SCSL-04-15-T
(25086-25154)

637)

25086

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:
Hon. Justice Bankole Thompson, Presiding
Hon. Justice Benjamin Itoe,
Hon. Justice Pierre Boutet

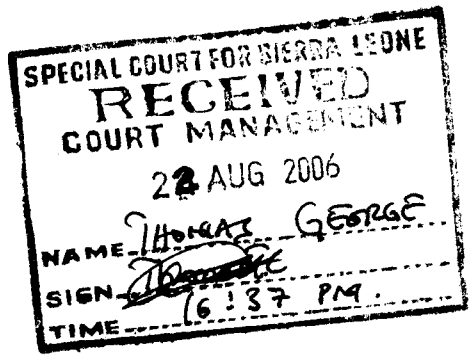
Registrar: **Mr. Lovemore Green Munlo, SC**

Date filed: **22nd August 2006**

The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao



Case No: SCSL – 04 – 15 – T

PUBLIC

APPLICATION FOR LEAVE TO APPEAL THE DECISION (3rd AUGUST 2006) ON DEFENCE MOTION FOR CLARIFICATION AND FOR A RULING THAT THE DEFENCE HAS BEEN DENIED CROSS–EXAMINATION OPPORTUNITIES

Office of the Prosecutor
Christopher Staker
James Johnson
Peter Harrison

Defence
Wayne Jordash
Sareta Ashraph

Defence Counsel for Kallon; Shekou Touray and Charles Taku
Defence Counsel for Gbao; Andreas O'Shea and John Cammegh

1. The Defence for Issa Sesay (the "Defence") submit that the Decision (3rd August 2006) on Defence Motion[1] ("The Motion") for Clarification and for a Ruling that the Defence has been denied Cross-Examination Opportunities (the "Decision") undermines the Accused's rights to a fair trial pursuant to Article 17 of the Statute of the Special Court for Sierra Leone (the "Statute"). It is submitted that the Trial Chamber has erred in law by failing to grant the motion for clarification. The clarification would have facilitated the administration of justice and the circumstances were therefore exceptional.[2]

2. The administration of justice would have been facilitated by an unequivocal statement from the Trial Chamber indicating whether the Defence right to apply for the recall of witnesses, relying only upon a lack of notice, had been prohibited or limited by previous rulings. The issue which required clarification concerned whether the Defence were estopped from asserting a lack of notice as support for an application for the recall of witnesses[3]. This apparent prohibition can be reasonably inferred from the earlier rulings which repeatedly state that the first Accused has sufficient notice of all factual allegations embodied in the supplemental evidence and is "estopped from asserting the contrary".[4] The envisaged clarification would have provided the Defence with an unambiguous indication, concerning the application of the stated prohibition, namely whether it was intended to apply to all applications for discretionary relief. Moreover it would have provided practical guidance as to whether and how it restricted reliance upon lack of notice as the basis for requesting recall.

3. The suggestion that the prohibition is a general one arises from either a literal or purposive interpretation of the rulings. However the prohibition was stated in the context of applications to exclude evidence, and not those seeking the recall of witnesses. The Defence can discern no intended restriction on the applicability of the prohibition and there appears to be no logical reason to prohibit the Defence from asserting a lack of notice in relation to one application for one type of discretionary remedy and not another. It is submitted that the Trial Chamber should have clarified whether the stated prohibition was applicable to an application for recall of witnesses.

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[1] *Prosecutor* v *Sesay et al.*, SCSL-04-15-T-588, "Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities" 29 June 2006.
[2] *Prosecutor v. Nahimana et al*, ICTR-99-52-A. "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order" 2 March 2004, para. 1.
[3] *See*, for example, the Motion, paras. 11, 18, 19, 20.
[4] *See*, *ibid*, para. 2.

4. The "clarification" which was provided by the Trial Chamber, namely that, "the recall of witnesses for cross – examination remains a discretionary matter for the Court"[5] was clarification which did not facilitate the administration of justice. The existence of this general discretion was uncontroversial and had not been questioned.

