all the evidence and legal submissions have been heard. The

40 Beyond the categorization in the Recitals to the grant of Leave to Appeal dated 12 October 2005 at page 3.

41 "*This Trial Chamber has clearly ruled that these matters are of weight which will be assessed in due course*" (paragraph 28 of the Minority Decision); see also the Decision granting leave to appeal and Rule 73(B) all of which presume that the testimony has probative weight.

interests of the defendants in having a fair trial will be given full and proper weight in this exercise.

61 The evidence which is given by organisations such as HRW will often be expert evidence and contain hearsay on factual matters. Usually it is testimony concerning the general situation in a particular area or country at the relevant time. In the ICTR case of *Bizimungu*[42] it was held that the non-disclosure of sources was a matter that went to weight rather than to the admissibility of an expert's evidence. It was further held that there was a fundamental difference between factual evidence called about the particular crimes in issue and expert evidence which is intended to enlighten the judges on specific issues. The Trial Chamber in *Bizimungu* concluded that the expert evidence should be admitted and that its weight would be determined in due course. The admission of the evidence did not infringe the defendants' right to a fair trial. It should be noted that this case concerned a witness who had refused to breach confidences.

62 It is important to note and, HRW submits, adopt the approach taken by the Court in *Bizimungu.* The Court addressed both the question of expert testimony and the issue of hearsay.[43] The clear conclusion is that the admission of hearsay or expert testimony (necessarily founded on hearsay in many instances) does not infringe the right of the accused to a fair trial.

63 It is submitted (and expressly acknowledged in *Bizimungu*) that the right of the accused and the right not to disclose confidential sources are not inconsistent. The protection of the confidential source is simply one factor which the Trial

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42 *Prosecutor v Casimir Bizimungu et al.*, ICTR Trial Chamber II Decision on Defence motion for exclusion of portions of testimony of expert witness Dr Alison Des Forges, 2 September 2005, paragraph 13.

43 Note in particular the citation and analysis of the *Ayakesu, Kordic* and *Rutaganda* cases in *Bizimungu.* HRW submits that the principle of admissibility should be accepted without the need for further extensive citation. The question in the case presently under appeal is the issue of **weight** once it is accepted that the HRO is entitled to protect the confidentiality of the sources of his or her expert or factual (hearsay) testimony.

Chamber has to take into account in determining the in this present case, adopting the approach in *Bizimungu*, the **weight** to be given to the evidence.

Section Seven:

CONCLUSION AND SUBMISSION

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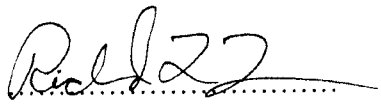
64 For these reasons, HRW supports this appeal and respectfully submits this brief as amicus curiae.

Respectfully submitted,



Michael Jones (London office)
Richard Levine (New York office)
WEIL, GOTSHAL & MANGES LLP

Sara Darehshori
(Senior Counsel International Justice Program)
HUMAN RIGHTS WATCH
350 Fifth Avenue
34th Floor
New York, N.Y. 10118
(v) (212) 290-4700
(f) (212) 736-1300
darehss@HRW.org

Dated: December 15, 2005

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Process

JACQUES CHARL HOFFMANN

AND

SOUTH AFRICAN AIRWAYS

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 17/00

Chaskalson, President *(Presided)*
Langa, Deputy President
Ackermann, J.,
Goldstone, J,
Kriegler, J,
Mokgoro,J,
O'Regan, J,
Sachs, J.,
Yacoob, J.,
Madlanga, AJ.
Ngcobo, J, *(Delivered the leading judgment)*

28TH SEPTEMBER, 2000

AMICUS CURIAE – Role and status of an *amicus curiae* in relation to proceedings – whether it is entitled to be awarded costs.

HUMAN RIGHTS – Right to equality – section 9 of the South African Constitution – challenges to statutory provisions and government conduct alleged to infringe same – approach of the Constitutional Court to the issue.

HUMAN RIGHTS – Unfair discrimination – equal dignity of all men as foundation for the prohibition of unfair discrimination under the South African Constitution.

HUMAN RIGHTS – Unfair discrimination against HIV carriers – whether prejudice against HIV carriers can justify same

HUMAN RIGHTS – Right to equality – denial of employment to an applicant

on the ground that he was an HIV carrier – whether impaired his dignity and constituted unfair discrimination – whether his right to equality under section 9 of South African Constitution is thereby violated.

HUMAN RIGHTS – Relief for violation of right – power of court to grant "appropriate relief" for violation of rights contained in the Bill of Rights under section 38 of the South African Constitution.

HUMAN RIGHTS – Relief for violation of right – "appropriate relief" for violation of freedom from discrimination- factors which a court should consider in granting same.

HUMAN RIGHTS – Relief for violation of rights – instatement – whether appropriate relief to a prospective employer denied employment by a violation of his freedom from discrimination.

PRACTICE AND PROCEUDRE –*Amicus curiae* – role and states of an *amicus curiea* in relation to proceedings and whether it is entitled to be awarded costs.

Facts and History:

In September, 1996 the appellant applied for employment as a cabin attendant with South African Airways. He went through a four stage selection process at the end of which he and eleven others were found to be suitable candidate for employment, subject to satisfactory pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and thus suitable for employment. However, the blood test showed that he was HIV positive. As a result, the medical report was altered to read that the appellant was "HIV positive" and therefore "unsuitable". He was subsequently informed that he could not be employment as a cabin attendant in view of his HIV positive status.

The appellant challenged the constitutionality of the refusal to employ him in the High Court, alleging that the refusal constituted unfair discrimination, and violated his constitutional right to equality, human dignity and fair labour practices. He sought an order in motion proceedings, amongst other things, directing the South African Airways to employ him as a cabin attendant.

In response to the appellant's claim the South African Airways denied the allegations. It asserted that its employment practice required the exclusion from employment as cabin attendant all persons who were HIV positive. It justified the practice on safety's medical and operational grounds. In particular its flight crew had to be fit for worldwide duty. In the course of their duties they are required to fly to yellow fever endemic countries. To fly to these countries they must be vaccinated against yellow fever, in accordance with guidlines issued by the National Department of Health. Persons who are HIV

positive may react negatively to this vaccine and may, therefore not take it. If they do not take it, however, they run the risk not only of contracting yellow fever, but also of transmitting it to others, including passengers. It added that people who are HIV positive are also prone to contracting diseases. There is a risk, therefore that they may contract these diseases and transmit them to others.

The High Court ruled in favour of the South African Airways and accepted the medical and other reasons adduced by South African Airways.

Issue:

Whether any constitutional rights of the appellant were violated by South African Airways and if so, the appropriate relief to which the appellant is entitled.

Held; *unanimously allowing the appeal.*

1. *On approach of the Constitutional Court of South African to challenges to statutory provisions and government conduct alleged to infringe the right to equality.*
"This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose.19 If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.
Mr Trengove sought to apply this analysis to SAA employment practice in the present case. He contended that the practice was irrational because: first, it disqualified from employment as cabin attendants all people who are HIV positive, yet objective medical evidence shows that not all such people are unsuitable for employment as cabin attendants; second, the policy excludes prospective cabin attendants who are HIV

positive but does not exclude existing cabin attendants who are likewise HIV positive, yet the existing cabin attendants who are HIV positive would pose the same health, safety and operational hazards asserted by SAA as the basis on which it was justifiable to discriminate against applicants for employment who are HIV positive.

In the view I take of the unfairness of the discrimination involved here, it is not necessary to embark upon the rationality enquiry or to reach any firm conclusion on whether it applies to the conduct of all organs of state, or whether the practice in issue in this case was irrational."

***Per* Ngcobo, J [P. 164] lines. 10 - 35**

3.

2. *On equal dignity of all men as the foundation for the prohibition of unfair discrimination under the South African Constitution.*

"At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. 20 That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. 21 Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.22

4.

The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice.23 They have been subjected to systemic disadvantage and discrimination.24 They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination

against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law."
Per Ngcobo, J [Pp. 164 - 165] lines. 35 - 20

3. *On whether prejudice can justify unfair discrimination against HIV carriers.*
"Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted.30 Our constitutional democracy has ushered in a new era - it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping."
Per Ngcobo, J [P. 167] lines. 5 - 15

4. *On whether denial of employment to an applicant on the ground that he was an HIV carrier impaired his dignity, constituted unfair discrimination and violated his right to equality guaranteed by section 9 of the South African Constitution.*
"As pointed out earlier, on the medical evidence not all people who are living with HIV are unsuitable for employment as cabin attendants.33 It is only those people whose CD4+ count has dropped below a certain level who may become unsuitable for employment. It follows that the finding of the High Court that HIV negative status is an inherent requirement "at least for the moment" for a cabin attendant is not borne out by the medical evidence on record.
Having regard to all these considerations, the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. This conclusion makes it unnecessary to consider whether the appellant was discriminated against on a listed ground of disability, as set out in section 9(3) of the Constitution, as Mr Trengove contended or whether people who are living with HIV ought not to be regarded as having a disability, as

contended by the *amicus*.
I conclude, therefore, that the refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by section 9 of the Constitution."
***Per* Ngcobo, J [P. 68] lines. 5 - 15**

5. *On power of court to grant "appropriate relief" for violation of rights contained in the Bill of Rights under section 38 of South African Constitution.*
"Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, "the court may grant appropriate relief." In the context of our Constitution, "appropriate relief" must be construed purposively, and in the light of section 172(l)(b), which empowers the court, in constitutional matters, to make "any order that is just and equitable."35 Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate.36 As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, "[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate."37 Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness."
***Per* Ngcobo, J [P. 168] lines. 25 - 35**

7.

6. *On factors which a court would consider in granting an "appropriate relief" for discrimination.*
"Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration.38 In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. This aspect of the interests of the community can be gathered from the preamble to the Constitution in which the people of this country declared:

'We, the people of South Africa,
Recognise the injustices of our past;
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the
Republic so as to -
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...'

This proclamation finds expression in the founding provisions of the Constitution, which include "human dignity, the achievement of equality and the advancement of human rights and freedoms."39

The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source."40

Per Ngcobo, J [Pp. 168 - 169] lines. 40 - 25

7. *On instatement as the appropriate relief to a prospective employee denied employment by a violation of his freedom from discrimination.*

"An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the

elimination of the discriminatory employment practice, but also requires that the person who has suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.

The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligation. 42

South Africa has ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples' Rights.43 In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination. Apart from these conventions, it is noteworthy that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment,44 formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status "should not be a factor in job status, promotion or transfer." It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV. Where a person has been wrongfully denied employment, the fullest redress obtainable is instatement.45 Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus, eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution.

In these circumstances, instatement should be denied only in circumstances where considerations of fairness and

justice, for example, dictate otherwise. There may well be other considerations too that make instatement inappropriate, such as where it would not be practical to give effect to it.

Here, there was no suggestion that it would either be unfair or unjust were SAA to be ordered to employ the appellant as a cabin attendant.

Nor was it suggested that it would not be practical to do so. On the contrary, Mr Cohen assured us that it would not be impractical to employ the appellant as a cabin attendant. Nor does the medical condition of the appellant render him unsuitable for employment as a cabin attendant.46 The appellant is currently receiving combination therapy, which should result in the complete suppression of the replication of the virus and lead to a marked improvement in his CD4+ count.47 On 19 June 2000 he was medically examined and his blood sample was taken. He was found to be asymptomatic, and his CD4+ count was 469 cells *per* microlitre of blood. He describes his prognosis as excellent. He is able to be vaccinated against yellow fever, and is not prone to opportunistic infections.48

It was contended that an order of instatement would open the floodgates for other people who are living with HIV and who were previously denied employment by SAA. However, what the appropriate relief would be in this case cannot be made to depend on other cases that may or may not be instituted. What constitutes appropriate relief depends on the facts of each case. The relief to be granted in those other cases will have to be determined in the light of their facts.

In the light of the afore-going, the appropriate order is one of instatement."

Per Ngcobo, J [Pp. 170 - 172] lines. 30 - 10

8. *On role and status of an amicus curiae in relation to proceedings and whether it is entitled to be awarded costs.*

"The *amicus* also asked for an order that SAA pay its costs. An *amicus curiae* assists the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or

interest in the matter before the court.
It chooses the side it wishes to join, unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.
Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case no such departure is warranted."
***Per* Ngcobo, J [Pp. 173 - 174] lines. 30 - 5**

Ngcobo, J., (Delivering the leading Judgment):

Introduction

This appeal concerns the constitutionality of South African Airways' (SAA) practice of refusing to employ as cabin attendants people who are living with the Human Immunodeficiency Virus (HIV). Two questions fall to be answered: first, is such a practice inconsistent with any provision of the Bill of Rights; and second, if so, what is the appropriate relief in this case?

Mr Hoffmann, the appellant, is living with HIV. He was refused employment as a cabin attendant by SAA because of his HIV positive status. He unsuccessfully challenged the constitutionality of the refusal to employ him in the Witwatersrand High Court (the High Court) on various constitutional grounds. The High Court issued a positive certificate and this court granted him leave to appeal directly to it1.

The AIDS Law Project (ALP)2 sought, and was granted, leave to be admitted as an *amicus curiae* in support of the appeal. In addition, the AIDS Law Project (ALP) sought leave to introduce factual and expert material that had been placed before the Labour Court in a case that also involved the refusal by SAA to employ as a cabin attendant someone who was living with HIV3. The additional material included opinions by various medical experts on the transmission, progression and treatment of HIV, as well as the ability of people with HIV to be vaccinated against yellow fever. In particular, it included minutes reflecting the unanimous view of these medical experts. Leave to introduce the additional material was granted subject to any written argument on its admissibility. Neither party objected to the admission of the additional material.

The ALP submitted written argument and was represented by Mr Tip, together with Mr Boda. We are indebted to the ALP and counsel for their assistance in this matter.

The factual background

In September 1996 the appellant applied for employment as a cabin attendant with SAA. He went through a four-stage selection process comprising a pre-screening interview, psychometric tests, a formal interview

and a final screening process involving role-play. At the end of the selection process, the appellant, together with eleven others, was found to be a suitable candidate for employment. This decision, however, was subject to a pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and thus suitable for employment. However, the blood test showed that he was HIV positive. As a result, the medical report was altered to read that the appellant was "HIV. Positive" and therefore "unsuitable."

He was subsequently informed that he could not be employed as a cabin attendant in view of his HIV positive status. All this was common cause.

In the course of his argument, Mr Cohen, who, together with Mr Sibeko, appeared for SAA, raised an issue as to whether HIV positive status was the sole reason for refusing to employ the appellant. Mr Trengove, who together with Mr Katz and Ms Camroodien, appeared on behalf of the appellant, submitted that it was. I deal with this issue later in the judgment4.

The appellant challenged the constitutionality of the refusal to employ him in the High Court, alleging that the refusal constituted unfair discrimination and violated his constitutional right to equality, human dignity and fair labour practices. He sought an order, in motion proceedings, amongst other things, directing SAA to employ him as a cabin attendant.

SAA denied the charge. It asserted that the exclusion of the appellant from employment had been dictated by its employment practice, which required the exclusion from employment as cabin attendant of all persons who were HIV positive. SAA justified this practice on safety, medical and operational grounds. In particular, SAA said that its flight crew had to be fit for worldwide duty. In the course of their duties they are required to fly to yellow fever endemic countries. To fly to these contries they must be vaccinated against yellow fever, in accordance with guidelines issued by the National Department of Health. Persons who are HIV positive may react negatively to this vaccine and may, therefore, not take it. If they do not take it, however, they run the risk not only of contracting yellow fever, but also of transmitting it to others, including passengers. It added that people who are HIV positive are also prone to contracting opportunistic diseases5. There is a risk, therefore, that they may contract these diseases and transmit them to others. If they are ill with these opportunistic diseases, they will not be able to perform the emergency and safety procedures that they are required to perform in the course of their duties as cabin attendants. SAA emphasised that its practice was directed at detecting all kinds of disability that make an individual unsuitable for employment as flight crew. In this regard, it pointed out that it had a similar practice that excluded from employment as cabin crew individuals with other disabilities, such as epilepsy, impaired vision and deafness. South Africa Airways added that the life expectancy of people who are HIV positive was too short to warrant the costs of training them. It also pointed out that other major airlines utilised similar practices.

It must be pointed out immediately that the assertions by SAA were

inconsistent with the medical evidence that was proffered in their support. SAA's medical expert, Professor Barry David Schoub, in an affidavit, told the High Court that only those persons whose HIV infection had reached the immunosuppression stage and whose CD4+ count had dropped below 300 cells *per* microlitre of blood were prone to the medical, safety and operational hazards asserted.6 The assertions made by SAA, therefore, were not only not true of all persons who are HIV positive, but they were not true of the appellant According to SAA's medical expert, at the time of medical examination there was nothing "to indicate that the infection has reached either the asymptomatic immunosuppressed state or the AIDS stage." On the medical evidence placed before the High Court, therefore, it was not established that the appellant posed the risks asserted. Yet he was excluded from employment.

The High Court, however, agreed with SAA.7 It found that the practice: was "based on considerations of medical, safety and operational grounds";8 did not exclude persons with HIV from employment in all positions within SAA, but only from cabin crew positions; and was "aimed at achieving a worthy and important societal goal.' The High Court noted that if the employment practices of South Africa Airways were not seen to promote the health and safety of its passengers and crew, its "commercial operation, and therefore the public perception about it, will be seriously impaired."10

A further factor that it took into consideration was the allegation by SAA that its competitors apply a similar employment policy., The court reasoned that if SAA were obliged to employ people with HIV, it "would be seriously disadvantaged as against its competitors".' It concluded that "it is an inherent requirement for a flight attendant, at least for the moment, to be HIV-negative' and that the practice did not unfairly discriminate against persons who are HIV positive.12 If it did, the court found, such discrimination was "justifiable within the meaning of s36 of the Constitution."13 In the result, it dismissed the application. The present appeal is the sequel.

To put the issues on appeal in context, it is necessary to refer to the medical evidence placed before this court by the *amicus*, for it is this medical evidence that altered the course of argument on appeal. This evidence however, told SAA nothing new. Indeed, it said nothing that SAA's expert did not already know.

Medical evidence on appeal

The medical opinion in this case tells us the following about HIV/ AIDS: it is a progressive disease of the immune system that is caused by the Human Immunodeficiency Virus, or HIV. HIV is a human retrovirus that affects essential white blood cells, called CD4+ lymphocytes. These cells play an essential part in the proper functioning of the human immune system. When all the interdependent parts of the immune system are functioning properly, a human being is able to fight off a variety of viruses and bacteria that are commonly present in our daily environment. When the body's immune

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system becomes suppressed or debilitated, these organisms are able to flourish unimpeded. Professor Schoub identifies four stages in the progression of untreated HIV infection:

(a) **Acute stage** - this stage begins shortly after infection. During this stage the infected individual experiences flu-like symptoms which last for some weeks. The immune system during this stage is depressed. However, this is a temporary phase and the immune system will revert to normal activity once the individual recovers clinically. This is called the window period. During this window period, individuals may test negative for HIV when in fact they are already infected with the virus.

(b) **Asymptomatic immunocompetent stage** - this follows the acute stage. During this stage the individual functions completely normally, and is unaware of any symptoms of the infection. The infection is clinically silent and the immune system is not yet materially affected.

(c) **Asymptomatic immunosuppressed stage** - this occurs when there is a progressive increase in the amount of virus in the body which has materially eroded the immune system. At this stage the body is unable to replenish the vast number of CD4+ lymphocytes that are destroyed by the actively replicating virus. The beginning of this stage is marked by a drop in the CD4+ count to below 500 cells *per* microlitre of blood. However, it is only when the count drops below 350 cells *per* microlitre of blood that an individual cannot be effectively vaccinated against yellow fever.
Below 300 cells *per* microlitre of blood, the individual becomes vulnerable to secondary infections and needs to take prophylactic antibiotics and anti-microbials. Although the individuals immune system is now significantly depressed, the individual may still be completely free of symptoms and be unaware of the progress of the disease in the body.

(d) **AIDS (Acquired Immune Deficiency Syndrome) stage** – this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them.

HIV is transmitted through intimate contact involving the exchange of body fluid. Thus, sexual intercourse, receipt of or exposure to the blood

products, semen, tissues or organs of the infected person or transmission from an infected mother to her foetus or suckling child are known methods by which it can be transmitted. HIV has never been shown to be transmitted through intact skin or casual contact.

It will be convenient at this stage to refer to the medical evidence which was placed before us on appeal by the *amicus*. The relevant evidence is contained in the minutes of the meetings of the medical experts of the parties in the Labour Court case, held on 28 April and 8 May, 2000.14 The minute of the first meeting reflects the unanimous view of these experts on the nature of the HIV disease, its progression, treatment and transmission, as well as the ability of people living with HIV to be vaccinated against yellow fever. The sole subject of the second meeting was the exact point at which HIV positive persons can no longer be effectively vaccinated against yellow fever, and the effectiveness of Highly Active Antiretroviral Therapy, which is a combination of drugs, referred to as HAART treatment. This minute concluded that a person with a CD4+ count below 350 cells *per* microlitre could not be vaccinated against yellow fever. The minute of the first meeting records that:

> "1. HIV is a progressive illness characterised by decreasing imunocompetence over time.
>
> 2. HIV is an infectious disease that requires intimate contact for transmission. By far the predominant mode of transmission is *via* sexual contact. A small number of medical work-related injuries from needles tick or sharp instruments have accounted for some cases of HIV transmission. Transmission also occurs through mother-to-child routes, through transfusion of blood products, and through needle sharing, by intravenous drug users.
>
> 3. HIV has never been demonstrated to be transmissible through intact skin or through casual contact. It is not a highly transmissible infection.
>
> 4. The standard test to diagnose HIV is a screening ELISA test followed by confirmatory tests. There is a window period of between two to twelve weeks depending on the tests used, within which an HIV-positive individual will test negative.
>
> 5. Predicting an individual's risk of developing AIDS can be done accurately by assessing the immune function and the level of HIV burden.
>
> 6. Immune function is determined by measuring a particular immune cell count in the blood, which is accepted as a marker This is the CD4+ lymphocyte cell, which is attacked and destroyed by HIV. The CD4+ count is used to assess the risk of various opportunistic diseases.
>
> 7. The level of HIV replication is assessed by quantifying the

amount of HIV genetic material in the blood (HIV-1RNA). This measurement is usually referred to as the individuals viral load.

8. The viral load and the CD4+ lymphocyte count are now routinely used in patient management.

9. During the asymptomatic phase, HIV infected individuals are able to maintain productive lives and can remain gainfully and productively employed, particularly if they are properly treated with antiretrovirals and prophylactic antibiotics appropriate to their condition.

10. The natural progression of HIV has been dramatically altered in consequence of recent advances in the available medication. There are now combinations of drugs that are capable of completely suppressing the replication of the virus within an HIV+ individual. This combination of drugs has been described as Highly Active Antiretroviral Therapy or HAART. They are available in South Africa and are increasingly accessible.

11. With successful HAART treatment, the individual's immune system recovers, together with a very marked improvement in the CD4+ lymphocyte count. A significant improvement in survival rates and life expectancy results."

In regard to the ability of people with HIV to perform employment duties, and in particular the work of a cabin attendant, the minute records that:

"12. With the advent of [HAART] treatment, individuals are capable of living normal lives and they can perform any employment tasks for which they are otherwise qualified.

13. The reasons for testing employees and potential employees for any medical condition are in general:

- to see whether they are fit for the inherent requirements of the job;
- to protect them from hazards inherent in the job;
- to protect others (clients, third parties etc) from hazards;
- to promote and maintain the health of employees.

14. Within this framework, as applied to the circumstances of a cabin crew member:

- the inherent requirements of a cabin crew attendant's position are such that an a symptomatic HIV-positive person could perform the work competently;
- the hazards to the immunocompetent employee inherent in the job of cabin crew attendant can be reasonably managed by counselling, monitoring, vaccination and the

administration of appropriate antibiotic prophylaxis if required;

- the hazards to the clients and third parties arising from a cabin crew attendant being an asymptomatic HIV-positive individual are inconsequential and, insofar as it may ever be necessary, well-established universal precautions can be utilised.

15. There is no well-founded medical support for a policy that all persons who are HIV positive are unable to be vaccinated for yellow fever. Whether or not a particular individual should receive such vaccination should be assessed on the basis of a proper clinical examination of that individual, having regard to *inter alia* the individual's CD4 count.

16. Thus, where an HIV-positive individual is asymptomatic and immunocompetent, he or she will in the absence of any other impediment be able both: to meet the performance requirements of the job; and to receive appropriate vaccination as required for the job.

17. On medical grounds *alone*, exclusion of an HIV-positive individual from employment *solely* on the basis of HIV positivity cannot be justified." (Italics supplied).

On the medical evidence, an asymptomatic HIV positive person can perform the work of a cabin attendant competently. Any hazards to which an immunocompetent cabin attendant may be exposed can be managed by counselling, monitoring, vaccination and the administration of the appropriate antibiotic prophylaxis if necessary. Similarly, the risks, to passengers and other third parties arising from an asymptomatic HIV positive cabin crew member are therefore inconsequential and, if necessary, well-established universal precautions can be utilised. In terms of Professor Schoub's affidavit, even immunosuppressed persons are not prone to opportunistic infections and may be vaccinated against yellow fever as long as their CD4+ count remains above a certain level.

The issues on appeal

Confronted by the consensus among medical experts, including its own expert, on the nature of the HIV disease its transmission, progression, tracking its progression and treatment as well as the ability of HIV positive persons to be vaccinated against yellow fever, SAA now concedes that: (a) its employment practice of refusing to employ people as cabin attendants because they are living with HIV cannot be justified on medical grounds and (b) therefore, its refusal to consider employing the appellant because he was living with HIV was unfair.

Despite these concessions, it is the duty of this court to determine whether any constitutional rights of the appellant were violated by SAA, and if so the appropriate relief to which the appellant is entitled.

Before turning to these questions, it is necessary to dispose at once of one matter. We were invited to express an opinion on SAA's policy of testing applicants for employment for HIV/AIDS status, and thereafter of refusing employment if the infection has progressed to such a stage that the person has become unsuitable for employment as a cabin attendant, This policy, we were told, represents SAA's true policy, but in the case of the appellant was incorrectly applied. It was desirable for this court to express such opinion, we were further told, in order to give guidance to the Labour Court, a court that has a statutory duty to address issues relating to testing to determine suitability for employment.15

This invitation must be declined because the policy that is now being urged on appeal was not in issue in the High Court. That policy, therefore, cannot be in issue on appeal.

There is a further consideration that militates against this Court making any decision on the policy put forward by SAA. The question of testing in order to determine suitability for employment is a matter that is now governed by section 7(2), read with section 50(4), of the Employment Equity Act.16 In my view, there is much to be said for the view that where a matter is required by statute to be dealt with by a specialist tribunal, it is that tribunal that must deal with such a matter in the first instance. The Labour Court is a specialist tribunal that has a statutory duty to deal with labour and employment issues. Because of this expertise, the legislature has considered it appropriate to give it jurisdiction to deal with testing in order to determine suitability for employment. It is therefore that court which, in the first instance, should deal with issues relating to testing in the context of employment.

I now turn to consider whether any constitutional rights have been violated by the refusal to employ the appellant as a cabin attendant. The appellant alleges that his rights to equality, human dignity and fair labour practices have been violated.

The right to equality

The relevant provisions of the equality clause, contained in section 9 of the Constitution, provide:

> "(1) Everyone is equal before the law, and has the right to equal protection and benefit of the law.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Transnet is a statutory body, under the control of the state, which has public powers and performs public functions in the public interest.17 It was common cause that SAA is a business unit of Transnet. As such, it is an organ of state and is bound by the provisions of the Bill of Rights in terms of section 8(l), read with section 239, of the Constitution. It is therefore, expressly prohibited from discriminating unfairly.18

This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose.19 If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.

Mr Trengove sought to apply this analysis to SAA employment practice in the present case. He contended that the practice was irrational because: first, it disqualified from employment as cabin attendants all people who are HIV positive, yet objective medical evidence shows that not all such people are unsuitable for employment as cabin attendants; second, the policy excludes prospective cabin attendants who are HIV positive but does not exclude existing cabin attendants who are likewise HIV positive, yet the existing cabin attendants who are HIV positive would pose the same health, safety and operational hazards asserted by SAA as the basis on which it was justifiable to discriminate against applicants for employment who are HIV positive.

In the view I take of the unfairness of the discrimination involved here, it is not necessary to embark upon the rationality enquiry or to reach any firm conclusion on whether it applies to the conduct of all organs of state, or whether the practice in issue in this case was irrational.

At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.20 That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. 21 Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the

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discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.22

The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice.23 They have been subjected to systemic disadvantage and discrimination.24 They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.25

There can be no doubt that SAA discriminated against the appellant because of his HIV status. Neither the purpose of the discrimination nor the objective medical evidence justifies such discrimination.

SAA refused to employ the appellant saying that he was unfit for worldwide duty because of his HIV status. But, on its own medical evidence, not all persons living with HIV cannot be vaccinated against yellow fever, or are prone to contracting infectious diseases - it is only those persons whose infection has reached the stage of immunosuppression, and whose CD4+ count has dropped below 350 cells *per* microlitre of blood.26 Therefore, the considerations that dictated its practice as advanced in the High Court did not apply to all persons who are living with HIV. Its practice, therefore, judged and treated all persons who are living with HIV on the same basis. It judged all of them to be unfit for employment as cabin attendants on the basis of assumptions that are true only for an identifiable group of people who are living with HIV. On SAA's own evidence, the appellant could have been at the asymptomatic stage of infection. Yet, because the appellant happened to have been HIV positive, he was automatically excluded from employment as a cabin attendant.

A further point must be made here. The conduct of SAA towards cabin attendants who are already in its employ is irreconcilable with the stated purpose of its practice.27 SAA does not test those already employed as cabin attendants for HIV/AIDS. They may continue to work despite the infection, and regardless of the stage of infection. Yet they may pose the same health, safety and operational hazards as prospective cabin attendants. Apart from

this, the practice also pays no attention to the window period. If a person happens to undergo a blood test during the window period, the person can secure employment. But if the same person undergoes the test outside of this period, he or she will not be employed.

The fact that some people, who are HIV positive may, under certain ircumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of *all* people who are living with HIV. Were this to be the case, people who are HIV positive would never have the opportunity to have their medical condition evaluated in the light of current medical knowledge for a determination to be made as to whether they are suitable for employment as cabin attendants. On the contrary, they would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions - precisely the type of injury our Constitution seeks to prevent. This is manifestly unfair. Mr. Cohen properly conceded that this was so.

The High Court found that the commercial operation of SAA, and therefore the public perception about it, would be undermined if the employment practices of SAA did not promote the health and safety of the crew and passengers. In addition, the High Court took into account that the ability of SAA to compete in the airline industry would be undermined "if it were obliged to appoint HIV-infected individuals as flight-deck crew members."28 This was apparently based on the allegation by SAA that other airlines have a similar policy. It is these considerations that led the High Court to conclude that HIV negative status was, at least for the moment, an inherent requirement for the job of cabin attendant and that therefore the appellant had not been unfairly discriminated against.

Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.29

The need to promote the health and safety of passengers and crew is important. So is the fact that if SAA is not perceived to be promoting the health and safety of its passengers and crew this may undermine the public perception of it. Yet the devastating effects of HIV infection and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgments. They must be protected against prejudice and stereotyping. We must combat erroneous, but nevertheless prevalent, perceptions about HIV. The fact that some people who are HIV

positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive.

The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of other airlines not subject to our Constitution.

Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted.30 Our constitutional democracy has ushered in a new era - it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping.

People who are living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them.31 They must not be condemned to "economic death" by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high. The remarks made by Tipnis J in MX of *Bombay Indian Inhabitant v. M/s ZY and another32* are apposite in this context:

> "In our opinion, the State and public Corporations like respondent No. 1 cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. As is evident from the material to which we have made a detailed reference in the earlier part of this judgment, the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution. The interests of the HIV positive persons, the interests of the employer and the interests of the

society will have to be balanced in such a case."

As pointed out earlier, on the medical evidence not all people who are living with HIV are unsuitable for employment as cabin attendants.33 It is only those people whose CD4+ count has dropped below a certain level who may become unsuitable for employment. It follows that the finding of the High Court that HIV negative status is an inherent requirement "at least for the moment" for a cabin attendant is not borne out by the medical evidence on record.

Having regard to all these considerations, the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. This conclusion makes it unnecessary to consider whether the appellant was discriminated against on a listed ground of disability, as set out in section 9(3) of the Constitution, as Mr Trengove contended or whether people who are living with HIV ought not to be regarded as having a disability, as contended by the *amicus*.

I conclude, therefore, that the refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by section 9 of the Constitution. The third enquiry, namely whether this violation was justified, does not arise. We are not dealing here with a law of general application.34 This conclusion makes it unnecessary to consider the other constitutional attacks based on human dignity and fair labour practices. It now remains to consider the remedy to which the appellant is entitled.

Remedy

Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, "the court may grant appropriate relief." In the context of our Constitution, "appropriate relief" must be construed purposively, and in the light of section 172(1)(b), which empowers the court, in constitutional matters, to make "any order that is just and equitable."35 Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate.36 As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, "[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate."37 Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.

Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration.38 In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of

discrimination. This aspect of the interests of the community can be gathered from the preamble to the Constitution in which the people of this country declared:

> "We, the people of South Africa, Recognise the injustices of our past; We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights . . ."

This proclamation finds expression in the founding provisions of the Constitution, which include "human dignity, the achievement of equality and the advancement of human rights and freedoms."39

The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source."40

With these considerations in mind, I now turn to consider the appropriate relief in this case. The infringement involved here consists of the refusal to employ the appellant because he was HIV positive. The relief to which the appellant is entitled depends, in the first place, on whether he would have been employed as a cabin attendant but for his HIV positive status. It is to that question that I now turn.

(a) Would the appellant have been employed but for the unfair discrimination?

It is common cause that the appellant was refused employment because of his HIV positive status. This much was conceded both in the written argument of SAA and in the course of oral argument by Mr Cohen. Cohen nevertheless contended that it had not been shown that the appellant would necessarily have been employed but for his HIV positive status. The contention being advanced here is that it has not been show that the appellant has been denied employment solely because of his HIV status. this contention rests on the assumption that there were fewer than twelve posts for which the twelve individuals, including the appellant, had been identified as suitable. It was submitted that there was, therefore, no guarantee that the appellant

would have been one of the individuals to fill the available posts.

The fallacy of this contention lies in its premise. It has never been SAA's case that there were fewer than twelve vacant posts at the time the twelve individuals were selected for employment, nor was there any suggestion that the individuals who were selected still had to go through some further selection process to determine who amongst them were to fill the available posts. Had this been its case, it would have been an easy matter for SAA to have said so. Far from saying so, SAA admitted the allegation that the appellant was selected "as one of twelve flight attendants to be employed out of one hundred and seventy three applicants", and that his selection was subject to a pre-employment medical examination, which included a test for HIV. SAA knew that the case it had to meet in the event that it was unsuccessful on the merits was why the appellant should not be employed. This was the main relief sought by the appellant. The contention must, therefore, fail.

It is common cause that the appellant successfully completed the final screening stage, having been found suitable for employment throughout the selection process. As already mentioned,41 when the blood test of the appellant indicated that he was infected with the HIV virus, the medical report was altered to indicate that he was unsuitable for employment as a cabin attendant. It follows that what stood between the appellant and employment as a cabin attendant was his HIV positive status. I am therefore satisfied that the appellant was denied employment as a cabin attendant solely because of his HIV positive status. It follows that the infringement involved here consists in the refusal to employ the appellant solely because he was HIV positive. It now remains to consider how to redress this wrong. Mr Trengove contended that instatement was the appropriate relief.

(b) Is instatement the appropriate relief?

An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who has suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.

The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligation. 42

South Africa has ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples' Rights.43 In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination. Apart from these conventions, it is noteworthy that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment,44 formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status "should not be a factor in job status, promotion or transfer." It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV.

Where a person has been wrongfully denied employment, the fullest redress obtainable is instatement.45 Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus, eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution.

In these circumstances, instatement should be denied only in circumstances where considerations of fairness and justice, for example, dictate otherwise. There may well be other considerations too that make instatement inappropriate, such as where it would not be practical to give effect to it.

Here, there was no suggestion that it would either be unfair or unjust were SAA to be ordered to employ the appellant as a cabin attendant.

Nor was it suggested that it would not be practical to do so. On the contrary, Mr Cohen assured us that it would not be impractical to employ the appellant as a cabin attendant. Nor does the medical condition of the appellant render him unsuitable for employment as a cabin attendant.46 The appellant is currently receiving combination therapy, which should result in the complete suppression of the replication of the virus and lead to a marked improvement in his CD4+ count.47 On 19 June 2000 he was medically examined and his blood sample was taken. He was found to be asymptomatic, and his CD4+ count was 469 cells *per* microlitre of blood. He describes his prognosis as excellent. He is able to be vaccinated against yellow fever, and is not prone to

opportunistic infections.48

It was contended that an order of instatement would open the floodgates for other people who are living with HIV and who were previously denied employment by SAA. However, what the appropriate relief would be in this case cannot be made to depend on other cases that may or may not be instituted. What constitutes appropriate relief depends on the facts of each case. The relief to be granted in those other cases will have to be determined in the light of their facts.

In the light of the afore-going, the appropriate order is one of instatement.

Mr Trengove submitted that the order for the employment of the appellant should be effective from the date of the judgment of the High Court. Whether it is appropriate to make such an order in this case is a matter to which I now turn.

(c) The effective date of the order

As a general matter, the question whether instatement is the appropriate relief must be determined as at the time when the matter came before the High Court. The denial of instatement by the High Court should not be allowed to prejudice the appellant. Indeed, it would be unfair to a litigant to fail to provide him or her with the full relief that the trial court should have given, where the trial court has wrongly refused such relief.

Albeit in a different context, Goldstone JA expressed the principle as follows:

> "Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order."49

However, the ultimate consideration is whether it would be appropriate to backdate the order of instatement to the date of the judgment of the trial court.

In this case there is, in my view, an insuperable difficulty besetting the appellant's path to that relief. Where, as here, the employee seeks an order backdating the order of instatement to the date of the High Court order, it is, in my view, incumbent upon that employee both to warn the employer that he or she intends to request such an order on appeal and to place before the court such information as may be relevant to the consideration of such relief This is

necessary so as to inform the employer of the case it will be required to meet on appeal in the event that it fails on the merits. Here the appellant did not seek such relief in his notice and grounds of appeal. As a result, SAA came to this court unprepared to meet a claim for the backdating of the order of instatement to the date of the High Court judgment.

There is a further consideration that militates against granting such relief. The backdating of an order for instatement raises a number of difficult legal questions relating to the form such relief should take. These questions were not argued. It is not possible physically to instate the appellant retrospectively to the date of the judgment of the High Court. Whether retrospectively of instatement can be expressed by the ordering of back pay and the provision of benefits or some other relief such as damages are matters that were not debated in this court. Although Mr Trengove informed us from the bar that the appellant has been in employment since the date of the judgment of the High Court, this is not enough. We do not have any information as to what he has earned. Nor do we have any information as to what he would have earned as a cabin attendant. More importantly, SAA has not had the opportunity of investigating these facts. In these circumstances it would be unfair to SAA to make an order backdating the instatement to the date of judgment in the High Court.

I conclude, therefore, that the appropriate relief in the circumstances of this case is an order directing SAA to employ the appellant as a cabin attendant with effect from the date of the order of this court. It now remains to consider the question of costs. The litigation resulting in this appeal was unnecessary, SAA effectively told us on appeal. It is a result, it also told us, of its true policy having been applied incorrectly to the appellant. There was, therefore, nothing for SAA to defend either in the High Court or in this court. It must, therefore, bear the costs of the Appellant in both courts. In the High Court, the appellant sought the costs of two counsel, and he is entitled to such costs. In this court, Mr Trengove sought the costs of two counsel, but limited the costs of the out-of-town counsel to reimbursements and actual costs incurred.50

The *amicus* also asked for an order that SAA pay its costs. An *amicus curiae* assists the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court.

It chooses the side it wishes to join, unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.

Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case no such departure is warranted.

Order

In the result, the following order is made:

(a) The appeal is upheld.

(b) The order of the High Court is set aside.

(c) The decision of SAA not to employ Mr. Jacques Charl Hoffmann as a cabin attendant is set aside.

(d) SAA is ordered forthwith to offer to employ Mr Jacques Charl Hoffmann as a cabin attendant; provided that should Mr Hoffmann fail to accept the offer within thirty days of the date of the offer, this order shall lapse.

(e) SAA is ordered to pay the appellant's costs as follows:
   (i) in the High Court, costs consequent upon the employment of two counsel; and
   (ii) in this court, costs consequent upon the employment of two counsel, the costs of the second counsel to be limited to the out of pocket expenses actually incurred.

ENDNOTES

1. In terms of rule 18 of the Constitutional Court Rules.
2. The ALP is a project of the Centre for Applied Legal Studies at the University of the Witwaterstrand. One of the objects of the ALP is to prevent discrimination against people living with HIV/AIDS.
3. The additional material was introduced in terms of rule 30 of the Constitutional Court Rules. The Labour Court case was *A v. South African Airways (Pty) Ltd,* Case J1916/99. The case was settled on the basis of payment of damages by SAA to the claimant.
4. See below paras 47-9.
5. Such as chronic diarrhoea and pulmonary tuberculosis.
6. The immunosuppressed stage is one of the stages in the progression of the HIV infection. The progress of HIV is discussed in more detail below at para 11.
7. The judgment of the High Court is reported as *Hoffmann v South African Airways* 2000 (2) SA 628 (W).
8. At para 26 of the judgment.
9. At para 28.
10. At para 28.
11. At paras 26-8.