5. The application for leave to Appeal relates directly to the ability of the Defence to avail itself of discretionary remedies; which might have ameliorated some of the deficiencies in cross examination and some of the unfairness which may have arisen due to the Prosecution's ongoing disclosure program. The failure to clarify the issue has placed an unfair burden upon the Defence, which has been placed into the position of having to guess at the precise meaning and intended application of the prohibition. Thus procedural fairness, on an issue (recall) which can prove fundamental to a fair trial, has been denied. The Decision denies the Accused the right to an equality of arms, namely the right to a fair hearing and a *reasonable opportunity* to present his case. It thus readily satisfies the criteria of "exceptional circumstances and irreparable prejudice" in order to satisfy the grant of leave to appeal test, as outlined by Trial Chamber I.[6]

Background to the Application for Leave

6. On the 3rd May 2006 the Defence filed a Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities (the "Motion"). The Defence sought clarification on whether the rulings, stating that the Defence had notice of all supplementary allegations and were estopped from asserting the contrary, was intended to preclude *any* assertion relied upon as the basis for an application for the recall of witnesses. The Defence made clear that it *wished* to assert that the lack of notice had led to deficiencies in cross examination which might, in part be remedied by the recall of witnesses.[7]

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[5] *See*, the Decision, para. 5.
[6] *See*, *Prosecutor* v *Sesay et al.*, SCSL-04-15-T-357 "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141" 28 April 2005 and *Prosecutor* v *Sesay et al.*, SCSL-04-15-T-401 "Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay – Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America And the Office of the Prosecutor" 15 June 2005.
[7] The Motion, paras. 10 – 21.

7. On the 10th July 2006 the Prosecution filed their Response[8] ("The Response") in which they implicitly conceded that the supplemental statements containing hitherto unknown or undisclosed facts might "be relevant in determining whether there is good cause for permitting the Defence to recall" a witness.[9] This was the first admission by the Prosecution that its rolling disclosure program could have caused any prejudice, other than the denial of adequate time to prepare and investigate the *new* factual allegation.[10] In the Reply[11] dated 17th July 2006 ("the Reply") the Defence noted that this belated admission created further confusion which was further evidence of the need for the Trial Chamber to clarify its earlier rulings, which had been based on supposed *bona fides* submissions by the Prosecution wherein they had vigorously and repeatedly contested the possibility or existence of any wider prejudice.[12]

The Decision

8. The Trial Chamber ruled that:

(i) It is satisfied "that, in the circumstances, this Chamber's relevant jurisprudence on the issue of supplemental witness statements disclosed by the Prosecution is clear and unambiguous and does not need to be further clarified by this Chamber"[13]

(ii) "Observing that the recall of a witness for cross-examination remains a discretionary matter for the Court....Pursuant to Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 54, 66, 73 and 89 of the Rules".[14]

The Applicable Law

Application for Leave

9. The applicable law has been outlined in a number of decisions. The subject of leave for interlocutory appeal is governed by Rule 73(B) which states as follows:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such appeal should be sought within 3

[8] *Prosecutor* v *Sesay et al.*, SCSL-04-15-T-593 "Prosecution Response to Sesay Motion that the Defence has been Denied Cross-Examination Opportunities" 10 July 2006
[9] *Ibid*, para. 13.
[10] *See, Prosecutor* v *Sesay et al.*, SCSL-04-15-T-604 "Defence Reply to the Prosecution Response to Sesay Motion that the Defence has been Denied Cross-Examination Opportunities" 17 July 2006, para. 4.
[11] *Prosecutor* v *Sesay et al.*, SCSL-04-15-T-604 "Defence Reply to the Prosecution Response to Sesay Motion that the Defence has been Denied Cross-Examination Opportunities" 10 July 2006.
[12] *See, ibid,* paras. 10 – 21.
[13] *See*, para. 5 of the Decision at p.4.
[14] *Ibid.*

days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders

10. As emphasised by Trial Chamber I Rule 73(B) is restrictive and "the applicant's case must reach a level of exceptional circumstances and irreparable prejudice" to satisfy the conjunctive requirement provided by the Rule"[15]

11. Trial Chamber I has also indicated that, "Exceptional circumstances" may exist depending upon the particular facts and circumstances, where for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the Appellate level would be conclusive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems"[16]

Equality of Arms

12. The principle of equality of arms "must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber".[17] The principle of equality of arms is one of the elements of the broader concept of a fair trial.[18] The purpose behind the principle remains the same – to give to each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed.[19] It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality. The principle, derived from the jurisprudence of the European Court of Human Rights, obligates a judicial body to ensure that, "each party must have a reasonable opportunity to defend its interests under conditions which do not place him at a substantial