12. At para 29.

13. At para 28. It does not appear from the judgment of the High Court on what basis the practice was found to be justifiable under section 36 of the Constitution, as that section is only applicable to a law of general application. This is dealt with at para 41 below.

14. At these meetings SAA was represented by its expert Professor Schoub, who, as mentioned in para 8 above, also deposed to an affidavit in these proceedings in the High Court.

15. In terms of section 7(2), read with section 50(4), of the Employment Equity Act, 55 of 1998.

16. Act 55 of 1998. Section 7 came into effect on 9 August 1999.

17. Transnet Limited has its origin in the South African Railways and Harbours Administration, which was administered by the state under the Railway Board Act, 73 of 1962. In terms of section 2(1) of the South African Transport Services Act, 65 of 1981 the South African Railways and Harbours Administration was renamed the South African Transport Services. In terms of section 3(1), it was not a separate legal person, but a commercial enterprise of the state. It was empowered, in terms of section 2(2)(a), amongst other things, to "control, manage, maintain and exploit ... air services (under the title South African Airways' or any title in the Minister's discretion)". Pursuant to sections 2(1) and 3(2) of the Legal Succession to the South African Transport Services Act, 9 of 1989 Transnet was incorporated as a public company, and took transfer of the whole of the commercial enterprise of the South African Transport Services. SAA is a business unit within Transnet, established in terms of section 32(1)(b) of that Act. In terms of section 2(2), the state is the only member and shareholder of Transnet. Section 15 requires it to provide certain services in the public interest. Its services must be performed in accordance with the provisions of schedule 1 to the Act.

18. In terms of section 9(3) of the Constitution.

19. The three stages were set out concisely in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 53. In *Jooste v Score Supermarket Trading (Pty) Ltd. (Minister of Labour Intervening)* (1999) (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at para 17, the court noted that the only purpose of the first stage of the test was "an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference...". In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998

(12) BCLR 1517 (CC) at para 18, the court held that the rationality test does not inevitably precede the unfair discrimination test, and that the "rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable."

20. *President of the Republic of South Africa and Another v Hugo* (1997) (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41.

21. *Harksen v Lane*, above n 19, at para 50.

22. Ibid, para 51.

23. Ngwena "HIV in the Workplace: Protecting Rights to Equality and Privacy" (1999) 15 SA Journal of Human Rights 513 at 514.

24. See section 34 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, 4 of 2000.

25. Section 6(1) of the Employment Equity Act, Which section came into effect on 9 August 1999, specifically mentions HIV status as a prohibited ground of unfair discrimination; section 7(2) prohibits the testing of an employee for HIV status unless the Labour Court, acting under section 50(4), determines that such testing is justifiable. Section 34(l) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, 4 of 2000, which section came into effect on 1 September, 2000, requires the Minister of Justice and Constitutional Development to give special consideration to the inclusion of, amongst other things, HIV/AIDS as a prohibited ground of discrimination; the schedule to that Act lists, as part of an illustrative list of unfair practices in the insurance services, "unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status". The National Department of Education has, in terms of section 3(4) of the National Education Policy Act, 27 of 1996, issued a national policy on HIV/AIDS which, amongst other things, prohibits unfair discrimination against learners, students and educators with HIV/AIDS. The National Department of Health has, in terms of the National Policy for Health Act, 116 of 1990, issued a national policy on testing for HIV. The Medical Schemes Act, 131 of 1998 obliges all medical schemes to provide at least a minimum cover for HIV positive persons. Finally, a draft code of good practice on key aspects of HIV/ AIDS and employment issued under the Employment Equity Act has been published for public comment. This draft code has, as one of its goals, the elimination, of unfair discrimination in the workplace based on HIV status.

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26. See above para 11 (c).

27. I accept, of course, that the obligations of an employer towards existing employees may be greater than its obligations towards prospective employees.

28. Above n 7, at para 28.

29. *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 88.

30. For example, in *Moller v Keimoes School Committee* (1911) AD 635, a case involving a challenge to segregation in public schools following an objection by a group of white parents to their children having to attend the same school as black children, *de Villiers* CJ, at 643-4, declined to ignore colour "prepossessions, or ... prejudices" in construing a statute. Relying on such prejudice, he found that a white parent would not have been "a consenting party to an Act by which European parents could be compelled to send their children to a school which children of mixed origin can also be compelled to attend". In *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, a case involving a challenge to segregation of counters at a post office following an objection by a group of whites to being served at the same counter as Indians, Stratford ACJ, at 175, held that "a division of the community on differences of race or language for the purpose of postal service seems, *prima facie*, to be sensible and make for the convenience and comfort of the public as a whole, since appropriate officials conversant with the customs, requirements and language of each section will conceivably serve the respective sections". In *Williams & Adendorff v Johannesburg Munici* (1915) TPD 106, a case involving a challenge to segregation in the use of tramcars, while the majority found that segregation was unlawful because it was unauthorised by the empowering statute, Bristowe J held, at 122, that regard might "be properly paid to the feelings and the sensitiveness, even to the prejudices and foibles of the general body of reasonable citizens" in determining whether segregation was lawful. Bristowe J held further that, having regard to "the existing state of public feeling the segregation of natives, even though not coming within bye-law 12, may be essential to an efficient tramway system." Curlewis J, also dissenting, held, at 128, that "apart from dress and behaviour it is possible that it may be established that the use, for instance, by natives of the ordinary tramcars would be so distasteful and revolting to the rest of the community that the council as a common carrier would be justified in refusing to carry them as passengers in the same cars as Europeans".

The State v Xhego and Others 83 Prentice Hall H76 concerned the admissibility of confessions. Some ten African accused challenged confessions made by them on the grounds that they had been induced by threats or force on the part of the police. Rejecting the evidence of the accused, *van der Riet* AJP observed, at 197, that "[h]ad the evidence been given by Europeans, it might well have prevailed against the single evidence of warrant officer de Beer" because there were many other policemen who were allegedly involved in the assault but who gave no evidence to contradict the accused. The evidence of the accused was rejected, however, because "the native, in giving evidence, is so prone to exaggeration that it is often impossible to distinguish the truth from fiction." The court also noted that there were other factors which "militated strongly against the acceptance of the allegations of the accused, again resulting largely from the inherent foolishness of the Bantu character". In *Incorporated Law Society v. Wookey* (1912) AD 623, a case involving an application by a woman to be admitted as an attorney, even though the statute in question did not expressly exclude women from practising as attorneys, relying upon the history of the profession, namely that it is a profession which has always been practised by men, the court found that the word "person" should be construed to refer to men only, to the exclusion of women.

31 *Ubuntu* is the recognition of human worth and respect for the dignity of every person. See also the comments of Langa J, Mahomed J and Mokgoro J in S v Makwanyane, above n 29, at paras 224, 263 and 308 respectively.

32 AIR 1997 (Bombay) 406 at 431.

33 Above para 15.

34 See *August and Another v Electoral Commission and Others* (1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 23.

35 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (2000) (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 65. In terms of section 7(4) of the interim Constitution, where the rights contained in Chapter 3 were infringed, persons referred to in paragraph (b) of section 7(4) were entitled to apply to court "for appropriate relief."

36 In *Re Kodellas et al* and *Saskatchewan Human Rights Commission et al; Attorney-General of Saskatchewan, Intervenor* (1989) 60 DLR (4th) 143, 187, Vancise JA said: "A just remedy must of necessity be appropriate, but an

appropriate remedy may not be fair or equitable in the circumstances." This statement must be understood in the context of section 24(1) of the Canadian Charter, which provides that anyone whose rights, guaranteed in the Charter, have been infringed may apply to court "to obtain such remedy as the court considers appropriate and just in the circumstances." The Canadian Constitution, therefore, makes a distinction between "appropriateness" and "justness". Our Constitution does not.

37 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 38.

38 Id.

39 In *Fose,* above n 37, Ackermann J said, at para 38, that in determining the appropriate relief under section 7(4) of the interim Constitution, "the interests of both the complainant and society as a whole ought, as far as possible, to be served."

40 *Fose,* above n 37, at para 96 *per* Kriegler J.

41 Above para 5.

42 In terms of section 231(2) of the Constitution, an international agreement is binding on the Republic of South Africa once it has been ratified.

43 South Africa has ratified the following Conventions dealing with discrimination: The African Charter on Human and Peoples' Rights, 1981, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979; the International Covenant on Civil and Political Rights, 1966; the International Convention on the Elimination of All Forms of Racial Discrimination, 1966; and ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958.

South Africa has signed, but not ratified, the Convention on the Political Rights of Women, 1953 and the International Covenant on Economic, Social and Cultural Rights, 1966.

44. In terms of the Code of Conduct on HIV/AIDS and employment in the Southern African Development Community (SADC), 1997.

45. In the context of an employee who is unfairly dismissed, Nicholas AJA expressed the rule as follows:

"Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed. The [Labour Relations Act, 28 of 1956] provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by

the restoration of the *status quo ante.* It follows that it is incumbent on the court when deciding what remedy is appropriate to, consider whether, in the light of all the proved circumstances, there is reason to refuse reinstatement." *National Union of Metalworkers of South Africa and Others v. Henred Fruehauf Trailers* (Pty) lid 1995 (4) SA 456 (A) at 462I-463A. In terms of section 193(2) of the 1995 Labour Relations Act (Act 66 of 1995), reinstatement is the primary remedy for a dismissal that is substantively unfair.

46. When the appeal was called, Mr. Trengove asked for leave to hand in an affidavit deposed to by the appellant, setting out his present HIV status, medical condition and the treatment he is receiving. Mr Cohen did not object and it was admitted.

47. See items 10 and 11 of the expert minute at para 13 above.

48. A person may not be effectively vaccinated against yellow fever when his or her CD4+ count drops below 350 cells *per* microlitre of blood, and only becomes prone to opportunistic infections when his or her CD4+ count drops to below 300 cells *per* microlitre of blood. See above para 11.1-

49. *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Worker Union and Others* (1994) (2) SA 204 (A) at 219H-I.

50. *Komani NO v. Bantu Affairs Administration Board, Peninsula Area* (1980) (4) SA 448 (A) at 473B-C.

Counsel:

WM Trengove SC, A Katz and Z Camroodien *(instructed by the Legal Resources Centre, Cape* Town), for the appellant

CZ Cohen SC and LT Sibeko *(instructed by Nalane Manaka)* for the respondent

KS Tip SC and FA Boda *(instructed by the Centre for Applied Legal Studies)* for the *amicus curiae.*

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***724** Ernst v. Belgium
Application No.33400/96

Before the European Court of Human Rights

ECHR

(The President, Judge Costa; Judges Baka, Loucaides, Bîrsan, Butkevych, Mularoni, ad hoc Judge Lemmens)

July 15, 2003

Adversarial proceedings; Discrimination; Equality of arms; Fair balance; Freedom of expression; Informers; Interference; Just satisfaction; Legitimate aim; Necessary in democratic society; Preliminary rulings; Prescribed by law; Pressing social need; Proportionality; Right to effective remedy; Right to fair and public hearing; Right to fair trial; Right to respect for private and family life; Sources of information

H1 The applicants were four journalists and two journalists' associations. In June 1995 the Serious Crimes Squad, under the authority of an investigating judge, searched the premises of three Belgian publications, the broadcaster RTBF and the journalists' homes, and seized documents and computer disks. This was in connection with the prosecution of members of the state legal service following leaks in sensitive criminal cases. In September 1995, the applicants lodged a complaint with an investigating judge and applied to be joined to the proceedings as civil parties. They argued that the searches had violated both the privilege attaching to journalists' sources of information and their right to respect for their homes and private lives. However, the court of first instance noted that the complaints were really directed against the judge who had authorised the investigative measures so it withdrew the case from the investigating judge and transferred it to the public prosecutor. The Minister of Justice eventually forwarded the case file to the Principal Public Prosecutor at the Court of Cassation. In April 1996, the Court of Cassation held that as the complaint was directed against a judge who enjoyed immunity from jurisdiction, the application to be joined to the proceedings as civil parties was inadmissible. It refused to refer a preliminary point of law to the Jurisdiction and Procedure Court. The applicants were subsequently informed that no further action would be taken on their complaint. Meanwhile, in November 1995 they had brought a civil action against the State seeking damages for the losses arising from the search and seizure operation. That action was still pending.

H2 Relying upon Art.6(1) of the Convention, the applicants complained that the Court of Cassation's interpretation of judicial privilege had led to a denial of ***725** justice. They also complained of various breaches of Art.6 in the proceedings before the Court of Cassation. Invoking Art.14 in conjunction with Art.6, moreover, they contended that they had been victims of discrimination by comparison with any citizen lodging a complaint against someone other than a member of the state legal service. They further complained that they were denied an effective remedy contrary to Art.13, and that the investigative measures had infringed their right to freedom of expression under Art.10 and their right to respect for their private lives and homes under Art.8. They claimed just satisfaction under Art.41.

H3 Held:

(1) unanimously that there had been no violation of Art.6(1) as regards the right of access to a court;

(2) unanimously that there had been no violation of Art.6(1) on the ground of failure to communicate documentary evidence concerning the searches;

(3) unanimously that there had been no violation of Art.6(1) due to the lack of a public hearing before the court of first instance and the Court of Cassation and as a result of failure to deliver the judgment of the Court of Cassation in public;

(4) unanimously that there had been no violation of Art.6(1) having regard to the refusal of the Court of Cassation to refer a preliminary question to the Jurisdiction and Procedure Court;

(5) unanimously that there had been no violation of Art.14 taken together with Art.6(1) as regards the restriction on the right of access to a court;

(6) unanimously that there had been no violation of Art.13;

(7) unanimously that there had been a violation of Art.10;

(8) unanimously that there had been a violation of Art.8;

(9) by six votes to one
(a) that the respondent State was to pay to each of the applicants, within three months from the date on which the judgment became final according to Art.44(2), euro2,000 in respect of non-pecuniary damage and to all the applicants together euro9,000 in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus 3 percentage points;

(10) unanimously that the remainder of the claim for just satisfaction be dismissed.

1. Right to a fair trial: access to a court; limitations; proportionality (Art.6(1)).

H4 (a) Access to a court must not be restricted in such a way that the very essence of the right to a court is impaired. A limitation will not be compatible with Art.6(1) unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued. [48]

H5 (b) The use of immunity from jurisdiction as a means of ensuring the proper administration of justice pursues a legitimate aim. [49]-[50]

H6 ***726** (c) Immunity from jurisdiction is not, as such, a disproportionate restriction on the right of access to a court. In order to decide whether immunity from jurisdiction is compatible with the Convention, the Court must examine whether the applicants had reasonable alternative remedies available to protect their Convention rights effectively. [52]-[53]

H7 (d) Since the applicants were able to bring an action for damages against the State, the inadmissibility of their application to be joined to the proceedings as civil parties and the discontinuance of the proceedings by the Principal Public Prosecutor did not deprive them of the opportunity to seek reparation. [55]

H8 (e) The restrictions on the right of access did not infringe the very essence of the right to a court and were not disproportionate. Accordingly, there has been no violation of Art.6(1). [56]-[57]

2. Right to a fair trial: equality of arms; adversarial proceedings (Art.6(1)).

H9 (a) The principle of equality of arms 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. The right to adversarial proceedings means that each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party. [60]

H10 (b) The Court of Cassation determined the admissibility of the application to be joined as civil parties on the basis of evidence which had been disclosed to the applicants and subjected to adversarial proceedings. No other evidence was required and it was of little consequence that evidence possessed by the Principal Public Prosecutor was not presented to the court or to the applicants. This evidence was in fact disclosed via the prosecutor's submissions, but in any event it could not and did not influence the court's decision. Accordingly, there has been no violation of Art.6(1). [61]-[62]

3. Right to a fair trial: public hearing; public delivery of judgment (Art.6(1)).

H11 (a) Public proceedings protect litigants from the secret administration of justice and help to maintain confidence in the courts. Publicity contributes to a fair trial. However, the requirement to hold a public hearing is subject to exceptions. Even in the criminal law context, it may occasionally be necessary to limit the open and public nature of proceedings. [65]

H12 (b) The confidential nature of the investigative procedure can be justified by reasons relating to the protection of the private lives of the parties and the interests of the administration of justice. Although Art.6(1) may be relevant before a case is sent for trial, the manner of its application during a preliminary investigation depends on the special features of the proceedings and the circumstances of the case. The fact that the hearing on the admissibility of the application to be joined as civil parties was held in private did not infringe Art.6(1). [68]

H13 (c) The requirement to deliver judgment in public should be interpreted with a certain amount of flexibility. A few days after the judgment of the Court of Cassation was delivered in private, the applicants obtained the text through the clerk of the court. Moreover, the fact that it was published in the official reports accompanied by the Principal Public Prosecutor's submissions permitted a degree of public scrutiny. Since the applicants did not provide more specific information ***727** and having regard to Strasbourg case law, the publicity requirements of Art.6(1) have been sufficiently respected. [69]-[71]

4. Right to a fair trial: preliminary rulings (Art.6(1)).

H14 (a) The Convention does not, as such, guarantee any right to have a case referred by a domestic court to another national or international court for a preliminary ruling. However, in certain circumstances the refusal of a final court of appeal to refer a question for a preliminary ruling may infringe Art.6(1), particular where such refusal is arbitrary. [74]

H15 (b) The Court of Cassation's refusal to refer a preliminary question to the Jurisdiction and Procedure Court is sufficiently reasoned and does not appear to have been arbitrary. Accordingly, there is no breach of Art.6(1). [75]-[76]

5. Right to an effective remedy (Art.13).

H16 The complaint under Art.13 overlaps with that under Art.6(1). The applicants submitted no argument to suggest a violation of Art.13 even in the absence of a finding of a violation of Art.6(1). Moreover, when the question of access to a court arises, the guarantees in Art.13 are absorbed by those in Art.6. The right of access to a court has not been violated. For the same reasons, there has been no violation of Art.13. [80]-[81]

6. Prohibition of discrimination: ambit test; "discrimination" (Art.14 taken together with Art.6(1)).

H17 (a) Article 14 complements the other substantive provisions of the Convention. Although its application does not presuppose a breach of those provisions, the facts must fall within the ambit of one or more of the latter. A difference in treatment is discriminatory if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim pursued. [84]

H18 (b) The differential treatment complained of by the applicants pursued a legitimate aim, namely to shield members of the judiciary from ill-considered proceedings and to enable them to perform their duties dispassionately and independently. Since the applicants had the right to bring a civil action against the State, the requirement of a reasonable relationship of proportionality between the means and the aim has not been violated. [85]

7. Freedom of expression: press freedom; protection of sources; interference; "prescribed by law"; legitimate aims; "necessary in a democratic society"; fair balance (Art.10).

H19 (a) Protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and its ability to provide accurate and reliable information may be adversely affected. A restriction cannot ***728** be compatible with Art.10 unless it is justified by an overriding requirement in the public interest. [91]

H20 (b) Although the press must not overstep certain bounds, its duty is to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest. [92]

H21 (c) The "necessity" for any restriction on freedom of expression must be convincingly established. In the first place it is for the national authorities to assess whether there is a "pressing social need" for the restriction, and in making their assessment they enjoy a certain margin of appreciation. In the present context, however, the margin of appreciation is circumscribed by the interest of a democratic society in ensuring a free press. Similarly, that interest will weigh heavily in the balance in determining whether the restriction was proportionate to the legitimate aim pursued. [93]

H22 (d) The searches at the applicants' homes and business premises interfered with their rights under Art.10(1). Such interference violates Art.10 unless it is "in accordance with the law", pursues one or more of the legitimate aims and is "necessary in a democratic society" to achieve them. [94]-[95]

H23 (e) Interference will not be "prescribed by law" unless it has a basis in domestic law. The term "law" must be understood in its substantive sense, not its formal one. In a sphere covered by the written law, the "law" is the enactment in force as interpreted by the courts. [96]

H24 (f) The searches and seizures were "prescribed by law", that is in accordance with various provisions of the Code of Criminal Procedure. [97]

H25 (g) The interference was intended to prevent the disclosure of confidential information, to protect the reputation of others and more generally, to protect the authority and impartiality of the judiciary. [98]

H26 (h) Journalists reporting on current criminal proceedings must ensure that they do not overstep the limits imposed in the interests of the proper administration of justice and that they respect the presumption of innocence. At no stage was it alleged that any of the articles written by the applicants contained confidential information. In so far as they had not been charged with any offence, the purpose of the measures must have been to assist in establishing the truth. The identification of the perpetrators, within the prosecution service, of a breach of confidentiality of the investigation could have given rise to an action for professional misconduct committed by the applicants in the performance of their duties. There is no doubt then that the measures fall within the sphere of the protection of journalistic sources. The fact that the searches and seizures proved unproductive did not deprive them of their purpose, which was to establish the source of the leaks. [100]

H27 (i) The Court is struck by the large scale of the search operation. As regards the reasons for conducting the searches, the Government affirms that a search is possible only where there is strong circumstantial evidence of an offence, but it does not explain how the applicants are alleged to have been involved in any offences. Neither has it given any indication of investigative measures taken directly against members of the legal service. [101]

H28 (j) The Court questions whether means other than massive searches and seizures at the homes of the applicants and at their publications' premises could not have ***729** been employed. In any event, the Government has not shown that without the searches and seizures the authorities would not have been able to establish any breach of professional confidence by members of the judiciary or whether the applicants were implicated in the offences. [102]

H29 (k) The Government has not shown that a fair balance between the competing interests has been struck. Even though the reasons were "relevant", they were not "sufficient" to justify searches and seizures on such a large scale. The measures were not reasonably proportionate to the legitimate aims pursued. There has therefore been a violation of Art.10. [104]-[105]

8. Right to respect for private life and home: "home"; interference; "in accordance with the law"; legitimate aims; "necessary in a democratic society" (Art.8(1)).

H30 (a) The notion of "home" may extend to a professional person's office. The rights guaranteed by Art.8 can include, for a company, the right to respect for its headquarters or business premises. [109]

H31 (b) The searches of the applicants' business premises, private homes and in some cases vehicles amounted to an interference with their rights under Art.8(1). [110]

H32 (c) The interference was "in accordance with the law" and pursued the legitimate aims of preventing disorder and crime and protecting the rights and freedoms of others. [111]-[112]

H33 (d) States have a certain margin of appreciation in assessing the need for interference but it goes hand in hand with European supervision. The exceptions provided for in Art.8(2) must be interpreted narrowly and the need for interference must be convincingly established. [113]

H34 (e) States may consider it necessary to have recourse to measures such as home searches and seizures in order to obtain evidence of offences and prosecute those responsible. National law and practice must afford adequate and effective safeguards against abuse. [114]

H35 (f) The searches were accompanied by procedural safeguards. They were ordered by the investigating judge and were conducted in the presence of the applicants or their close relatives by a member of the police force assisted by various inspectors and, during certain searches, by experts who copied the contents of the computer systems. Records were drawn up on completion of the searches. On the other hand, bearing in mind that the applicants had not been accused of any offence, the

search warrants were drawn up in broad terms. They contained no information about the investigation concerned, the premises to be searched or the objects to be seized and gave the investigators wide powers. A large number of objects, including computer disks, were seized and the contents of certain documents and other media were copied. Furthermore, the applicants were given no information about the proceedings which triggered the operation. They were thus left in the dark as to the reasons for the searches. [115]-[116]

H36 (g) In view of the above, the searches were not proportionate to the legitimate aims pursued. There has therefore been a violation of Art.8. [117]

***730 9. Just satisfaction: damage; costs and expenses; default interest (Art.41).**

H37 (a) Assessment of non-pecuniary damage is on an equitable basis. [121]

H38 (b) Costs and expenses are awarded only in so far as they were actually and necessarily incurred and are reasonable as to *quantum*. As regards the costs relating to the domestic proceedings, the applicants have not indicated the proportion of expenses incurred in attempting to remedy the alleged violations. Accordingly, the claim must be dismissed on that account. However, an award is made in respect of the costs and expenses relating to the proceedings in Strasbourg. [124]

H39 (c) Default interest should be based on the marginal lending rate of the European Central Bank plus 3 percentage points. [125]

H40 The following cases are referred to in the Court's judgment:

1. A v United Kingdom: (1999) 27 E.H.R.R. 611.

2. Al-Adsani v United Kingdom: (2002) 34 E.H.R.R. 11.

3. Allenet de Ribemont v France (A/308): (1995) 20 E.H.R.R. 557.

4. Axen v Germany (A/72): (1984) 6 E.H.R.R. 195.

5. B and P v United Kingdom: (2002) 34 E.H.R.R. 19.

6. Chappel v United Kingdom (A/152-A): (1990) 12 E.H.R.R. 1.

7. De Haes and Gijsels v Belgium: (1998) 25 E.H.R.R. 1.

8. Fayed v United Kingdom (A/294-B): (1994) 18 E.H.R.R. 393.

9. Fogarty v United Kingdom: (2002) 34 E.H.R.R. 12.

10. Fressoz and Roire v France: (2001) 31 E.H.R.R. 2.

11. Funke and Crémieux v France (A/256-A): (1993) 16 E.H.R.R. 297.

12. Goodwin v United Kingdom: (1996) 22 E.H.R.R. 123.

13. Imbrioscia v Switzerland (A/275): (1994) 17 E.H.R.R. 441.

14. Kruslin and Huvig v France (A/176): (1990) 12 E.H.R.R. 547.

15. Miailhe v France (A/256-C): (1997) 23 E.H.R.R. 491.

16. Murray v United Kingdom: (1996) 22 E.H.R.R. 29.

17. Niemietz v Germany (A/251-B): (1993) 16 E.H.R.R. 97.

18. Osman v United Kingdom: (2000) 29 E.H.R.R. 245.

19. Pérez de Rada Cavanilles v Spain: (2000) 29 E.H.R.R. 109.

20. Petrovic v Austria: (2001) 33 E.H.R.R. 14.

21. Pretto v Italy (A/71): (1984) 6 E.H.R.R. 182.

22. Ruiz-Mateos v Spain (A/262): (1993) 16 E.H.R.R. 505.

23. Sutter v Switzerland (A/74): (1984) 6 E.H.R.R. 272.

24. Tinnelly & Sons Ltd and McElduff v United Kingdom: (1999) 27 E.H.R.R. 249.

25. Waite and Kennedy v Germany: (2000) 30 E.H.R.R. 261.

26. Weber v Switzerland (A/177): (1990) 12 E.H.R.R. 508.

27. Worm v Austria: (1998) 25 E.H.R.R. 454.

28. Z v United Kingdom: (2002) 34 E.H.R.R. 3.

29. Application Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Coëme v Belgium, June 22, 2000.

30. Application No.32576/96, Wynen v Belgium, November 5, 2002.

31. Application No.32911/96, Meftah v France, July 26, 2002.

32. Application No.34000/96, Du Roy and Malaurie v France, October 3, 2000 .

33. Application No.37971/97, Société Colas v France, April 16, 2002. ***731**

34. Application No.39594/98, Kress v France, June 7, 2001.

35. Application No.40877/98, Cordova v Italy (No.1), January 30, 2003, not yet reported in E.H.R.R.

36. Application No.45649/99, Cordova v Italy (No.2), January 30, 2003, not yet reported in E.H.R.R.

37. Application No.51578/99, Keslassy v France, Dec.08.01.2002.

38. Application No.51772/99, Roemen and Schmit v Luxembourg, February 25, 2003, not yet reported in E.H.R.R.

39. Application No.62002/00, Tamosius v United Kingdom, Dec.19.09.2002.

40. Application No.64336/01, Varela Assalino v Portugal, April 25, 2002.

H41 The following domestic cases are referred to in the Court's judgment:

41. Cass., June 5, 1905, Pasicrisie, 1905, I, 247.

42. Cass., October 21, 1912, Pasicrisie, 1912, I, 427.

43. Cass., February 4, 1918, Pas., 1918, I, 211.

44. Cass., November 27, 1985, Pasicrisie, 1986, I, 211.

45. No.66/94 of July 14, 1994, *Recueil des arrêts de la Cour d'Arbitrage*, p.847.

46. No.12/98 of November 4, 1998, Moniteur belge, January 27, 1999, p.2346.

H42 The following additional cases are referred to in the concurring opinion of Judge Loucaides:

47. Dulaurans v France: (2001) 33 E.H.R.R. 45.

48. Fouquet v France: (1996) 22 E.H.R.R. 279.

49. Goktan v France: (2003) 37 E.H.R.R. 11.

50. Golder v United Kingdom (A/18): (1979-80) 1 E.H.R.R. 524.

H43 The following additional domestic case is referred to in the concurring opinion of Judge Loucaides:

51. No.66/94 of July 14, 1994, *Selected Reports of the Court of Jurisdiction and Procedure*, 1994, p.847.

H44 The following additional cases are referred to in the partially concurring and partially dissenting opinion of Judge Lemmens:

52. Acquaviva v France (A/333-A): (2001) 32 E.H.R.R. 7.

53. AÏt-Mouhoub v France: (2000) 30 E.H.R.R. 382.

54. Beyeler v Italy: (2001) 33 E.H.R.R. 52.

55. Hamer v France: (1997) 23 E.H.R.R. 1.

56. Helmers v Sweden (A/212-A): (1993) 15 E.H.R.R. 285.

57. Moreira de Azevedo v Portugal (A/189): (1991) 13 E.H.R.R. 721.

58. Quadrelli v Italy: (2002) 34 E.H.R.R. 8.

59. Tomasi v France (A/241-A): (1993) 15 E.H.R.R. 1.

60. Application No.25701/94, Former King of Greece v Greece, November 28, 2002.

61. Application No.31801/96, Maini v France, October 26, 1999.

62. Application No.32976/96, Calvelli and Ciglio v Italy, January 17, 2002.

63. Application No.37370/97, Strategies et Communications and Demoulin v Belgium, July 15, 2002. ***732**

64. Application No.51308/99, Stokas v Greece, November 29, 2001.

65. Application No.54102/00, Asociación de víctimas del terrorismo v Spain, Dec.29.03.2001.

66. Application No.54589/00, Anagnostopolous v Greece, April 3, 2003, not yet reported in E.H.R.R..

67. Application No.73373/01, Salegi Igoa v Spain, November 19, 2002.

H45 Representation

Mr J. Lathouwers, Assistant Legal Advisor, Ministry of Justice (Agent), Mr T. Ongenae of the Brussels Bar (Counsel) for the Government.

Mr G-H. Beauthier of the Brussels Bar, Mr P. Grollet of the Brussels Bar (Counsel) for the applicants.

The Facts

I. The circumstances of the case

A. Background

11 [FN1]This case originated in a Court of Cassation ruling of June 21, 1995 removing from the jurisdiction of the Liège Court of Appeal eight cases involving breaches of professional confidence, some of which appeared to be attributable to members of the Liège Court of Appeal. There had been several leaks from various case files topical at the material time. In his submissions prior to the judgment of the Court of Cassation, the public prosecutor stated:

"[...] there have been numerous 'leaks' going back several months as regards judicial matters, in particular in the case of Agusta and apparently connected cases, notably the so-called 'bond robberies' case and the case concerning the murder of the Secretary of State André Cools, which, as is well known, are of great interest to the media and to the general public. Public opinion is swayed by this situation, which is generating profound malaise, prejudicial not only to the proper conduct of court proceedings, but also to those people who have to provide an explanation to the courts.

FN1 The following is a Sweet & Maxwell translation of the Court's judgment.

These people, even though they have been charged or have to give an explanation of the facts behind the accusations, are no less innocent; they have the right to respect for their human dignity and their honour."
Failure to respect this right could have major serious or even dramatic consequences. Thus it was that at the beginning of March 1995, a general in the Belgian Air Force who had been implicated in the Agusta case, was found dead in a Brussels hotel room. He had apparently committed suicide and his desperate actions must have been connected to the out-and-out 'lynching' to which he was subjected by the press. His name, which came up numerous times during the investigation, was reported every time in the press, sometimes accompanied by comments or insinuations. The persistence of the press ended up being unbearable.

"It would appear that various revelations by the written, radio and television media of facts which should not have been disclosed, at least at the time they ***733** were disclosed, could only have come about as a result of breaches of professional confidence".

12 The judgment of June 21, 1995 referred the eight cases to the First President of the Brussels Court of Appeal for him to appoint a judge to act as the investigating judge. By an order of June 22, the First President appointed PM to act as investigating judge in these cases. On June 23, PM issued warrants for simultaneous searches to be carried out, notably at the homes of the journalists and at the offices of their newspapers.

13 The various search warrants were all worded as follows:

"I, MP, member of the Brussels Court of Appeal appointed to perform the duties normally performed by the investigating judge by order [...] [of the] Division President of the Brussels Court of Appeal [...] of June 22, 1995 [...],

Having regard to Art.10 of the Constitution, ss.35 to 39, 87 to 89 bis of the Code of Criminal Procedure and Art.10 of the Law of April 7, 1919;"
Delegate:

"To the Superintendent of the Serious Crimes Squad;

The bearer of this warrant, with, should he so require, the assistance of the police, powers to carry out urgently and in accordance with the provisions of the law, a home search at the [premises] [home]

[Newspaper *Le Soir Illustré* at ...] [Brewaeys Philippe, journalist, rue ...]

For the purposes of searching for and seizing any document or object that might assist the investigation.

Subsequently, to deposit the seized objects at the Registry of the Criminal Court and to issue any summonses necessary and collect any information that might assist the investigation.

Done in Brussels, on June 23, 1995".

14 On June 23, 1995, at approximately 16.30, the Serious Crimes Squad carried out simultaneous searches and seized documents at the premises of three Belgian publications-- *De Morgen, Le Soir* and *Le Soir Illustré*--and at the premises of the broadcaster RTBF in Liège and Brussels. The searches were carried out by a superintendent holding delegated powers, assisted by the chief inspectors and in some cases, experts from the police computer division. The searches of the business premises were limited to the offices occupied by the applicants and were followed, in the cases of two of the applicants, by a search of their vehicles. On the same day, the Squad also searched the respective homes of the applicants. Before each search, the search warrant was read to the applicants, but they were not given a copy.

15 During the eight searches, the Squad seized various documents as well as floppy disks and the hard disks of the applicants' computers. The searches lasted between half an hour, for the shortest, and three hours for the longest. A record and an inventory were drawn up at the time of each search. Various documents and objects seized were returned to their owners on June 27 and 28, since it was clear ***734** that they were not connected with the investigation in any way. Other documents were subsequently returned to the applicants at their request in April and May 1996. Some objects and documents are still in the hands of the court authorities.

16 The applicants were given no information on the prosecutions which triggered the operation, in which they were involved neither as defendants nor civil parties.

17 At the hearing, the Government indicated that no charges had been brought as a result of the operation.

B. The complaint to the investigating judge against X with an application by the applicants to join the proceedings as civil parties

18 On September 20, 1995, the applicants lodged a complaint with the investigating judge of the Brussels court of first instance against X and applied to be joined to the proceedings as civil parties. Relying on ss.148 and 151 of the Penal Code, they complained "of violations by civil servants or officers of the court or the police of the rights enshrined in the Constitution". They argued that the massive searches carried out on June 23, 1995 had seriously violated the privilege attaching to journalists' sources of information, in breach of Art.10 of the Convention, and the right guaranteed by Art.8 of the Convention. They also argued that these searches constituted a flagrant violation of various legal provisions and principles of law. In a report drawn up the same day, the investigating judge of the court of first instance officially noted the applicants' application to be joined to the proceedings as civil parties.

19 On October 3, 1995, the applicants were invited to appear on October 9, before the Brussels court of first instance sitting in private to rule as to how the proceedings should be conducted. According to them, the case file, which they had been able to consult a few hours earlier, was extremely thin. The warrants issued by PM ordering the searches of June 23, 1995, the records of the searches and the inventory of objects seized were missing. The case file did however contain the application of the Brussels public prosecutor of September 29, 1995 to have the cases removed from the original court, which was worded as follows:

"Whereas the terms of the complaint show that the complainants consider the investigative measures ordered by the investigating judge, and not the circumstances in which these measures were carried out by the police officers to be violations in ss.148 and 151 of the Penal Code;"

Whereas, consequently, this complaint is directed implicitly though nonetheless undoubtedly, against a member of the Brussels Court of Appeal, PM;

"Whereas by virtue of ss.479 and 483 of the Code of Criminal Procedure, only a court of appeal has jurisdiction to deal with these offences, in the conditions laid down in ss.485 and 486 of the same Code;

Whereas the case must be withdrawn from the investigating judge and transferred to the public prosecutor for the appropriate legal purposes".

20 ***735** By an order of October 16, 1995, the Brussels court of first instance, sitting in private, allowed the application. It withdrew the case from the investigating judge and transferred it to the public prosecutor "for the appropriate legal purposes".

21 As soon as they were informed, the lawyers acting for the applicants approached the clerk for a copy of this order. They were informed that the case file had been transferred immediately to the public prosecutor and that it was not therefore possible to take copies. They then contacted the public prosecutor and were informed that the case file had just been sent to the Principal Public Prosecutor. On October 18, 1995, the applicants wrote to the Principal Public Prosecutor at the Brussels Court of Appeal seeking a copy of the order of October 16, 1995. In a letter of October 27, 1995, they received the following reply:

"The file containing the original warrant has been forwarded to the Minister of Justice in order to enable him to assess whether s.486 of the Code of Criminal Procedure should be applied. I am afraid that I am consequently unable to comply with your request".

22 On November 8, 1995, the applicants contacted the Minister of Justice to obtain a copy of the warrant. A reminder letter was sent on February 7, 1996 by registered mail.

23 In the meantime, on January 22, 1996, the Minister of Justice had forwarded the case file to the Principal Public Prosecutor at the Court of Cassation.

24 In a letter of February 14, 1996, the applicants were invited to appear on February 21, 1996 before the Court of Cassation. They were also informed that the case file would be available to them at the court registry. This case file contained the submissions of the Principal Public Prosecutor at the Court of Cassation dated January 30, 1996, worded as follows:

"[...] According to the memorandum dated September 20, 1995 from the Brussels Investigating Judge, [the applicants] have applied to be joined to the proceedings as civil parties against X on the ground of violation of ss.148 and 151 of the Penal Code, offences by which the civil parties claim to have been injured and in respect of which they have claimed damages.

It appears from the complaint annexed to this memorandum of joinder as civil parties that, although the complainants seek action 'against persons unknown', one of these persons, whose name they themselves mention on the first line of the statement of claim, is PM, a member of the Brussels Court of Appeal. A full reading of the complaint only serves to confirm that the complainants' complaints are directed primarily, if not exclusively, at the investigating judge.

This finding, which means that the application to join the proceedings as civil parties is directed against a person who enjoys immunity from jurisdiction, is sufficient to have it declared inadmissible.

Nevertheless, the application to be joined to the proceedings as civil parties exists, is the subject of a report by an investigating judge who could not have refused to officially document what was said to him and therefore, the competent authority of the Brussels court of first instance should have declared the complainants' application to join the proceedings as civil parties inadmissible following a proper procedure.

This, officially documented by a judge, called for a judicial decision. The inadmissibility, decided by the court in private, should, subject to any ***736** possible appeals, have legally put an end to the proceedings instituted by the complainants.

[...]

From the circumstances [...] and the documents in the case attached to this application, it would appear first that since the complainants' application to be joined to the proceedings as civil parties was inadmissible, the prosecution could not be set in motion and therefore, the matter could not be referred to the investigating judge, so that the above mentioned order of October 16, 1995 withdrawing the case from the judge is devoid of purpose and secondly, that the complainants' application to be joined to the proceedings as civil parties, since it is clearly established that it is directed against a member of the court of appeal, should have been declared inadmissible by a court, which was not the case, no legal decision other than the above-mentioned order of October 16, 1995 having been made to date.

Moreover, the public prosecutor at the Brussels Court of Appeal considered, on the basis of the documents annexed hereto, that there was no evidence of any offence on the part of PM. He did not therefore request the First President of the Brussels Court of Appeal to appoint an investigating judge."

It follows that no criminal proceedings have been instituted against PM. The prosecution was not in fact set in motion either by the complainants' application to be joined to the proceedings as civil parties, which due to its inadmissibility produced no effect, nor by the public prosecutor who found that no further

action was necessary.

25 On February 21, 1996, the Court of Cassation held a private hearing during which the Principal Public Prosecutor at the Court of Cassation gave a detailed explanation of his submissions. The lawyers acting for the applicants submitted their pleadings and claims. During the course of their arguments, the lawyers acting for the applicants raised the question of the unlawfulness of the searches and the breach of the privilege attaching to journalists' sources of information. They also claimed that the immunity from jurisdiction mentioned by the public prosecution office had produced a denial of justice, since it allowed officers of the State Legal Service to avoid prosecution at the request of litigants. They also pointed out that the case file mentioned various documents communicated to the Minister of Justice and transferred by that person, documents which they had not even been able to see. They therefore asked for their complaint to be referred to the public prosecutor at a court of appeal in a district other than Brussels in order to set in motion a prosecution. In the alternative, they asked for a preliminary question to be referred to the Jurisdiction and Procedure Court. This question was worded as follows:

"Do ss.479, 480, 481, 482 and 483 up to and including s.503 of the Code of Criminal Procedure violate Arts 10 and 11 of the Constitution (provisions guaranteeing equality and non-discrimination) due to the fact that the party harmed by the breach committed as the case may be, or in particular by a member of the State Legal Service, is not entitled to file a complaint or to apply to an investigating judge to be joined to the proceedings as a civil party ***737** and must wait for a Principal Public Prosecutor to decide--with no opportunity to appeal--to take legal action himself, while other victims of offences in which the persons listed in ss.479 and subsequent of the Code of Criminal Procedure are not or do not run the risk of being involved, benefit from the rights and guarantees of all complainants to apply to be joined as civil parties and therefore to initiate legal proceedings which must be the subject of a court decision?".