[15] *See, supra*, note 6, *Prosecutor* v *Sesay et al.*, SCSL-04-15-T-401, paras. 14, 15.
[16] *Ibid*, para. 16.
[17] *Prosecutor v. Tadic*, IT-94-1-A, "Judgement" 15 July 1999, para. 47.
[18] G.B. v. France (Application no. 44069/98), 2 October 2001, para. 58.
[19] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, "Decision on Application by Mario Cerkez for Extension of Time to File his Respondent's Brief", 11 September 2001, para. 7.

disadvantage vis – a – vis his opponent".[20] Moreover in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities... the Court's task is to ascertain whether the decision making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused"[21]

Equality of Arms - *Responsibility of the Tribunal*

13. The role of any Trial Chamber is to "conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision".[22]

Merits

Submissions on Application for Leave to Appeal the Decision

Exceptional Circumstances

14. It is submitted that a reasonable interpretation, whether read literally or purposively, of the earlier rulings (concerning applications for exclusion of supplemental evidence) is that the Defence are prohibited from asserting that it had insufficient notice of supplemental allegations. This is the basis upon which the Defence want to rely to persuade the Trial Chamber to allow recall of particular witnesses. The Defence would wish to allege that lack of notice has rendered cross examination ineffective and this might in part be remedied by recall.

15. The Decision not only fails to offer any clarification on the extent of the application of the prohibition but arguably creates further confusion. On the one hand no clarification is offered concerning whether the Defence are prohibited from asserting lack of notice as the basis for an application for recall. This lack of clarity is compounded by the Decision, which appears to contradict the logic of the prohibition, by suggesting that the recall of a witness for cross–examination remains a discretionary matter for the Court.[23]

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[20] *Supra*, note 17, paras. 43, 44, 48, 52.
[21] Atlan v. The United Kingdom Application no. 36533/97, 19 June 2001 paras. 40, 41.
[22] Kraska v. Switzerland Application no. 13942/88, 19 April 1993, para. 30, as approved in *Prosecutor v. Delalic*, IT-96-21-T, "Decision on the Motion of the Joint Request of the Accused Persons regarding the Presentation of Evidence Dated 24 May 1998" 12 June 1998, Para. 47.
[23] *See*, the Decision, para. 5.

The Trial Chamber's stated reasoning

16. The Trial Chamber's reasoning provides little assistance in ascertaining how the Decision was reached or how the prohibition could *not* be of general application. In particular the Court notes:

(i) ***"Mindful of this Chamber's previous Decisions concerning disclosure of supplemental witness statements and the requirement that it must be demonstrated that there has been a breach of Rule 66 of the Rules on the part of the Prosecution".***[24] It is difficult to ascertain the exact relevance of this statement of principle to the Decision since the Motion did not involve any assertion that there had been a breach of Rule 66. The Defence are unable to assert such a breach given the jurisprudence of Trial Chamber I, which suggests that all supplemental evidence is admissible, whenever it is disclosed, provided that the Defence have adequate time to investigate and prepare for the evidence. However the fact that the Trial Chamber felt constrained to reiterate this principle would further suggest that the prohibition applies to all supplemental evidence wherein no breach of Rule 66 had been demonstrated. This would appear to support an interpretation that the prohibition is of general application, since all the factual allegations disclosed throughout the Prosecution case in the form of "so-called proofing notes" have been found to have been served pursuant to Rule 66.

(ii) ***"Mindful that, one principle emerging from such Decisions is that as the primary charging instrument, the indictment itself, together with the Prosecution Pre-Trial Brief and Supplemental Pre-Trial Brief, has already served notice on the Accused as to the material facts alleged in the charges against him"***[25] It is difficult to ascertain the precise relevance of this emerging (and uncontroversial) principle, that the instruments *should* serve notice as to the material facts. The principle appears to offer nothing by way of clarification on the present issues. The reliance of the Trial Chamber on this principle as part of its reasoning could perhaps be taken as a reiteration of the oft repeated rebuttal of Defence claims to ongoing prejudice. In other words it is a re-enunciation of the Trial Chamber's view that the Defence, through these documents, have been provided with sufficient notice of all supplemental factual allegations. This would appear to support an interpretation that the prohibition is applicable to all discretionary applications.

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[24]The Decision, para. 2.
[25]The Decision, para. 3.