26 In a judgment of April 1, 1996 delivered in private, the Court of Cassation declared the applicants' application to be joined as civil parties inadmissible. The judgment was worded as follows:

"Whereas the documents which the Court is able to take into account show that the complainants' applications to be joined as civil parties were officially noted and that no decision has yet been made as to these applications;

Whereas by virtue of s.63 of the Code of Criminal Procedure, any person who claims to have been injured by a crime or offence may file a complaint and apply to the investigating judge having jurisdiction to be joined to the proceedings as a civil party; this provision means that any party claiming to have been injured by a crime or offence can only apply to the investigating judge dealing with the case or to whom the case may be referred as a matter of course to be joined to the proceedings as a civil party;

Whereas ss.479 and 483 of the Code of Criminal Procedure establish that power is vested only in the Principal Public Prosecutor at the court of appeal to prosecute the persons covered by these provisions;

Whereas it follows, in the instant case, that the complainants did not refer the matter properly to the investigating judge by applying to that judge to be joined to the proceedings as civil parties; their application to be joined as civil parties did not set the prosecution in motion;

Whereas the complainants ask, in the alternative, to have a preliminary point of law referred to the Jurisdiction and Procedure Court [...];

Whereas the conditions for admissibility of the application to be joined as civil parties are laid down in s.63 of the Code of Criminal Procedure;

Whereas the application to be joined as a civil parties is inadmissible under s.63 which is not itself the subject matter of the request for referral of preliminary points of law, the Court is not bound, under Art.26 (2), indent 2 of the special law of January 6, 1989, to ask the Jurisdiction and Procedure Court to rule on this matter;

FOR THESE REASONS:

Adopting the grounds of the submissions and ruling in private,

Holds that as it was directed against a member of the State Legal Service, that is to say a person enjoying immunity from jurisdiction, the complainants' application to be joined to the proceedings as civil parties is inadmissible and has not therefore set the prosecution in motion;

Holds that since the prosecution has not been set in motion by the public prosecutor, the case has not been prosecuted and therefore, any referral to another court would be devoid of purpose;

Holds that there is no need to commit the case for trial;

***738** Holds that there is no need to refer the preliminary point of law proposed by the complainants to the Jurisdiction and Procedure Court".

27 On April 26, 1996, the Principal Public Prosecutor at the Brussels court of appeal wrote to

the applicants as follows:

"The case file in these proceedings has been forwarded to me by the Minister of Justice following the judgment [...] given on April 1, 1996 by the Court of Cassation, Division two. I have decided to discontinue these proceedings".

C. Action for damages before the Brussels Court of First Instance

28 By means of a summons served on November 21, 1995, the applicants brought a civil action for damages in the Brussels court of first instance (civil division) under ss.1382 and 1383 of the Civil Code, seeking to have the state ordered to pay them compensation for the loss that they incurred as a result of the offences committed by the state authorities during the searches and seizures carried out on June 23, 1995. In their summons, they asserted that the searches had violated their rights guaranteed under Arts 8 and 10 of the Convention.

29 On commencement of the proceedings on December 14, 1995, the case was referred to the court's general list in order to enable the parties to prepare it.

30 On February 13, 1996, one of the lawyers acting for the applicants forwarded to state counsel the inventory of the documents in the joint case file and asked them to disclose their submissions.

31 On June 21, 1996, Me Louveaux, one of the lawyers acting for the applicants, wrote to the state counsel. He pointed out that he was still awaiting their submissions and attached to the applicants' case file the judgment of the Court of Cassation of April 1, 1996.

32 The parties exchanged submissions in the spring of 1998. In their submissions to the court, the applicants again referred to breaches and violations of Belgian law and the rights guaranteed under Arts 8 and 10 of the Convention as the basis of their loss.

33 In 1998, the applicants requested that a date for the case be set. In a notice of May 4, 1998, the clerk of the court informed the parties that the hearing had been set for October 28, 1998.

34 On September 14, 1998, the Belgian Government filed its submissions and made them available to the applicants.

35 At the hearing of October 28, 1998, the case was transferred to the list in order to enable the applicants to respond to the submissions of the Belgian Government. On October 4, 1999, the applicants responded.

36 On October 10, 2000, the parties filed a joint application for a date to be set for oral submissions. On December 12, the clerk of the court list informed the parties that it was not possible to fix the date for oral submissions at such short notice due to the excessive number of cases on the list.

37 The parties were recently informed that the case would be heard on June 19, 2003.

***739 II. Relevant domestic law**

A. The Constitution

38 The relevant provisions of the Belgian Constitution are worded as follows:

"Article 148

Court hearings are open, unless public access should jeopardise morals or order. In this case, the court so declares by ruling."
Regarding political wrongdoings, or those of the press, proceedings behind closed doors may be undertaken only on the basis of a unanimous vote.

"Article 149

All judgments are well founded. They are pronounced in open court".
However, the established case law of the Court of Cassation shows that these articles only apply to trial courts and not to investigating courts, in particular where they are ruling as to the way in which proceedings are to be conducted. [FN2]

FN2 Cass., June 5, 1905, Pasicrisie, 1905, I, 247; Cass., October 21, 1912, Pasicrisie, 1912, I, 427; Cass., February 4, 1918, Pas., 1918, I. 211; Cass., November 27, 1985, Pasicrisie, 1986, I, 211.

B. The Civil Code

39 Sections 1382 and 1383 of the Belgian Civil Code read as follows:

"Article 1382

Any act committed by a person which causes damage to another shall render the person through

whose fault the damage was caused to make reparation for it.

Article 1383

Everyone shall be liable for damage he has caused not only through his own act but also through his failure to act or his negligence".

C. The Penal Code

40 The relevant provisions of the Penal Code are as follows: ***740**

"Section 148

Any civil servant of the administration or the courts, any court or police officer, any chief inspector or member of the police force who, acting in such capacity, enters the home of a householder against the will of the latter, save in the cases provided for, and without the formalities prescribed by law, shall be punished by a term of imprisonment of between eight days and six months and a fine of between 26 francs and 200 francs.

Section 151

Any other arbitrary act or any act that infringes the freedoms and rights guaranteed by the Constitution, ordered or carried out by a civil servant or public official, by a person exercising public authority or a member of the police force, shall be punished by a term of imprisonment of between 15 days and 1 year".

D. The Code of Criminal Procedure

41 The relevant provisions of the Code of Criminal Procedure (CIC), in the version prevailing at the material time, read as follows:

"Section 63

Any person claiming to have been injured by a crime or offence may file a complaint and apply to the investigating judge having jurisdiction to be joined to the proceedings as a civil party.

Section 87

The investigating judge shall, where so requested, and may of his own motion, visit the domicile of the accused in order to search his papers, effects and generally, any object deemed to be useful to discovery of the truth.

Section 88

The investigating judge may likewise visit any other places at which he believes that the items referred to in the preceding article may be secreted.

Section 89 bis

For the purposes of a search and seizure of papers, deeds or documents, the investigating judge may delegate a senior police officer attached to the public prosecution service of the district in which the investigation is to take place.

***741 Section 274**

The Principal Public Prosecutor, either *ex oficio* or on instructions from the Minister of Justice, shall charge the public prosecutor with prosecuting any offences of which he is aware.

Section 479

Where [...] a member of the court of appeal [...] is accused of having committed an offence carrying a criminal sentence outside his office, the Principal Public Prosecutor at the court of appeal shall summon him to appear before that court, which shall rule with no appeal being allowed.

Section 481

If a member of a court of appeal or an officer acting within that court as state counsel is charged with an offence or crime outside his office, the officer having received the report or complaint shall send copies to the Minister of Justice right away. There shall be an immediate investigation, conducted as set out above, and the officer shall likewise send copies of the documents in the case to the Minister of Justice.

Section 482

The Minister of Justice shall forward the documents to the Court of Cassation which shall refer the case, as appropriate, either to a criminal court or to an investigating judge outside the district of the court to which the accused member belongs [...]

Section 483

Where a [...] member of the court of appeal [...] is

accused of having committed, in performance of his duties, an offence carrying a criminal sentence, this offence shall be prosecuted and judged as set forth in Art.479".

E. The preliminary points of law at the Jurisdiction and Procedure Court

42 Article 26 of the special law of January 6, 1989 on the Jurisdiction and Procedure Court, in the version prevailing at the material time, provided as follows:

"§ 1. The Jurisdiction and Procedure Court may give preliminary rulings, by way of a judgment, on matters concerning:

1. The infringement by a law, decree or ordinance contained in Art.134 of the Constitution, rules that are established by the Constitution or by virtue of the Constitution in order to determine the respective jurisdiction of the state, the communities and the regions;

2. Without prejudice to 1 above, any conflict between decrees or between the rules referred to in Art.134 of the Constitution emanating from different legislators and provided the conflict arises out of their respective ambit;

3. The violation by a law, a decree or a rule contained in Art.134 of the Constitution, Arts 10, 11 and 24 of the Constitution.

***742** § 2. Where such a question is raised before a court, that court shall ask the Jurisdiction and Procedure Court to rule on the matter.

However, the court shall not be bound to do so where the action is inadmissible for procedural reasons on the basis of rules which are not themselves the subject-matter of the request for a preliminary ruling.

The court whose decision is, as the case may be, subject to appeal, subject to an application to have it set aside, an appeal on a point of law or an appeal to the Conseil d'Etat for it to be set aside, is neither bound:

1. Where the court has already ruled on a matter or an appeal having the same purpose;

2. Where it is of the opinion that the reply to the preliminary question is not vital to its decision;

3. If the law, decree or rule referred to in Art.26 *bis* of the Constitution does not manifestly violate a rule or an article of the Constitution referred to in § 1".

43 The Jurisdiction and Procedure Court has been called upon, many times [FN3] to rule on preliminary questions of whether the exclusive unappealable power vested in the Principal Public Prosecutor at the court of appeal to prosecute a member of the judiciary violated Arts 10 and 11 of the Constitution (non-discrimination). It considered that the questions called for a negative response and ruled that s.479 of the CIC did not violate the above-mentioned provisions of the Constitution in so far as it reserved to the Principal Public Prosecutor of the court of appeal the right to decide whether or not to prosecute members of the judiciary for any offences they may have committed and in so far as the consequence thereof is not to allow the party claiming to have been injured to set in motion a prosecution by applying to be joined to the proceedings as a civil party or by direct summons, or to file any appeal against the decision not to prosecute. In its judgment of November 4, 1998, which confirms others, the Jurisdiction and Procedure Court gave the following reasons for its decision:

"The so-called system of immunity from jurisdiction applicable to members of the judiciary [...] was established with a view to ensuring the impartial and dispassionate administration of justice by those persons. The specific rules that it contains as regards investigation, prosecution and judgment which entail immunity from jurisdiction are designed on the one hand, to prevent reckless, unjustified or vexatious prosecutions against the persons to whom this system applies and on the other hand, to prevent the same persons being treated too severely or too leniently.

FN3 See in particular judgments No.66/94 of July 14, 1994, *Recueil des arrêts de la Cour d'Arbitrage*, p.847 and No.112/98 of November 4, 1998, *Moniteur belge*, January 27, 1999, p.2346.

All these reasons could reasonably justify the people to whom immunity from jurisdiction applies, as regards investigation, prosecution and judgment, ***743** being treated differently to other persons subject to the jurisdiction of the courts to whom the ordinary rules of criminal investigation apply.

The preliminary questions do not concern immunity from jurisdiction in itself, but relate, in terms of the victims of a crime or an offence committed by a person benefiting from this immunity from jurisdiction, to their lack of opportunity to apply to an investigating judge to be joined to the proceedings as civil parties or to summon an accused to appear before the criminal court, and to the lack of opportunity to file an appeal against the decision of the Principal Public Prosecutor. So, within the category of persons likely to be injured by an offence, different treatment is thus established for those who are subject to the effects of Art.479 and

citizens in general.

Provided the legitimate aims pursued by the legislator justify jurisdiction being granted to the courts of appeal to deal with charges against persons enjoying immunity from jurisdiction, it is not manifestly unreasonable that the power to set in motion prosecutions against these persons is vested solely in the Principal Public Prosecutor at the court of appeal, and that the person claiming to have been injured by the offence cannot bring a prosecution, which may be reckless or malicious, directly.

According to the reasoning of the established system, the legislator could, as in the case of the decision handed down by the court of appeal which again is not subject to appeal, not provide for any appeal on the part of party claiming to have been injured against the decision of the Principal Public Prosecutor not to prosecute the alleged author of the offence.

These measures do not excessively limit the rights of anyone who claims to have been injured; that person, who can only pursue a private interest when setting in motion a prosecution, is entitled to file a claim for damages before the civil court, quite apart from the fact that the same party may report the offence in order that steps may be taken by the Ministry of Justice (ss.482 and 486 of the Code of Criminal Procedure) or by the Court of Appeal (s.443 of the Judicial Code)".

Judgment

I. As to the alleged violations of Article 6(1) of the Convention

44 Relying on Art.6 of the Convention, the applicants assert that the judgment of the Court of Cassation of April 1, 1996 produced a denial of justice. They also assert that within the framework of the proceedings relating to their complaint with an application to join the proceedings as civil parties, various requirements of Art.6 (1) of the Convention were breached. The relevant part of Art.6 of the Convention reads as follows:

"In the determination of his civil rights and obligations, [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part ***744** of the trial in the interests of morals, public order or national security in a democratic society, where [...] the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

A. As to the right of access to a court

1. Arguments of the parties

45 The applicants assert that the judgment of the Court of Cassation of April 1, 1996 resulted in a denial of justice. As far as they are concerned, the right of access comprised the right to put in motion a prosecution against those responsible for the serious infringements they suffered. This in effect is the sole means available to them of obtaining a ruling on the merits of the accusations made via their application to be joined to the proceedings as civil parties, the intention of which was not only to find those responsible for the offences guilty but also to assess the loss sustained. On the pretext that the case was directed against a judge of the Court of Appeal, the applicants were prevented from asserting their rights before a court that had jurisdiction to decide all matters of fact and law. Now, the complaint did not concern a judge as such; it was directed against X in order to establish the others responsible for the errors committed in connection with the case file. Although the aim was legitimate, it must be noted that the means employed to pursue this aim were manifestly disproportionate since the result was a denial of justice, the merits of the case never having been examined. According to the Court of Cassation's interpretation of ss.479 and following of the CIC, victims of offences committed by members of the judiciary do not have the right to apply to be joined to the proceedings as civil parties, while in ordinary law, the counterbalance to the power reserved to the prosecution service to decide to discontinue proceedings for reasons of mere convenience is specifically the right for the victim to apply to be joined to the proceedings as a civil party.

46 According to the Government, the applicants actually rely less on the right of access to a court than the right to set in motion a prosecution. In deciding that an application to be joined as civil parties against a member of the State Legal Service enjoying immunity from jurisdiction was inadmissible, the Court of Cassation in no way deprived the applicants of their right of access to a court since they were entitled to seek reparation for their loss before the civil courts. Moreover, the right of access is not absolute and can be subject to implicit limitations in so far as, by its very nature, it calls for regulation by the State. Like the conditions for admissibility of an appeal, the decision to discontinue and discharge

constituted a valid limitation; parliamentary immunity and judges' immunity from jurisdiction are others. To conclude, in Belgian law, the system of immunity from jurisdiction, established with a legitimate aim, in no way rules out the right to take action for compensation for damages caused through the fault of a judge under ordinary civil liability law.

***745 2. The Court's assessment**

47 In its decision as to admissibility of June 25, 2002, the Court considered that Art.6 (1) was applicable in the material case only in relation to civil matters, and the guarantees of Art.6 (1) did not extend to the right of individuals to cause criminal prosecutions to be set in motion against a third party.

48 It recalls that Art.6 (1) embodies the "right to a court" of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access, by its very nature, calls for regulation by the States. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Art.6 (1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. [FN4]

FN4 Z v United Kingdom: (2002) 34 E.H.R.R. 3, para.[93]; Osman v United Kingdom: (2000) 29 E.H.R.R. 245, para.[147]; Waite and Kennedy v Germany: (2000) 30 E.H.R.R. 261, para.[59] and the summary of relevant principles in Fayed v United Kingdom (A/294-B): (1994) 18 E.H.R.R. 393, para.[65].

49 The Court notes that both the chamber of the Brussels court of first instance and the Court of Cassation were called upon to rule as to how the proceedings were to be conducted and that the applicants were given access to the Court of Cassation only to see their application to be joined to the proceedings as civil parties declared inadmissible on the ground that it was directed against a member of the State Legal Service who was thus immune from jurisdiction. The Court must ascertain whether this limited degree of access to a preliminary question was sufficient to provide the applicants with access to a court.

50 First, the Court needs to ascertain whether this limitation pursued a legitimate aim. The fact that states generally grant immunity from jurisdiction to judges is a long-standing practice intended to ensure the proper administration of justice. More particularly, in Belgium, specific rules as regards investigation, prosecution and judgment entailing immunity from jurisdiction are designed on the one hand to prevent reckless, unjustified or vexatious prosecutions against the persons to whom this system is applicable, and on the other hand, to prevent the same persons being treated too severely or too leniently. [FN5]

FN5 See para.[43] above.

The Court notes that such a privilege, that is, immunity from jurisdiction, is also afforded to judges in other internal domestic systems and international legal systems for similar reasons. It therefore considers that in the material case, the use of the immunity from jurisdiction applicable to members of the judiciary, as a means of ensuring the proper administration of justice, pursued a legitimate aim.

51 As to the issue of proportionality, the Court must assess the contested limitation in the light of the particular circumstances of the case. [FN6] It recalls in this regard that ***746** it is not for the Court to examine *in abstracto* the relevant law and practice, but to ascertain whether the manner in which they have affected the applicants has violated the Convention. In particular, it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. [FN7] The role of the Court is limited to verifying that the effects of such interpretation are consistent with the Convention.

FN6 Waite and Kennedy v Germany, cited above, para.[64].

FN7 See, *inter alia*, Pérez de Rada Cavanilles v Spain: (2000) 29 E.H.R.R. 109, para.[43].

52 The Court observes that when a state grants judges immunity from jurisdiction, the protection of fundamental rights may be affected. However,

immunity from jurisdiction cannot, as such, be considered a disproportionate limitation on the right of access to a court as enshrined in Art.6 (1). Just as the right of access to a court is an inherent part of the fair trial guarantee, so some restrictions on access must likewise be regarded as inherent, an example being those limits generally accepted by signatory states as part of the doctrine of parliamentary immunity, [FN8]. immunity of the sovereign states [FN9] or immunity of an international organisation. [FN10]

FN8 A v United Kingdom: (1999) 27 E.H.R.R. 611, para.[83]; App. No.40877/98, Cordova v Italy (No.1), January 30, 2003 and App. No.45649/99, Cordova v Italy (No.2), January 30, 2003

FN9 Al-Adsani v United Kingdom: (2002) 34 E.H.R.R. 11, para.[56]; Fogarty v United Kingdom: (2002) 34 E.H.R.R. 12.

FN10 Waite and Kennedy v Germany, cited above.

53 Under Belgian law, it is the court of appeal that has jurisdiction to hear criminal proceedings against members of the judiciary, the power to bring proceedings against such persons being vested solely in the Principal Public Prosecutor at the court of appeal, any direct action by the party claiming to have been injured by the offence being prohibited. In order to decide whether immunity from jurisdiction is compatible with the Convention, the Court has to examine whether the applicants had reasonable alternative remedies available to protect their rights under the Convention effectively. [FN11]

FN11 See the above-mentioned judgments in the cases of Waite and Kennedy v Germany, para.[68], and A. v United Kingdom, para.[86]

54 In this connection, the Court attaches importance to the fact that in Belgian law, an application to the investigating judge to be joined to the proceedings as a civil party is one of the ways in which a prosecution can be set in motion and that in principle, the victims had other ways of asserting their civil rights. In the material case, in so far as their complaint was directed against persons other than members of the judiciary, they could have taken action before the civil court.