(iii) ***"... that the obligation of disclosure by the Prosecution of the evidence in its custody which it intends to introduce to establish material facts of the charges and the allegations contained in the indictment does differ from, and should not be confused with its obligation to state the material facts constituting the charges against the accused persons in the indictment and as to the form and contents of the indictment***".[26] The Defence can not discern a meaning to this assertion other than *evidence* is distinct from the *allegations* contained in the charges (as outlined in the indictment). This is uncontroversial. This principle does not provide any elucidation on the central issue of whether the Trial Chamber's previous rulings are clear nor does it provide any obvious basis or reasoning to support the conclusion that the "relevant jurisprudence on the issue of supplemental witness statements disclosed is clear and unambiguous".[27] The meaning which can be discerned would appear to suggest that the Prosecution do not have any duty to serve their evidence within any particular time frame. It appears to suggest that their obligation to provide notice to the Defence begins and ends with their disclosure of the indictment. In other words it implies that the Defence are prohibited from asserting a lack of notice based only upon service of supplemental evidence.

17. It is submitted that the correct and appropriate exercise of judicial discretion in relation to the Motion, bearing in mind Article 17 of the Statute and the sacrosanct requirement that the Accused should have a fair trial, conducted by a fair and independent tribunal, in full procedural equality, is that the Trial Chamber had a duty to provide a proper explanation of the applicability of the prohibition so that the Defence could properly understand its applicability and fully comply with its terms. At no stage have the Trial Chamber explained the applicability of the prohibition. At no stage have the Trial Chamber suggested it was or was not of general application.

18. The role of any Trial Chamber is to "conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision".[28] The corollary to this is that the Trial Chamber has a duty to properly explain what its rulings mean and the full extent of their application. This

[26]The Decision, pp. 3 and 4 (24948 – 24949)
[27]The Decision, at Para. 4.
[28] *Supra*, note 22, para. 47.

obligation must be a strict one when the rulings appear to limit the discretionary remedies ordinarily available to an accused. The obligation must mean that a party is able to fully and in full knowledge be able to approach the Trial Chamber to properly avail itself of procedural remedies which would assist in advancing its case.

19. As noted above the purpose behind the equality of arms principle is that it ought, when properly applied, to provide each party with equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed. It is submitted that the Decision fails to provide the Accused with any opportunity to seek procedural relief, without the risk of breaching a stated prohibition. The clarification sought and denied could have provided the Accused with real, rather than illusory, access to potentially essential relief.

20. The Decision therefore goes to the heart of the role of the judiciary at the Special Court and International Tribunals in general and to the correct interpretation of the role of Trial Chambers in holding the balance of procedural fairness to ensure effective access to procedural relief. It therefore involves issues which are exceptional and leave ought to be granted to allow these issues to be properly considered.

Irreparable Prejudice

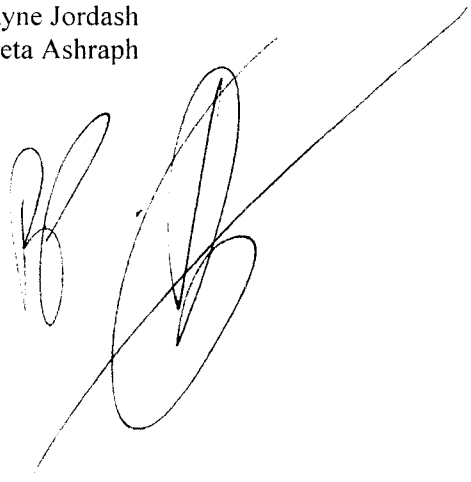
21. The issues relate to fair trial procedural rights, namely the discretionary right to apply to a Trial Chamber for the recall of witnesses to allow for the remedy of deficiencies in cross examination. The Decision fails to deal with the central issue: are the Defence prohibited from applying for recall when the basis for the application is an asserted lack of notice? The failure to provide the necessary clarification places the Defence in an impossible situation, either in breach of a stated prohibition or without access to procedural rights which might, in full efficacy, secure the Accused's eventual acquittal on charges relating to serious violations of international law. In the event that the Defence are not able to enjoy well informed access to this discretionary remedy there potentially arises irreparable prejudice, notwithstanding the right to an appeal against conviction.

Request

22. The Defence thus request Leave to Appeal the Decision pursuant to Rule 73(B).

Dated 22nd August 2006

Wayne Jordash
Sareta Ashraph



Book of Authorities

Decisions and Orders

Prosecutor v Sesay et al., SCSL-04-15-T-357 "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141" 28 April 2005

Prosecutor v Sesay et al., SCSL-04-15-T-401 "Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay – Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor" 15 June 2005.

Motions, Responses and Replies

Prosecutor v Sesay et al., SCSL-04-15-T-604 "Defence Reply to the Prosecution Response to Sesay Motion that the Defence has been Denied Cross-Examination Opportunities" 17 July 2006.

Prosecutor v Sesay et al., SCSL-04-15-T-593 "Prosecution Response to Sesay Motion that the Defence has been Denied Cross-Examination Opportunities" 10 July 2006

Prosecutor v Sesay et al., SCSL-04-15-T-588, "Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities" 29 June 2006.

Prosecutor v Sesay et al., SCSL-04-15-T-604 "Defence Reply to the Prosecution Response to Sesay Motion that the Defence has been Denied Cross-Examination Opportunities" 10 July 2006.

ICTR

Prosecutor v. Nahimana et al, ICTR-99-52-A. "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order" 2 March 2004. www.ictr.org

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Prosecutor v. Kordic and Cerkez, IT-95-14/2-A, "Decision on Application by Mario Cerkez for Extension of Time to File his Respondent's Brief" 11 September 2001.
http://www.un.org/icty/kordic/appeal/decision-e/10911BR316286.htm

Prosecutor v. Tadic, IT-94-1-A, "Judgement" 15 July 1999.
http://www.un.org/icty/tadic/appeal/judgement/index.htm

Prosecutor v. Delalic, IT-96-21-T, "Decision on the Motion of the Joint Request of the Accused Persons regarding the Presentation of Evidence Dated 24 May 1998" 12 June 1998.
http://www.un.org/icty/celebici/trialc2/decision-e/80612EV2.htm

European Court of Human Rights

G.B. v. France, Application no. 44069/98, "Judgement" 2 October 2001.

Atlan v. The United Kingdom, Application no. 36533/97, "Judgement" 19 June 2001.

Kraska v. Switzerland, Application no. 13942/88, "Judgement" 19 April 1993.

Annexes

25098

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF G.B. v. FRANCE

(Application no. 44069/98)

JUDGMENT

STRASBOURG

2 October 2001

FINAL

02/01/2002

25099

In the case of G.B. v. France,

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

Mr W. FUHRMANN, *President*,
Mr J.-P. COSTA,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 16 May 2000 and 11 September 2001,

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

PROCEDURE

1. The case originated in an application (no. 44069/98) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr G.B. ("the applicant"), on 30 July 1998.

2. The applicant was represented by Mrs C. Waquet, of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs. The President of the Chamber acceded to the applicant's request not to have his identity disclosed (Rule 47 § 3 of the Rules of Court).

3. Relying in particular on Article 6 §§ 1 and 3 (b) of the Convention, the applicant complained of an infringement of the principle of equality of arms and the rights of the defence, firstly, in that, at the beginning of his trial at the Assize Court, the prosecution had filed documents that had never been brought to his notice and, secondly, in that the Assize Court had refused to order a further expert opinion when the expert contradicted his written report in the course of his oral submissions.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 16 May 2000 taken in the light of the parties' written observations, the application was declared partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry]. The Court decided that no hearing was necessary (Rule 59 § 2).

7. The Court also asked the Government to produce the documents filed by the prosecution at the start of the trial at the Assize Court.

8. On 27 July 2000 the Government filed the documents requested along with further observations on the merits of the application.

9. On 15 September 2000 the applicant's lawyer filed further observations in reply to those of the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The investigation proceedings

10. In the course of a judicial investigation concerning the applicant, his wife, his former brother-in-law and one of his nephews, the applicant was remanded in custody on 16 June 1993 and charged with rape of a child under 15 (his niece), sexual assaults on children under 15 (his nephews) and a number of further counts of sexual assault.

On 16 September 1993 the investigating judge at the Lorient *tribunal de grande instance* ordered medico-psychological examinations of the applicant's niece and all the persons under investigation. He appointed two doctors, named Gautier and Daumer, for that purpose.

11. The two doctors were informed of the applicant's criminal record. In addition to a number of prison sentences, this included an investigation opened in 1989 into charges against the applicant of sexual interference with the daughter of his brother-in-law's sister.

12. On 29 October 1993 the experts filed their report on the applicant. They stated, among other things, that although the applicant, by his own admission, did have fantasist and even mythomaniac tendencies, these were not obviously pathological in nature, as had been shown two years previously by his statements regarding the relations between P.H. and K.S, two of the victims.