Civil action against a member of the judiciary would appear to be subject to the restrictive conditions laid down by the Judicial Code for claims for damages against a judge for misuse of authority. [FN12] This is an extraordinary remedy which can only be used in exceptional cases. The Court thinks it unlikely that it could have been used in the instant case; it notes that the Government, in its observations, paid no particular attention to it.

FN12 ss.1140 and 1147.

55 Although the applicants did not take civil action against individuals, they did, in parallel with their application to be joined to the proceedings as civil parties, bring a civil action against the State on November 21, 1995 for damages in relation to the same matters as those set out in their complaint and application to be joined to the proceedings as civil parties [FN13]; these proceedings are still pending. More ***747** fundamentally, the facts show that the inadmissibility of the applicants' application to be joined to the proceedings as civil parties and the discontinuance of the proceedings by the Principal Public Prosecutor at the court of appeal did not deprive them of the opportunity to take action to seek reparation.

FN13 para.[28] above.

56 In these circumstances, the Court, limiting itself to judging the specific features of immunity from jurisdiction, finds that the restrictions on the right of access to a court did not infringe the very essence of their right to a court and were not disproportionate for the purposes of Art.6 (1) of the Convention.

57 In view of the above, the Court holds that there has been no violation of the right to access to a court guaranteed under Art.6 (1).

B. As to failure to communicate documentary evidence concerning the searches

1. Arguments of the parties

58 The applicants believe that the proceedings before the Court of Cassation were unfair since various documents had not been added to the Court of Cassation case file, in particular, the acts and warrants relating to the searches of June 23, 1995, while the Court of Cassation, along with the Principal Public Prosecutor at the Court of Cassation, made reference to these documents. By not ordering that these vital documents be disclosed, the court of appeal breached the principle of equality of arms which must prevail between two parties to proceedings. As far as the applicants are concerned, it is on the basis of these documents that the Principal

Public Prosecutor was able to find that there was no need to proceed against PM. Finally, the fact that the Court of Cassation based its decision solely on the information contained in the case file and known to the applicants would not have re-established this balance since, in their opinion, the documents in the case file alone were not conclusive.

59 The Government responds that the Court of Cassation ruled solely on the basis of the documents in the case file that had been disclosed to the applicants. In order to reach its decision, the Court of Cassation had no need to refer to any other documentation, in particular the file relating to the criminal investigation within the framework of which the searches were ordered. The fact that evidence in the hands of the Principal Public Prosecutor at the Court of Cassation was not produced to the Court or to the parties is of little consequence since not only had the judges and the injured parties been equally informed via the written and oral submissions of the Principal Public Prosecutor, but moreover and more especially, these documents could in no way influence the decision of the latter as to the matter of the admissibility of the application to be joined to the proceedings as civil parties. So, as found by the Court of Cassation adopting the grounds of the Principal Public Prosecutor's submissions, it was sufficient to read the applicants' complaint to decide that it was directed against a member of the judiciary. The injured party was not therefore at a disadvantage or, in any case, would not have been significantly or clearly disadvantaged.

2. Assessment of the Court

60 The Court reiterates that the principle of equality of arms--one of the elements of the broader concept of a fair trial--requires each party to be given a reasonable ***748** opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. [FN14] As far as the Court is concerned, the right to adversarial proceedings means that each party must be given the opportunity to have knowledge of and to comment on the observations filed or evidence adduced by the other party. [FN15] In order to appreciate the scope of this right, account must be taken of the special features of the proceedings in question. [FN16]

FN14 See, among others, App. No.39594/98, Kress v France, June 7, 2001, para. [72].

FN15 See, among others, Ruiz-Mateos v Spain (A/262): (1993) 16 E.H.R.R. 505, para.[63].

FN16 See App. No.32911/96, Meftah v France, July 26, 2002, paras [42]-[43].

61 In the instant case, the Court of Cassation, ruling as an investigating court, was called upon to rule as to the admissibility of the application to be joined to the proceedings as civil parties. It ruled on the basis of the evidence in the case file which had been disclosed to the applicants and therefore had been the subject of adversarial proceedings. Like the Government, the Court considers that in order to reach its decision on the matter of the admissibility of the application to be joined to the proceedings as civil parties, the Court of Cassation required no other evidence and that it was of little consequence that the evidence in the hands of the Principal Public Prosecutor at the Court of Cassation had not been produced to the Court of Cassation or to the applicants. In fact, the evidence had been disclosed equally to the Court of Cassation and the applicants via the written and oral submissions of the Principal Public Prosecutor at the Court of Cassation, but more especially, this evidence could not influence the decision of the latter as to the admissibility of the application to be joined to the proceedings as civil parties, and therefore, did not influence that decision at all.

62 Accordingly, Art.6(1) of the Convention has not been violated under this head.

C. As to the lack of a public hearing and public delivery of the judgment

1. Arguments of the parties

63 The applicants also complain that the hearings before the court of first instance sitting in private and the Court of Cassation were held behind closed doors and that the judgment of the Court of Cassation was not delivered in public. The fact that the courts concerned decided to sit as investigative courts even though the applicants had asked them in particular to rule as to the merits, did not exempt them from having regard to the guarantees of Art.6 of the Convention. The "privacy" imposed on the applicants was in no way justified. The applicants were not informed of the judgment of the Court of Cassation until they contacted the clerk, after having learned, by chance, that the judgment was available.

64 The Government notes that it does not appear that the applicants requested a public hearing or expressed any reservations about the fact that the

hearings would be held in private. The right to a public hearing is not, furthermore, absolute. The Court has already allowed exceptions. Attention should be paid to the special circumstances of the proceedings before the Court of Cassation. In the instant case, this court had an investigative role because the action was directed against a member of the State Legal Service. It was called upon to rule as to whether or not to ***749** commit a judge belonging to a court of appeal to appear for trial before another court of appeal for a judgment on the legal action. Having regard to the circumstances, the Court of Cassation could merely note that the application was devoid of purpose as the prosecution had not been set in motion in accordance with the domestic legal system.

Moreover, the proceedings were conducted in the presence of the applicants' lawyers. First, they had been informed of the written submissions of the Principal Public Prosecutor at the Court of Cassation on January 30, 1996 and heard his oral submissions. Secondly, at the hearing of February 21, 1996, they had the opportunity to set out their grounds and to file their submissions. Consequently, bearing in mind the specific role played by the Court of Cassation and the specific arrangements for the conduct of the proceedings before it, the lack of a public hearing before that Court could not give rise to a violation of Art.6. In other words, in the circumstances of the case, a public hearing would not have ensured that the fundamental principles of Art.6(1) would have been any better ensured.

2. Assessment of the Court

65 The Court recalls that the public character of proceedings before the judicial bodies constitutes a fundamental principle enshrined in Art.6(1). It protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Art.6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society. [FN17]

FN17 Axen v Germany (A/72): (1984) 6 E.H.R.R. 195, para.[25].

66 However, the requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Art.6(1) itself, which contains the proviso that:

"the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances when publicity would prejudice the interests of justice".

However, it is established in the Court's case law that even in a criminal law context where there is a high expectation of publicity, it may on occasion be necessary under Art.6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice. [FN18] The Court also takes into account the circumstances of the case in question and the nature of the questions to be resolved. It has also considered that proceedings dedicated exclusively to points of law or highly technical points can meet the requirements of Art.6 even where there is no public hearing. ***750** [FN19]

FN18 B and P v United Kingdom: (2002) 34 E.H.R.R. 19.

FN19 App. No.64336/01, Varela Assalino v Portugal, April 25, 2002.

67 The Court notes that two separate provisions of the Belgian Constitution require hearings to be held and judgments to be delivered in public, but that these provisions do not in principle apply to investigating courts. [FN20] In fact, in Belgium, investigation is confidential. The reason for confidentiality in the investigation is to safeguard two major interests: first, respect for the moral integrity and private life of any person presumed innocent and secondly, efficiency in the conduct of the investigation. It follows that where a court rules as an investigating court, the hearing is in principle held in private and the decision is not delivered in public. In the instant case, the Brussels court of first instance, ruling in private, and the Court of Cassation, in so far as they were called upon to rule as investigating courts when deciding as to how the proceedings should be conducted, sat in private. As the Government has noted, the applicants do not appear to have requested a public hearing or to have expressed any reservations concerning the fact that the hearings would be held in private.

FN20 para.[38] above.

68 The Court considers that the confidential nature of the investigative procedure can be justified by reasons relating to the protection of the private lives of the parties to the case and the interests of the administration of justice, within the meaning of the second sentence of Art.6(1). It notes, furthermore, that although the applicants' case led, after full investigation, to referral to a court of appeal ruling as a trial court, the defendants and the applicants, as civil parties, were entitled to have the proceedings heard in full in public. It recalls in this regard that although Art.6 may be relevant before a case is sent for trial, the manner in which it is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. [FN21]

FN21 Imbrioscia v Switzerland (A/275): (1994) 17 E.H.R.R. 441, para.[38]; Murray v United Kingdom: (1996) 22 E.H.R.R. 29, para.[62].

The Court therefore considers that the fact that the hearing on the admissibility of the applicants' application to be joined to the proceedings as civil parties was held in private did not infringe Art.6(1) with regard to public hearings.

69 As regards the failure of the Court of Cassation to deliver its judgment in public, of which the applicants complain without providing any information, the Court recalls that despite the absence of any restrictions, the requirement that the judgment should be delivered in public was interpreted with a certain degree of flexibility. Thus it considered that in each case, the form of the publicity to be given to the "judgment" under the domestic law of the respondent state must be assessed in the light of the special features of the case and by reference to the object and purpose of Art.6(1). [FN22] In the case of Sutter v Switzerland, [FN23] it found that the publicity requirement under Art.6(1) did not need to take the form of reading out aloud, and stated that the requirement under Art.6(1) was satisfied by the fact that anyone establishing an interest could consult the full text of the judgments of the Military Court of Cassation.

FN22 Pretto v Italy (A/71): (1984) 6 E.H.R.R. 182, para.[26]; B and P v United Kingdom, cited above, paras [45]-[46].

FN23 Sutter v Switzerland (A/74): (1984) 6 E.H.R.R. 272, para.[33].

70 In the instant case, a few days after the judgment was delivered in private, the applicants procured the text thereof having contacted the clerk of the court. Moreover, in the instant case, the judgment of the Court of Cassation of April 1, 1996 was published in the official selection, accompanied by the Principal Public ***751** Prosecutor's submissions. This publication therefore made possible a degree of public scrutiny over the case law of the Court of Cassation. [FN24] Due to the fact that the applicants have not provided any information, and having regard to the case law referred to above, the Court finds no violation of the requirement to deliver the judgment of the Court of Cassation in public.

FN24 *ibid.*, para.[34].

71 To conclude, the Court considers that the publicity requirements contained in Art.6(1) of the Convention have been sufficiently respected.

D. As to the refusal to refer a preliminary question to the Jurisdiction and Procedure Court

72 The applicants also argued that the refusal of the Court of Cassation to refer their preliminary question to the Jurisdiction and Procedure Court demonstrated the desire of the Belgian courts to close the case file before any investigation. In maintaining that the preliminary question need not be referred to the Jurisdiction and Procedure Court on the grounds that when the action is liable to be struck out on procedural grounds arising out of rules which themselves are not the subject matter of the application for a preliminary question, the Government would seriously be ignoring reality, whilst it is clear that the unacceptability of the application to be joined to the proceedings as civil parties was based on ss.479 and 483 of the CIC, the subject-matter of their preliminary question.

73 The Government maintains that the Court of Cassation merely applied Art.26(2) of the special law of January 6, 1989 on the Jurisdiction and Procedure Court strictly. [FN25]

FN25 para.[42] above.

74 The Court recalls that the Convention does not, as such, guarantee any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling. It further refers to its case law, to the effect that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the

conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the state, which enjoys a certain margin of appreciation in this regard. The right to have a preliminary question referred to a court cannot be absolute either, even where a particular field of law may be interpreted only by a court designated by statute and where the legislation concerned requires other courts to refer to that court, without reservation, all questions relating to that field. It is in accordance with the functioning of such a mechanism for the court to verify whether it is empowered or required to refer a preliminary question, first satisfying itself that the question must be answered before it can determine the case before it. However, it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance might infringe the principle of fair trial as set forth in Art.6(1) of the Convention, in particular where such refusal appears arbitrary. [FN26]

FN26 App. Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Coëme v Belgium, June 22, 2000, para.[114]; App. No.32576/96, Wynen v Belgium, November 5, 2002, paras [41]-[43].

75 The Court considers that this is not so in the present case. In fact, the Court of Cassation, under Art.26(2), indent 2 of the above-mentioned law of January 6, ***752** 1989 refused the application to have a preliminary question referred on the basis of the fact that the application to be joined to the proceedings as civil parties was inadmissible on procedural grounds based on rules which themselves were not the subject-matter of the application for submission of a preliminary question. The Court notes that this decision is sufficiently reasoned and does not appear to have been arbitrary. It further notes that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. [FN27]

FN27 Coëme v Belgium, cited above, para.[115].

76 In conclusion, the refusal to refer a preliminary question to the Jurisdiction and Procedure Court did not violate Art.6(1).

II. As to the alleged violation of Article 13 of the Convention

77 The applicants also complain of a violation of Art.13, which reads as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

78 The applicants consider that the right to an effective remedy has not been respected in so far as their complaint with an application to be joined to the proceedings as civil parties was unsuccessful. More particularly, the Court of Cassation did not allow their case to be investigated on the merits on the ground that their complaint was directed against a member of the judiciary who enjoyed immunity from jurisdiction. Such exemption from jurisdiction made it impossible to set in motion criminal proceedings against a member of the State Legal Service.

79 The Government considers that the civil action instituted by the applicants under Art.1382 of the Civil Code is an effective remedy for seeking reparation of their loss.

80 The Court notes that the complaint made by the applicants under Art.13 overlaps with that made under Art.6 of the Convention. The applicants submitted no argument to lead the Court to find a violation of Art.13 even in the absence of a finding of a violation of Art.6(1). Moreover, when the question of access to a court arises, the guarantees under Art.13 are absorbed by the guarantees set out in Art.6. [FN28]

FN28 Tinnelly & Sons Ltd and McElduff v United Kingdom: (1999) 27 E.H.R.R. 249, para.[77].

81 The Court considers that the right to access to a court has not been violated. For the same reasons, there has been no violation of Art.13.

III. As to the violation of Article 14 of the Convention

82 The applicants maintain that the immunity from jurisdiction and the consequences thereof create a distinction between victims. While the victims of offences attributed to private individuals can set in motion a prosecution by means of an application to be joined to the proceedings as a civil party, this right is refused to the victims of offences allegedly committed by persons benefiting from immunity from jurisdiction. In this regard, they rely on Art.14 of the Convention taken together with Art.6. Article 14 reads as follows: ***753**

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,

colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

83 The Government stresses that the difference in treatment between persons injured as a result of an offence committed by a member of the judiciary does not constitute a case of discrimination prohibited under Art.14 in so far as this difference is reasonably justified by the fact that the person against whom action is being taken is a member of the State Legal Service and that it is not manifestly disproportionate.

84 As the Court has consistently held, Art.14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms safeguarded by those provisions". Although the application of Art.14 does not presuppose a breach of those provisions--and to this extent it is autonomous--there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter. [FN29]

FN29 See, among many others, Petrovic v Austria: (2001) 33 E.H.R.R. 14, para.[22].

However, under the Court's case law, a difference in treatment is discriminatory for the purposes of Art.14 if it has no objective justification, that is if it does not pursue a legitimate aim or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". [FN30]

FN30 See, in particular, Petrovic v Austria, cited above, para.[30].

85 The Court notes that the Court of Jurisdiction and Procedure [FN31] has considered on various occasions that the immunity from jurisdiction applicable to members of the State Legal Service had been established with a view to guaranteeing the impartial and dispassionate administration of justice by these persons and that the specific rules which involved in this privilege were intended on the one hand to prevent unjustified, reckless or vexatious prosecutions being brought against members of the judiciary and on the other hand, to prevent the same people being treated too severely or too leniently. This shows that the distinction complained of pursued a legitimate aim, namely to shield members of the judiciary from ill-considered proceedings and to allow them to perform their judicial duties dispassionately and independently. In so far as the applicants, regardless of the stance of the public prosecutor, retained the right to bring a civil action against the Belgian State, the court cannot find that the requirement for there to be a reasonable relationship of proportionality between the means used by the Belgian legislature and the aim pursued has been violated.

FN31 para.[43] above.

86 Accordingly, there has been no violation in the instant case of Art.14 taken together with Art.6(1) of the Convention.

IV. As to the alleged violation of Article 10 of the Convention

87 The applicants complain of a violation of Art.10 of the Convention. They claim that the massive searches and seizures constitute an unspeakable interference by ***754** the Belgian authorities in their right to freedom of expression. The relevant part of Art.10 reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontier [...]

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, [...] for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"

A. Arguments of the parties

88 As far as the applicants are concerned, the warrants for the searches ordered by the investigating judge were not sufficiently detailed as required by the Convention and did not therefore constitute a sufficient legal basis on which to base a limitation on freedom of expression and more particularly, on the privilege attaching to journalists' sources of information. At the material time, they were not given a copy of the warrants, which were merely read out to them. Neither were they informed of the reasons for the searches and seizures nor were they informed of any strong circumstantial evidence on which they were based. The premises referred to in the warrants were described so vaguely that the police officers had a free hand to enter the homes and

business premises as they deemed fit and to carry out there any searches and investigations of their choice.

The interference pursued no legitimate aim.

As to proportionality, the Belgian State has still not explained in what way they could have been involved in the prosecution of a judge on charges of breach of professional confidence. The applicants highlight the fact that they were neither defendants in nor civil parties to the proceedings leading to the operation. The journalists were not bound to keep the investigation confidential, unlike the members of the prosecution service and the investigating authorities. They were committing no offence by informing the public of information legitimately supplied to them on cases in progress.

More particularly, none of the applicants was responsible for writing articles implicating the Belgian Air Force general who committed suicide following his naming by the press, and none of them could therefore have been involved in the leaks from the case files. The articles written by the applicants on this dramatic accident were subsequent to the fact. The Belgian State never stated in what way the applicants could have been involved in these leaks and the breaches of the presumption of innocence.

The number of items and documents seized was, moreover, considerable, to the point that the purpose of these measures appeared to be to prevent them from carrying out their work and to intimidate their sources of information. It would appear that the investigating judge used his privileges in this case to "go fishing" that is, to seek out crimes and offences, the existence of which had not yet been established.

***755** Even *a posteriori*, no connection was established between the applicants and any breach of the confidentiality of the investigation. Neither was it shown that the measures taken had or could have had any effect on the conduct of the investigation to identify the source of the leaks from within the judiciary. In brief, the interference did not meet an overriding social need and cannot therefore be regarded as proportionate to the aims pursued.

89 The Government recalls that the freedom set forth in Art.10 of the Convention is not absolute. Paragraph 2 of that provision provides for the possibility of interference, while making any such interference subject to certain conditions. A proviso for limitations is also contained in Arts 2 and 8 of the Resolution of the European Parliament on confidentiality for journalists' sources and the right of civil servants to disclose information which they have, as well as Council of Europe Resolution No.2 on journalistic freedoms and human rights.

The searches and seizures ordered by PM satisfied the requirements of Art.10(2). The searches were provided for under ss.36, 37, 87, 88, 89bis and 90 of the CIC and by the law of June 7, 1969 establishing the time during which no searches or house searches could be carried out. As regards the seizures, their legal basis can be found in ss.35 to 39, 89, 89bis and 90 of the CIC.

The searches and seizures were aimed at protecting the reputation of others, preventing the disclosure of information received in confidence and finally, ensuring the authority and impartiality of the judiciary. More particularly, they were carried out within the framework of an order relating to breaches of professional confidence, some of which most certainly appeared to be attributable to a member of the Liège court of appeal. Respect for confidentiality of the investigation was therefore at issue.

90 The Government adds that the interference was motivated by an overriding social need arising out of violations of the confidentiality of the investigation and the real danger for the interests protected thereby. The overriding social need was referred to by the Principal Public Prosecutor in his submissions prior to the judgment of the Court of Cassation of June 21, 1995. [FN32] In its Allenet de Ribemont v France judgment, [FN33] the Court stressed that although freedom of expression includes the right to receive and impart information, this must be done with "all the discretion and circumspection necessary if the presumption of innocence is to be respected". In assessing proportionality, account should be taken of the difficulty of combating certain forms of criminality, which could give rise to the need to have recourse to certain measures, such as house searches and seizures, in order to obtain the physical evidence of the offences and, where appropriate, to prosecute those responsible. It is extremely difficult to ensure confidentiality of the investigation; it is difficult to pinpoint leaks within the judicial system and to assemble the physical evidence. So, when there are significant and blatant leaks, it may be necessary to resort to searches and seizures in order to establish the physical evidence of breaches of the confidentiality of investigation. To conclude, the searches and seizures were carried out within the framework of legislation offering adequate and sufficient guarantees against abuse, in particular, the

intervention of an investigating judge.