13. The doctors concluded as follows:

> "1. Our examination of G.B. has revealed psychopathic traits and signs of sexual perversion for which objective evidence is provided by his statements regarding P.H. and C.H.

2. The offence of which he stands accused with respect to C.H. and P.H. is linked to a state of sexual perversion. It is difficult to assess the extent or the nature of this state in so far as the accused presents the facts as isolated incidents. He denies raping K.S. and so it is not possible to address that issue from a clinical viewpoint.

3. The subject is not in a dangerous state in the psychiatric sense.

4. It would not be inappropriate to impose a criminal penalty on him.

5. Rehabilitation will not pose a problem, but a cure will depend on clearer identification of the subject's underlying sexual problem.

6. The subject was not insane within the meaning of (former) Article 64 of the Criminal Code when committing the offences of which he stands accused.

7. His state is not such as to require confinement or psychotherapeutic assistance."

14. In November 1993 the experts' conclusions were served on the applicant. The applicant's detention pending trial was extended several times during the investigation of the case.

15. On 19 October 1995 the applicant and his co-defendants (J.C.H., C.H. and S.C., the applicant's wife) were committed for trial at the Morbihan Assize Court by a judgment delivered by the Indictment Division of the Rennes Court of Appeal. The Indictment Division pointed out, in particular, that the applicant had initially denied any sexual abuse of his niece and nephews and then admitted to the conduct of which he was accused only to retract that admission. It related what had been said during the examination of the applicant's niece on the one hand and his nephews on the other, the latter having also been accused of rape and sexual abuse by the niece. The Indictment Division also mentioned the previous convictions on the applicant's criminal record, namely driving under the influence of alcohol, insulting a member of the police force in the performance of his duties, a hit-and-run offence and a further conviction for driving under the influence of alcohol.

16. The applicant appealed on points of law against the decision to commit him for trial, drawing attention to the vagueness of the terms used in the operative provisions of that decision. In a judgment of 26 February 1996 the Court of Cassation rejected that appeal.

B. The trial

17. The trial at the Assize Court began on 13 March 1997. The registrar read out the decision of the Indictment Division committing the applicant for trial. At that point the advocate-general stated that he wished to file certain documents regarding the personality of the defendants, including the applicant, and relating primarily to offences reported in 1979 and 1980.

18. The documents in question were records of evidence taken from witnesses, a procedural report by a police superintendent, a psychiatric report on the applicant at the age of 17 and a judgment relating to educational assistance. They comprised mainly a description of the applicant's sexual conduct when he was a minor and information about his family background. They related firstly to a charge of indecent assault on a girl under 15 brought against him in 1979 in proceedings during which the applicant had said that he had done the same thing "at least a dozen times both with little girls and with little boys aged between 7 and 9" and, secondly, to several counts of indecent assault without violence on three children under the age of 15. The proceedings concerning these offences, brought in 1979, and those mentioned above were discontinued.

19. The applicant's lawyer objected to the filing of those documents and requested an adjournment to prepare a pleading to that effect. The hearing was adjourned for thirty-five minutes. The applicant's lawyer lodged an application for all the documents to be rejected on the ground that they related to offences that were subject to limitation and had occurred prior to various amnesty laws which could apply to them. According to the defence, the documents were so old that they contravened the principle that a defendant's antecedents were inadmissible in evidence against him.

20. In an interlocutory judgment delivered on the same day the Assize Court rejected that application on the following grounds:

> "... The prosecution, like every other party to a criminal trial, is entitled to produce at the hearing any documents that appear to be helpful in establishing the truth provided that they relate to the offences of which the defendants stand accused and shed light on their personality.
>
> Provided that they are communicated to all the parties and can thus be examined adversarially, the production of such documents cannot have any adverse effect on the rights of the defence. ..."

21. Copies of the documents filed by the prosecution were distributed to each of the civil parties' lawyers and the defence lawyers but the case was not adjourned.

22. When the examination of the defendants began as to their backgrounds, the applicant's hearing was deliberately put back until the end of the afternoon. Exercising his discretionary powers, the President of the Assize Court called a teacher of children with special needs as a witness to be heard for information purposes only. Following that hearing, the respective lawyers of C.H., who stood accused along with the applicant, and of P.H. declared that they were bringing civil-party proceedings on their clients' behalf and made a written application.

The trial was adjourned.