FN32 para.[11] above.

FN33 Allenet de Ribemont v France (A/308): (1995) 20 E.H.R.R. 557 ***756** , para.[38].

B. The Court's assessment

1. General principles

91 Freedom of expression constitutes one of the essential foundations of a democratic society in that the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, such a measure cannot be compatible with Art.10 of the Convention unless it is justified by an overriding requirement in the public interest. [FN34]

FN34 Goodwin v United Kingdom: (1996) 22 E.H.R.R. 123, para.[39]; App. No.51772/99, Roemen and Schmit v Luxembourg, February 25, 2003, para.[57].

92 The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest. [FN35]

FN35 De Haes and Gijsels v Belgium: (1998) 25 E.H.R.R. 1, para.[37]; Fressoz and Roire v France: (2001) 31 E.H.R.R. 2, para.[45].

93 As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction, and in making their assessment, they enjoy a certain margin of appreciation. In the present context however, the national margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under para.2 of Art.10, whether the restriction was proportionate to the legitimate aim pursued. [FN36]

FN36 See, *mutatis mutandis*, Goodwin v United Kingdom, cited above, para.[40] and Worm v Austria: (1998) 25 E.H.R.R. 454, para.[47].

2. Application of the above-mentioned principles in the present case

94 In the instant case, the Court considers that the searches at the homes and business premises of the applicants undoubtedly constituted an interference in their rights under para.1 of Art.10.

95 Such interference constitutes a violation of Art.10 unless it is "in accordance with the law", pursues one of the legitimate aims of para.2 and "necessary in a democratic society" to achieve them.

(a) In accordance with law

96 The Court recalls that interference cannot be regarded as "in accordance with law" unless it has a basis in domestic law. [FN37] According to the case law of the bodies ***757** of the Convention, the term "law" must be understood in its "substantive" sense, not in its "formal" one. In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it. [FN38]

FN37 Chappel v United Kingdom (A/152-A): (1990) 12 E.H.R.R. 1, para.[52].

FN38 *mutatis mutandis*, Kruslin and Huvig v France (A/176): (1990) 12 E.H.R.R. 547, para.[29].

97 In the instant case, although the applicants claim that the searches and seizures breached several legal requirements, the Court, recalling that it is primarily for the national authorities to interpret and apply domestic law, considers that they were in accordance with law, that is, in accordance with the various provisions of the CIC referred to by the Government. [FN39] The manner in which these provisions were applied in this particular case can affect the Court's assessment of the necessary character of the measure.

FN39 paras [41] and [89] above.

(b) Legitimate aim

98 The Court has already found that interference arising out of the confidentiality of the investigation was intended to ensure the proper conduct of the investigation and was therefore designed to protect the authority and impartiality of the judiciary. [FN40] Having regard to the particular circumstances of the case, the Court considers that the interference was intended to prevent the disclosure of confidential information, to protect the reputation of others and more generally, to protect the authority and impartiality of the judiciary.

FN40 Weber v Switzerland (A/177): (1990) 12 E.H.R.R. 508, para.[45].

(c) Necessary in a democratic society

99 The facts show that the case originated in the judgment of the Court of Cassation of June 21, 1995 removing from the Liège Court of Appeal various cases concerning breaches of professional confidence, some of which appeared to be attributable to a member of the Liège Court of Appeal. In his submissions prior to the judgment, the Principal Public Prosecutor mentioned in particular that various leaks in relation to court matters had been reported over several months causing great interest in the media and public opinion. He also noted that a breach of the right to respect for human dignity and honour of persons presumed innocent could have significant consequences and on this point, he recalled the case of a general who had committed suicide as the result of an "out-and-out lynching" to which he had been subjected by the press. [FN41] On June 23, 1995, following the removal of the cases on June 21, 1995, the Brussels Court of Appeal judge appointed to act as investigating judge issued warrants for searches to be carried out simultaneously at the homes of the applicants and at the premises of their publications.

FN41 para.[11] above.

100 The Court recalls that journalists reporting on criminal proceedings currently taking place must ensure that they do not overstep the bounds imposed in the interests of the proper administration of justice and that they respect the accused's right to be presumed innocent. [FN42] In the instant case, it must be pointed out that at no stage was it alleged that any of the articles written by the applicants on the subject of the matters covered by the Principal Public Prosecutor in his submissions ***758** [FN43] contained confidential information. In so far as, according to the case file, the applicants had not been charged with any offence, it must be deduced that the purpose of the measures complained of was to assemble information that would assist in establishing the truth in the case files opened following the "leaks". The identification of the potential perpetrators, within the prosecution service, of a breach of the confidentiality of the investigation would admittedly give rise to action for professional misconduct committed by the applicants in the performance of their duties. There is no doubt then that the measures fall within the sphere of the protection of journalistic sources. The fact that the searches and seizures proved unproductive did not deprive them of their purpose, namely, to establish the identity of the person responsible for the leaks, in other words, the journalists' source. [FN44]

FN42 Worm v Austria, cited above, para.[50]; App. No.34000/96, Du Roy and Malaurie v France, October 3, 2000, para.[34].

FN43 para.[11] above.

FN44 Roemen and Schmit v Luxembourg, cited above, paras [47] and [52].

101 As regards the searches complained of, the Court is struck by the large scale of the operation, which amounted to eight almost simultaneous searches. [FN45] At the hearing, the lawyers acting for the applicants stated that 160 police officers had been involved. The scale of the operation is again illustrated by the fact that the operation was carried out only two days after the ruling of the Court of Cassation referring the cases to the first President of the Brussels Court of Appeal in order to have an investigating judge appointed, and only one day after the appointment of that judge. [FN46]

FN45 para.[14] above.

FN46 para.[12] above.

As regards the reasons for the applicants being chosen to be subjected to the searches, the Government merely affirms that a search is only possible where there is strong circumstantial evidence of the existence of an offence, but it does not state in what way the applicants are alleged to have been involved in the offences concerned. Neither has it given any indication of any investigative measures taken directly against members of the legal service believed to have been responsible for breaches of professional confidence.

102 The Court questions whether means other than the massive searches and seizures at the homes of the applicants and at the premises of their publications could not have been employed, for example, internal inquiries including the questioning of judges, to enable the investigating judge to identify the perpetrators of the breaches of professional confidence. Whatever the circumstances, the Court must note that the Government has not shown that without the searches and seizures complained of, the national authorities would not have been able to establish first the existence of any breach of professional confidence committed by members of the judiciary and secondly, whether the applicants were implicated in the offences.

103 In the Court's opinion, there is a fundamental difference between this case and the above-mentioned case of Goodwin v United Kingdom. In the latter case, an order for discovery was served on the journalist requiring him to reveal the identity of his informant, whereas in the instant case, wide scale simultaneous searches were carried out. The Court considers that even if unproductive, searches conducted with a view to uncover a journalist's source constitute a more serious ***759** measure than an order to divulge the source's identity. [FN47] In fact, investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigation powers as by definition, they have access to all the documentation held by the journalist. The Court reiterates that limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court, [FN48]and thus considers that the searches and seizures complained of had a far more significant impact on the protection of journalistic sources than in the Goodwin case.

FN47 Roemen and Schmit v Luxembourg, cited above, para.[57].

FN48 See Goodwin v United Kingdom, cited above, para.[40].

104 The Court concludes that the Government has not shown that a fair balance between the competing interests has been struck. In this regard, it recalls that the considerations to be taken into account by the Convention institutions for their review under para.2 of Art.10 tip the balance of competing interests in favour of the interest of democratic society in securing a free press. [FN49] In the present case, even though the reasons relied on were considered "relevant" the Court finds that they were not in any circumstances "sufficient" to justify searches and seizures on such a large scale.

FN49 *ibid.* para.[45].

105 The Court concludes that the measures at issue were not reasonably proportionate to the pursuit of the legitimate aims referred to, when the interest of a democratic society in ensuring and maintaining the freedom of the press are taken into account. There has therefore been a violation of Art.10 of the Convention.

V. As to the alleged violation of Article 8 of the Convention

106 The applicants again maintain that the searches and seizures interfered with their right to respect for their homes and their private lives, in violation of Art.8 of the Convention, the relevant parts of which read as follows:

"1. Everyone has the right to respect for his private [...] life, his home [...]

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of [...] the prevention of disorder or crime [...] or the protection of the rights and freedoms of others".

A. Arguments of the parties

107 The applicants believe that the searches carried out at their homes and at their places of work amounted to interference with their private lives and their homes. Data of a personal nature were seized, in particular from their homes, and no inventory of the items seized was drawn up. Neither were they informed of what had become of these items or what they were or could have been used for. Although the Court recognises that the states may consider it necessary to have recourse to measures such as home searches and seizures in order to obtain physical evidence of offences, and, where appropriate, to prosecute those responsible, the relevant legislation and practice must afford adequate and effective safeguards against abuse. [FN50] Even though the State has a certain margin of ***760** appreciation as regards the need to conduct a search, it must be accompanied by adequate and effective safeguards against abuse so that any interference is strictly proportionate to the legitimate aim pursued. In the instant case, the interference in the applicants' private and family lives and their homes was not justified having regard to the guarantees contained in para.2.

On this last point, the applicants refer to the developments detailed during the investigation of the complaint in relation to violation of Art.10. The means employed were clearly disproportionate to the aim pursued, which was unknown to the applicants at the material time and is still very vague.

FN50 Funke and Crémieux v France (A/256-A): (1993) 16 E.H.R.R. 297, para. [56].

108 From the point of view of Art.8, the Government submits the same observations as for Art.10. It notes that like the right guaranteed by Art.10, the right to respect for one's private life and home is not absolute, para.2 making provision for interference. In the present case, the interference was intended to prevent disorder and to protect the rights and freedoms of others, both legitimate aims within the meaning of this paragraph.

B. The Court's assessment

109 The Court recalls that the word "domicile" in case law has a broader connotation than the word "home" and may extend, for example, to a professional person's office. [FN51] It has also considered that a search conducted at the domicile of a natural person which is at the same time the headquarters of the offices of a company controlled by that person, amounted to an interference in the right to respect for the home. [FN52] More recently, it has ruled that it was time to recognise, in certain circumstances, that the rights guaranteed under Art.8 of the Convention could be interpreted as including, for a company, the right to respect for its headquarters, its agencies or its business premises. [FN53]

FN51 Niemietz v Germany (A/251-B): (1993) 16 E.H.R.R. 97, para.[30].

FN52 Chappel v United Kingdom, cited above, para.[63].

FN53 App. No.37971/97, Société Colas v France, April 16, 2002, para.[41].

110 The Court notes that as part of an immense operation, the investigators searched the business premises of the applicants, their private homes and, as far as some of them were concerned, their vehicles and seized numerous documents. It notes that the Government does not dispute the fact that there was interference in their rights guaranteed under para.1 of Art.8 of the Convention. Such interference violates Art.8 unless it satisfies the conditions of para.2.

1. In accordance with the law

111 In the present case, with reference to the reasons indicated in paras 96 and 97 above, the Court considers that the interference was "in accordance with the law". In fact, various provisions of the CIC cover searches and seizures and the law of June 7, 1969 lays down the procedures to be followed in cases of searches or home searches.

2. Legitimate aim

112 The purpose of the interference was to obtain evidence of a breach of professional confidence attributable to a member of the judiciary. Evidently, it ***761** pursued both the prevention of disorder and the prevention of criminal offences and the protection of the rights and freedoms of others, *i.e.* the aims listed in para.2 of Art.8, and legitimate aims having regard to that Article.

3. Necessary in a democratic society

113 The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The exceptions provided for in para.2 of Art.8 are to be interpreted narrowly, and the need for them in a given case must be convincingly established. [FN54]

FN54 Funke and Crémieux v France, cited above, paras [55] and [38] and Miailhe v France (A/256-C): (1997) 23 E.H.R.R. 491, para.[36].

114 Of course, in the sphere in question, ensuring against breaches of confidentiality investigation, the states face serious problems in locating leaks and assembling physical evidence. The Court therefore recognises that the states may consider it necessary to have recourse to measures such as home searches and seizures in order to obtain physical evidence of offences, and, where appropriate, to prosecute those responsible. Their relevant legislation and practice must afford adequate and effective safeguards against abuse. [FN55]

FN55 See, *mutatis mutandis*, Funke, Crémieux v France, cited above, para.[56] and Miailhe v France, cited above, para.[37].

115 The Court notes that the searches conducted in the material case were accompanied by certain

procedural safeguards. They were ordered by the investigating judge, who of course did not himself carry out the searches himself but delegated the task to the chief inspector of police. As regards the circumstances in which the searches were conducted, it must be noted that they were conducted each time in the presence of the applicants or their close relations, by a member of the police force assisted by various inspectors and, during certain searches, by two experts who made a copy of the contents of the computer systems. The length of the searches varied between half an hour and three hours. Records were drawn up on completion of the searches.

116 On the other hand, the Court, recalling that the applicants had not been accused of any offence, has to note that the various search warrants were drawn in broad terms. [FN56] In fact, on June 23, 1995 the investigating judge ordered the series of searches "to search for and seize any document or object that might assist the investigation", [FN57] without any limitation. These search warrants, which gave no information about the investigation concerned, the premises to be searched and the objects to be seized, thus gave the investigators wide powers. [FN58] A large number of objects, including computer disks and the hard disks of the applicants' computers, were in fact seized; the content of certain documents and magnetic media were copied. Furthermore, the Government acknowledges that the applicants were given no information on the proceedings triggering the operation. They were thus left in the dark as to the actual reasons for the searches conducted at their homes and business premises.

FN56 Niemietz v Germany ***762** , cited above, para.[37]; Roemen and Schmit v Luxembourg, cited above, para.[70]; *a contrario*, App. No.51578/99, Keslassy v France, Dec.08.01.2002 and App. No.62002/00, Tamosius v United Kingdom, Dec.19.09.2002.

FN57 para.[13] above.

FN58 See Funke, Crémieux and Miailhe v France, cited above.

117 In view of the above, and using reasoning partly similar to that developed with regard to Art.10, [FN59] the Court finds that the searches were not proportionate to the legitimate aims pursued. There has therefore been a violation of Art.8 of the Convention.

FN59 Paras [101]-[105].

VI. As to the application of Article 41 of the Convention

118 According to Art.41 of the Convention,

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

A. Damage

119 The applicants estimate the non-pecuniary damage caused by the search and seizure measures, *ex aequo et bono*, at euro3,000 per applicant, that is, euro12,000. The applicants paid the price for a wide scale police operation. Besides the numerous infringements of their rights, they were implicated in an affair which did not concern them at all and suspected of conniving with certain members of the Court of Appeal, which finally led to a man committing suicide.

120 The Government points out that the amount claimed by the applicants should be reduced on the basis of the number and significance of the violations of the Convention actually found.

121 Ruling on an equitable basis, as required under Art.41, the Court awards--by way of non-pecuniary damage incurred--a sum of euro2,000 to each applicant.

B. Costs and expenses

122 The applicants estimate the costs and expenses of their lawyers at euro10,000. These expenses relate to the various proceedings in Belgium since 1995 and the costs incurred in respect of the proceedings before the Court. Numerous procedural documents have been exchanged and significant administrative costs incurred, in addition to expenses for travelling to Strasbourg to present their grounds for appeal at the hearing before the Court.

123 The Government notes that the applicants have not established the amount of lawyers' fees and expenses actually paid in relation to this case.

124 According to the Court's case law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to

quantum. [FN60] As regards the costs relating to the domestic proceedings, the Court notes that the applicants have not indicated the proportion of expenses incurred in respect of the domestic proceedings to try to remedy the alleged violations. The claim must be dismissed on that account. As regards the costs and expenses relating to the proceedings before the bodies of the Convention, having regard to the information before it and the above mentioned criteria, the Court awards the sum of euro9,000.

FN60 See, *e.g.* Kress v France ***763** , cited above, para.[102].

C. Default interest

125 The Court considers it appropriate that the rate of default interest should be based on the marginal lending rate of the European Central Bank to which should be added 3 percentage points

For these reasons, THE COURT

1. *Holds* unanimously that there has been no violation of Art.6(1) of the Convention as regards the right of access to a court;

2. *Holds* unanimously that there has been no violation of Art.6(1) of the Convention on the ground of failure to communicate documentary evidence concerning the searches;

3. *Holds* unanimously that there has been no violation of Art.6(1) of the Convention due to the lack of a public hearing before the court of first instance and before the Court of Cassation and a result of failure to deliver the judgment of the Court of Cassation in public;

4. *Holds* unanimously that there has been no violation of Art.6(1) of the Convention having regard to the refusal of the Court of Cassation to refer a preliminary question to the Jurisdiction and Procedure Court;

5. *Holds* unanimously that there has been no violation of Art.14 taken together with Art.6(1) of the Convention as regards the restriction on the right of access to a court;

6. *Holds* unanimously, that there has been no violation of Art.13 of the Convention;

7. *Holds* unanimously, that there has been a violation of Art.10 of the Convention;

8. *Holds* unanimously, that there has been a violation of Art.8 of the Convention;

9. *Holds*, by six votes to one,
(a) that the respondent State is to pay to each of the applicants, within three months as of the date on which the judgment becomes final in accordance with Art.44(2) of the Convention, euro2,000 in respect of non-pecuniary damage and to all the applicants together euro9,000 in respect of costs and expenses,
(b) and that simple interest shall be payable on these amounts at an annual rate equal to the marginal lending rate of the European Central Bank applicable for the period, plus 3 percentage points from expiry of the above-mentioned three months until settlement.

10. *Dismisses* the remainder of the claim for just satisfaction.

Concurring Opinion of Judge Loucaides

(Translation)

O-I1 [FN61]I subscribe to the terms of the judgment save as regards the reasoning in relation to the applicants' complaint arising out of the refusal of the Court of Cassation to refer a preliminary question to the Jurisdiction and Procedure Court on the ***764** constitutionality of " ss.479, 480, 481, 482 and 483 up to and including s.503 of the Code of Criminal Procedure" is concerned.

FN61 Paragraph numbering added by the publiser.

O-I2 Like the majority, I believe that the refusal complained of does not, in the present case, amount to a violation of Art.6(1) of the Convention but in this regard, I have not used the same reasoning as the majority.

O-I3 The majority consider that the relevant decision of the Court of Cassation was sufficiently reasoned and was not arbitrary. The Court of Cassation considered that there was no need to put the applicants' question to the Court of Jurisdiction and Procedure on the ground that Art.63--which authorises applications to be joined to criminal proceedings as civil parties-- was not itself the subject-matter of the request for preliminary questions. Now, this reasoning is clearly non-committal and erroneous. The applicants specifically cited the articles in regard to which they sought to

obtain a decision of the Jurisdiction and Procedure Court. I cannot see why it was necessary to mention s.63 in order to allow the Court of Jurisdiction and Procedure to examine the other sections cited in the preliminary question. According to domestic law, the Court of Cassation must refer to the Jurisdiction and Procedure Court any question concerning the violation by any law of Arts 10, 11 and 24 of the Constitution. The applicants' request to the Court of Cassation to refer their preliminary question to the Court of Jurisdiction and Procedure was therefore clearly in line with domestic law. The complaint had nothing whatsoever to do with s.63, which is why it was not necessary to mention that section in the preliminary question. It should be recalled in this respect that s.63 provides:

"Any person claiming to have been injured by a crime or an offence may file a complaint and apply to the investigating judge having jurisdiction to be joined to the proceedings as a civil party".

O-I4 Like the majority, I believe that it is primarily for the national authorities, namely the courts, to interpret domestic legislation. I believe however that the question of the fairness of the proceedings arises where the judgment of a national court, whichever one that may be, is clearly wrong. I have already had occasion to use this argument in the case of Goktan v France [FN62] where I stated as follows:

"I believe that the right to a fair hearing/trial is not confined to procedural safeguards but extends also to the judicial determination itself of the case. Indeed, it would have been absurd for the Convention to secure proper procedures for the determination of a right or a criminal charge and at the same time, leave the litigant or the accused unprotected as far as the result of such a determination is concerned. Such approach would allow a fair procedure to end up in an arbitrary or evidently unjustified result".

FN62 Goktan v France: (2003) 37 E.H.R.R. 11.

O-I5 I could also site the Golder [FN63] case here, where the Court judged that the right to a fair hearing/trial involved ensuring the right of access to a court by stating:

"It would be inconceivable that Art.6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not ***765** first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings".

FN63 Golder v United Kingdom (A/18): (1979-80) 1 E.H.R.R. 524, para.[35].

O-I6 In my opinion, it would also be inconceivable that " Art.6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit" and not protect against unfair judgments or decisions. "The fair, public and expeditious characteristics of judicial proceedings are of no value at all" if they produce clearly unfair results. The Court in fact disagreed with the finding of a national court on the grounds of unfairness in the judgment in the case of Dulaurans v France [FN64] stating that the French Court of Cassation had dismissed the applicant's appeal on points of law on a manifestly incorrect ground.

FN64 Dulaurans v France: (2001) 33 E.H.R.R. 45. See the opinion of the Commission annexed to Fouquet v France: (1996) 22 E.H.R.R. 279, paras [37]-[38] where the Commission found that there had been a violation of the right to a fair hearing/trial as the Court of Cassation erroneously relied on the finding that the applicant had admitted in his notice and grounds for appeal that he had committed an offence.

O-I7 Given that in the instant case, the decision of the Court of Cassation not to refer the applicants' question to the Jurisdiction and Procedure court was the result of a manifest error for the reasons given above, I would normally have allowed their complaint that the Court of Cassation treated them in a manner that was incompatible with the principle of fairness enshrined in Art.6 of the Convention. However, having regard to all the facts and circumstances of the case, I cannot conclude that the refusal of the Court of Cassation to refer the relevant question to the Jurisdiction and Procedure Court in the material case rendered the proceedings unfair, the reason being that such referral would not actually have altered the outcome of the case since, even before the applicants asked for a decision, via referral, on the question which concerned them, the Jurisdiction and Procedure Court had already settled the matter in a manner contrary to the interpretation suggested by the applicants. [FN65]

FN65 See judgment No.66/94 of July 14, 1994, *Selected Reports of the Court of Jurisdiction and Procedure*, 1994, p.847.

O-I8 Therefore, applying the principle that the question of whether a given procedure was fair should be examined on the basis of the proceedings as a whole and in the light of all the facts and circumstances of the case, I, like the majority, find that there was no violation of Art.6(1) in the present case as regards the complaint at issue.

Partially Concurring and Partially Dissenting Opinion of Judge Lemmens

O-II1 [FN66]I voted with the other members of the Court on all points save point 9 (just satisfaction). Before briefly explaining my opinion on this point, I would like to explain why I voted with my colleagues as regards the complaints under Art.6(1), taken alone or together with Art.14 (points 1 to 5 of the operative provisions), because my reasoning on these points differs slightly from that of my colleagues.

FN66 Paragraph prefixes added by the publisher.

As regards the complaints under Arts 13, 10 and 8, I agree unreservedly with the opinion of the Court (points 6 to 8 of the operative provisions).

***766** *A. As regards Article 6(1) (taken alone or together with Article 14)*

O-II2 In its decision of June 25, 2002 as to the admissibility of the application, the Court took a position on the question of the applicability of Art.6(1). It considered, in particular:

"Under Belgian law, an application to join the proceedings as a civil party is intended to make reparation for the loss incurred as a result of an offence and the effect is to set in motion a prosecution. Admittedly, an application to be joined as a civil party in proceedings against a member of the judiciary cannot set in motion a prosecution at the same time as civil action since prosecutions against members of the judiciary can only be set in motion by the Principal Public Prosecutor at the court of appeal. The fact remains that when a complaint is filed together with an application to be joined to the proceedings as a civil party, and in this case, moreover, against X (even though in reality it was one or more judges against whom it was directed), the applicants had a justifiable right to seek reparation, a right that was not identical to that which they subsequently asserted in the civil courts against the state. So, the application to be joined to the proceedings as civil parties related in particular to the return of objects seized during the searches. This was one of the facets of reparation of the damage sustained by the applicants. The outcome of the proceedings was therefore directly decisive for the purposes of Art.6(1) of the Convention for establishing the applicants' right to compensation, and this Article is applicable in the present case".
The judgment makes no further reference to this point. I feel obliged to explain how I interpret this decision of the Court.

O-II3 First of all, it is clear that Art.6(1) applies to the dispute brought before the criminal courts via the complaint with an application to be joined to the proceedings as civil parties.

In this regard, it is sufficient to recall that the applicants complained of violations of their fundamental rights. [FN67] In her submissions to the Court of Cassation, the Advocate General, Mme Liekendael, noted that the civil parties claimed to have been injured by breaches that they attributed to X and that they thus claimed violation of a "civil" right under the Belgian Constitution [FN68] This was the "justifiable right to seek reparation" to which the European Court referred in its above-mentioned decision, that is to say, a right "of a civil nature", within the meaning of Art.6(1) of the Convention.

FN67 para.[18] of the judgment.

FN68 Submissions of the Advocate General, Mme Liekendael prior to the judgment of the Court of Cassation of April 1, 1996, Pasicrisie, 1996, I, (255), p.258, No.7.

By applying to be joined to the proceedings as civil parties, the applicants demonstrated the importance they attached not only to the criminal conviction of the accused but also to securing financial reparation of the damage sustained. [FN69]

FN69 Moreira de Azevedo v Portugal (A/189): (1991) 13 E.H.R.R. 721, para. [67].

It is true that the applicants had not detailed their loss when they filed their complaint with the application to be joined to the proceedings as civil parties. That ***767** is of no account, as they retained the right to submit a claim for damages up to and during the trial. [FN70]

FN70 Acquaviva v France (A/333-A): (2001) 32 E.H.R.R. 7, para.[47]; Aït-Mouhoub v France: (2000) 30 E.H.R.R. 382, para.[44]; App. No.31801/96, Maini v France, October 26, 1999, para

28.

The main point here, in my opinion, is that their application to be joined to the proceedings as civil parties was designed to set in motion judicial criminal proceedings in order to secure a conviction that could have enabled them to exercise their civil rights in regard to the alleged offences and, in particular, to obtain compensation for the financial loss they claimed to have sustained. [FN71]

FN71 AÏt-Mouhoub v France, cited above, para.[45]; Maini v France, cited above, para.[29].

I must add that this case differs from other cases in which the court has found Art.6(1) inapplicable, after having noted that the applicant, though having had the opportunity to submit a claim for compensation, at no stage of the proceedings claimed damages or made known any intention of so doing, [FN72] or that he had demonstrated a clear intention to take civil action before the civil courts and that said courts were not bound by any decision of the criminal courts. [FN73]

FN72 Hamer v France: (1997) 23 E.H.R.R. 1, paras [75]-[76]; App. No.54102/00, Asociación de vÍtimas del terrorismo v Spain, Dec.29.03.2001; App. No.73373/01, Salegi Igoa v Spain, November 19, 2002.

FN73 App. No.51308/99, Stokas v Greece, November 29, 2001.

O-II4 The fact that the proceedings before the criminal courts concerned only the legal action against X does not change the applicability of Art.6(1) in the least. In fact, the criminal proceedings were apt to have repercussions on the claims made by the applicants as civil parties. From the moment the applicants were joined as civil parties until the conclusion of those proceedings by the Court of Cassation, the civil limb of those proceedings is closely linked to the criminal limb. [FN74]

FN74 App. No.32976/96, Calvelli and Ciglio v Italy, January 17, 2002.

It could be said that the civil right asserted by the applicants depended on the outcome of their complaint and civil party application, that is to say, the conviction of those responsible for the alleged offences. [FN75] The outcome of the criminal proceedings was therefore directly decisive for establishing the applicants' civil right. [FN76] The decision of the Court of Cassation to put an end to the prosecutions (through a finding that there was no need to refer the case to another court) effectively deprived the applicants of any opportunity to sue for compensation before the criminal courts. [FN77]

FN75 Tomasi v France (A/241-A): (1993) 15 E.H.R.R. 1, para.[121].

FN76 Helmers v Sweden (A/212-A): (1993) 15 E.H.R.R. 285, para.[29]; AÏt-Mouhoub v France, cited above, para.[45].

FN77 Compare with Acquaviva v France, cited above, para.[47].

O-II5 It is true that it was possible for the applicants to submit a claim for compensation to the civil courts along with their complaint or even at a later date, at least in so far as any such action was not directed at a member of the judiciary. However, as the Court recently recalled, where the domestic legal system provides litigants with a remedy, such as the possibility of lodging a criminal complaint and civil party application, the state is under an obligation to ensure that they enjoy the fundamental guarantees laid down by Art.6(1). [FN78]

FN78 App. No.54589/00, Anagnostopolous v Greece, April 3, 2003, para.[32].

O-II6 The consequence of the fact that Art.6(1) applies to the dispute arising out of the compliant with an application to join the proceedings as civil parties was that the applicants could claim the right of access to a court. The Court therefore examined ***768** the complaints concerning the right of access to a court. [FN79] I have no comment to make on these points as I am in agreement with my colleagues.

FN79 See points 1 to 5 of the operative provisions.

As regards the complaints arising out of a violation of the structural and procedural requirements of Art.6(1), I believe that the applicability of Art.6(1) to the "dispute" does not necessarily entail the applicability of its structural and procedural guarantees at each stage of the proceedings. There may in fact be stages in the proceedings where the outcome of the proceedings is not directly decisive for establishing the civil rights at issue. On this point, my reasoning differs from that of the majority.

I must stress that the fact that the proceedings were conducted entirely before investigating courts (court

of first instance in private, Court of Cassation) cannot constitute an obstacle to the applicability of Art.6 to this stage of the proceedings. Admittedly, in Belgian law, the confidentiality of the investigation constitutes a basic principle of the preparatory stage of the criminal process. However, that is not sufficient to find that Art.6 is purely and unconditionally inapplicable. As stated in para.68 of this judgment, the principle can affect the way in which the various guarantees of Art.6 are applied. [FN80]

FN80 See also, App. No.37370/97, Strategies et Communications and Demoulin v Belgium, July 15, 2002, para.[40].

The specific purpose of the proceedings at the various stages thereof remains to be seen.

O-II7 In chambers, the procedure concerned only the removal of the case from the investigating judge. It is in fact in this sense that the public prosecutor asked for a decision as to the conduct of the proceedings. [FN81] The chambers allowed this application and referred to case to the public prosecutor "for the appropriate legal purposes". [FN82] The chambers therefore only settled a simple preliminary question of a procedural nature. Its decision had no direct effect whatsoever either on the legal action or on the claims of the applicants. [FN83]

FN81 See para.[19] of the judgment.

FN82 para.[20].

FN83 Compare with Quadrelli v Italy: (2002) 34 E.H.R.R. 8, para.[30].

In my opinion, the outcome of the proceedings in chambers was therefore not decisive for establishing the rights claimed by the applicants. Contrary to the majority opinion of the Court, I believe that the structural and procedural guarantees of Art.6(1) were not applicable here.

The inapplicability of Art.6(1) explains my vote of non-violation of Art.6(1) in so far as the application concerns the lack of a public hearing. [FN84]

FN84 Point 3 *partim.*, of the operative provisions.

O-II8 Before the Court of Cassation, the proceedings concerned the issue of whether the case should be referred to the First President of a court of appeal in order to have him appoint a judge to perform the duties of an investigating judge to carry out the investigation, or whether it should be declared that no further action was required, either because no legal action had been taken or because the prosecution was unjustified, due to lack of evidence. In the instant case, the Court of Cassation found that no legal action (admissible) had been taken in the case and decided that there was no need to refer the case. [FN85] This decision, which brought an end to the ***769** dispute, had repercussions on the applicant's civil claim, so that the structural and procedural requirements of Art.6(1) had in principle to be respected.

FN85 See para.[26] of the judgment.

On this point, I share the point of view of my colleagues. I therefore examined, with them, the merits of the complaints relating to the proceedings before the Court of Cassation. [FN86]

FN86 Points 2, 3 *partim* and 4 of the operative provisions.

O-II9 I agree entirely with the grounds for the judgment in relation to the failure to communicate documentary evidence concerning the searches. I also share the reasoning of the Court as regards the complaint arising out of the lack of a public hearing and public delivery of the judgment, in so far as it concerns the proceedings before the Court of Cassation.

O-II10 As regards the complaint arising out of the refusal of the Court of Cassation to refer a preliminary question to the Jurisdiction and Procedure Court (Constitutional Court), I agree with the Court's reasoning, but I would like to add a few brief comments.

In its judgment of April 1, 1996, the Court of Cassation officially noted, subsidiarily, the applicants' request that a preliminary question be asked "in order to ascertain whether ss.489, 481, 482 and 483 up to and including s.503 of the Code of Criminal Procedure (violate) the Constitution". These sections all concerned the special procedure to be followed in the case of offences committed by members of the judiciary. The Court of Cassation, basing itself on Art.26(2), indent 2 of the special law of January 6, 1989 on the Jurisdiction and Procedure Court, in the version in force at the material time, [FN87] dismissed the application for a preliminary question on the grounds that the inadmissibility of the

civil party application arose out of s.63 of the Code of Criminal Procedure (CIC), which provision was not itself the subject matter of the application for a preliminary question. According to the Court of Cassation, s.63 of the CIC in fact "provides that anyone who claims to have been injured by a crime or offence can only apply to the investigating judge dealing with the case or to whom the case may be referred as a matter of course to be joined to the proceedings as a civil party".

FN87 See para.[42] of the judgment.

This reasoning may be surprising. It is apparent from the grounds of the judgment of the Court of Cassation that this is based not only on s.63 of the CIC, which provides in general terms for the injured party to be able to apply to join the proceedings as a civil party, but also on ss.479 and 483 of the CIC, which vest in the Principal Public Prosecutor at the court of appeal alone the power to take legal action against the persons covered by these provisions. [FN88] Now, the application for a preliminary question concerned these last two sections in particular and was designed have the question of whether immunity from jurisdiction created a distinction between the persons injured by an act committed by a member of the judiciary and persons injured by acts committed by any other person referred to the Constitutional Court.

FN88 See para.[26] of the judgment.

I have doubts as to the consistency of the actions of the Court of Cassation with Art.26 of the special law of January 6, 1989. However, as pointed out in para.[75] of the judgment, it is primarily for the national authorities, and in particular, the ***770** courts to resolve problems of interpretation of domestic legislation. [FN89] The European Court does not have to comment on the Court of Cassation's interpretation of s.63 of the CIC, or on the view expressed by the Court of Cassation whereby this provision constituted a sufficient basis for declaring the applicants' application to join the proceedings as civil parties inadmissible. As to the remainder, it is sufficient for me to note that the Court of Cassation resolved the point at issue, on the basis of the relevant rules of law, and by giving the reasons for its decision. Even if this decision may be debateable from the point of view of national law, I do not see how it would be so to such a point as it would be arbitrary (see my separate opinion in the case of Wynen above, where a similar question was raised).

FN89 Coëme v Belgium, cited above, para.[115]; Wynen v Belgium, cited above, para.[42].

I therefore voted with the other members of the Court for non-violation of Art.6(1) on this point.

B. As to Article 41

O-II11 The court awards the sum of euro2,000 to each applicant by way of non-pecuniary damage incurred.

I do not dispute the fact that the applicants incurred non-pecuniary damage as a result of the searches and seizures. I even acknowledge that the amount awarded is not at all exaggerated.

However, I believe that while the applicants' action for damages against Belgium is still pending before the Belgian courts, [FN90] it cannot be said that the applicants have incurred a loss for which no reparation has been made and which, therefore, can give rise to the finding of just satisfaction within the meaning of Art.41 of the Convention.

FN90 See paras [28]-[37].

O-II12 The Court awards a sum of euro9,000 to the applicants together for costs and expenses in relation to the proceedings before the bodies of the Convention.

This figure is close to the amount claimed by the applicants, *i.e.* euro10, 000. According to the applicants, this amount constituted all the expenses incurred during the various proceedings in Belgium and the appeals in Strasbourg.

According to the Court's established case law, costs and expenses will not be awarded under Art.41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to *quantum*. Furthermore, legal costs are only recoverable in so far as they relate to the violation found. [FN91]

FN91 See, *e.g.* Beyeler v Italy: (2001) 33 E.H.R.R. 52, para.[27]; App. No.25701/94, Former King of Greece v Greece, November 28, 2002, para.[105].

I have no reason to doubt that the amount requested was actually incurred, was necessarily incurred and was reasonable as to *quantum*.

However, it should be borne in mind that although

the Court found that there had been a violation of Art.8 and Art.10 of the Convention, it dismissed all the other complaints made by the applicants. I do not deny that the complaints under Arts 8 and 10 concern the essential aspect of the application. Nevertheless, the fact that the other complaints were dismissed should, in my opinion, have given rise to a greater reduction in the amount sought by the applicants.

O-II13 *771 Having regard to the above, I have been obliged, to my regret, to vote against point 9 of the operative provisions.

Although I have not gone along with my colleagues all the way, I must stress that my disagreement with the majority relates after all only to a secondary aspect of the case.

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[1] Where the submission makes no reference to specific provisions, paragraphs, or pages, we indicate that the authority is cited "generally."

United States

1 *Branzburg v. Hayes*, 408 U.S. 665 (1972) (generally).
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=408&invol=665

2 *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=474&invol=15

3 *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=475&invol=673

4 *In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000).
http://web2.westlaw.com/find/default.wl?mt=Litigation&fn=_top&sv=Split&cite=199+F.3d+522&rp=%2ffind%2fdefault.wl&vr=2.0&rs=WLW5.12

5 *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983).
http://web2.westlaw.com/find/default.wl?mt=Litigation&fn=_top&sv=Split&cite=700+F.2d+70&rp=%2ffind%2fdefault.wl&vr=2.0&rs=WLW5.12

6. *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).
http://web2.westlaw.com/find/default.wl?mt=Litigation&fn=_top&sv=Split&cite=806+F.2d+1487&rp=%2ffind%2fdefault.wl&vr=2.0&rs=WLW5.12

7. *United States v. Criden*, 633 F.2d 346, 355-356, 358-359 (3rd Cir. 1981).
http://web2.westlaw.com/find/default.wl?mt=Litigation&fn=_top&sv=Split&cite=633+F+2d+346&rp=%2ffind%2fdefault.wl&vr=2.0&rs=WLW5.12

8. *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980).
http://web2.westlaw.com/find/default.wl?mt=Litigation&fn=_top&sv=Split&cite=630+F+2d+139&rp=%2ffind%2fdefault.wl&vr=2.0&rs=WLW5.12

9. *United States v. LaRouche*, 841 F.2d 1176, 1182 (1st Cir. 1988).
http://web2.westlaw.com/find/default.wl?mt=Litigation&fn=_top&sv=Split&cite=841+F.2d+1176&rp=%2ffind%2fdefault.wl&vr=2.0&rs=WLW5.12

10. *United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976).
http://web2.westlaw.com/find/default.wl?mt=Litigation&fn=_top&sv=Split&cite=542+F.2d+517&rp=%2ffind%2fdefault.wl&vr=2.0&rs=WLW5.12

11. *United States v. Rainone*, 32 F. 3d 1203, 1207 (7th Cir. 1994)
http://web2.westlaw.com/find/default.wl?mt=Litigation&fn=_top&sv=Split&cite=32+F.+3d+1203&rp=%2ffind%2fdefault.wl&vr=2.0&rs=WLW5.12

European Court of Human Rights

1. *Goodwin v. UK*, [1996] 22 ECHR 123 at paragraph 39. http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Goodwin%20%7C%20v.%20%7C%20UK&sessionid=5048819&skin=hudoc-en

2. *Ernst and others v. Belgium*, [2003] ECHR 359 (generally). http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=ernst%20%7C%20belgique&sessionid=5037101&skin=hudoc-fr (English version attached)

ICTR

1. *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, "Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges," 2 September 2005, at paragraph 13. http://65.18.216.88/ENGLISH/cases/Bizimungu/decisions/020905.htm

ICTY

1. *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR 73.9, 11 December 2002, paragraphs 36, 40 and generally. http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm

2. *Prosecutor v Milosevic*, Case No. IT-02-54-AR 73.3 Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 (generally). http://www.un.org/icty/milosevic/appeal/decision-e/23102002.htm

II. Conventions

1. European Convention on Human Rights, Article 10. http://conventions.coe.int/treaty/en/Treaties/Html/005.htm

III. Other Authorities

1. UN Security Counsel Resolution 1181 (1998) (generally). http://www.un.org/Docs/scres/1998/scres98.htm

2. General Assembly's Declaration on Human Rights Defenders, 9 December 1998, A/RES/53/144 (generally). http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En?OpenDocument

3. Promotion and Protection of Human Rights Defenders, Economic and Social Council, 58th Session (2002), paragraph 17.
http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.2002.23++E.CN.4.2002.200.En?Opendocument

4. Recommendation No. R(2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (adopted 8 March 2000) (generally).
http://www.fondspascaldecroos.com/organisaties/officiele_instanties/bronnen3.html

6. National Union of Journalists Code of Conduct, Principle 7.
http://media.gn.apc.org/nujcode.html

7. Submissions: Review of the Uniform Evidence Acts – Non Disclosure of Confidential Sources by Journalists, 30 September 2005 (generally).
http://www.corrs.com.au/corrs/website/web.nsf/Content/Pub_LT_CorrsMedia_231105_Submission_concerning_journalists_sources/$FILE/Submissions_concerning_journalists_sources.pdf