23. At the beginning of the afternoon the lawyer representing the applicant's wife in turn applied for the investigation to be reopened to take

account of the documents relating to her that had been filed by the prosecution. Those documents included a judgment delivered by the Lorient *tribunal de grande instance* in 1996, records of the hearing by that court's registrar and written statements by S.C. The applicant's wife's lawyer requested that in the course of the reopened investigation the statements on the proceedings made by Mr and Mrs B. in the documents filed by the prosecution be added to the file. Failing that, the trial would have to be adjourned to a subsequent session. In support of his requests, the lawyer relied on the requirement of a fair trial.

24. In an interlocutory judgment the Assize Court deferred its decision on the above application pending completion of the hearing of evidence. The President continued his examination of the defendants until 6 p.m. with one short adjournment of fifteen minutes. At 6.20 p.m. the examination of the defendants resumed and thereafter a witness was heard.

25. Lastly, on the evening of the first day of the trial, that is on 13 March 1997, the Court heard one of the experts who had been appointed to prepare an opinion during the pre-trial investigation. He made an oral presentation of the report he had submitted on 29 October 1993 during the investigation proceedings (see paragraph 13 above).

26. The President then adjourned the proceedings for fifteen minutes during which the expert studied the new documents produced by the prosecution.

27. As soon as the hearing of the expert resumed, the latter allegedly changed his opinion, stating, among other things, that the applicant was a "paedophile" and that "psychotherapy [was] necessary, but would be ineffective for the time being".

28. The examination of the expert lasted about two hours, at the end of which the President authorised him to withdraw permanently, a decision on which he had consulted the parties and to which none of them had raised any objection.

29. On the following day, 14 March 1997, the applicant's lawyer disputed the expert's oral submissions and applied for a second opinion, on the following grounds:

> "After ... one of the two experts appointed by the investigating judge had made his statement before the Assize Court, he was informed of the two discontinued sets of proceedings that had been brought against G.B., who is now 34, when he was 16 years old. The depositions made by G.B. at that time were read out to the expert. Immediately after being informed of those facts, of which he had been unaware when preparing his expert opinion, the expert radically altered his submissions, stating that:
>
> – in his view G.B. is unquestionably a paedophile;
>
> – psychotherapeutic treatment is necessary, but, given G.B.'s current state of mind, would be totally ineffective because he has no feelings of guilt;

– the length of a prison sentence has no effect on an individual of that type as the potential to be cured depends solely on a feeling of guilt, which G.B. lacks;

– in the absence of a feeling of guilt, there is a major risk that G.B. will reoffend even after a long sentence, meaning that imprisonment can only serve as a means of protecting society. ...

G.B. formally disputes the expert's oral submissions. A second opinion is indispensable. If it had considered it necessary, it was during the investigation that the prosecution should have filed the documents it produced at the beginning of the trial relating to proceedings brought over fifteen years ago. In that case the expert would have drawn up his report in the light of the evidence contained therein and G.B. would undoubtedly have requested a second opinion, prepared by two experts.

The Assize Court therefore heard an oral report that differed radically from the written report by the two experts.

Respect for the rights of the defence requires that a new expert opinion be ordered in the context of an application for the investigation to be reopened. Everyone has the right to a fair trial."

30. The lawyer also applied for the applicant's release on the ground that his client should not have to suffer the consequences of the prosecution's having taken three years and nine months to file documents that it considered indispensable.

31. In an interlocutory judgment of 14 March the Assize Court deferred its decision on the application for further investigative measures pending completion of the hearing of evidence and rejected the application for release on the ground that detention was "necessary to ensure that the defendant remain[ed] at the disposal of the judicial authorities".

32. The President continued to examine the defendants and obtained their statements. After that he took evidence from the applicant's mother, from a person sentenced for a serious crime and from eight witnesses.

33. The applicant's lawyer then reiterated his previous submissions while his wife's lawyer withdrew the interlocutory application he had lodged with the Assize Court.

34. On 15 March 1997 the Assize Court took formal note of the withdrawal by S.C.'s lawyer. On 15 March 1997, after a procedural defect vitiating the interlocutory application made by the applicant's lawyer had in the meantime been cured, the Assize Court nevertheless refused it. It made the following points regarding the complaint of an infringement of the rights of the defence:

"Firstly, the new documents produced by the prosecution and duly communicated to each of the parties to the proceedings could have been contested, particularly by G.B., whether directly or through the intermediary of his counsel.

Secondly, once the above documents had been brought to the notice of the expert ... and he had completed the presentation of his report, G.B. and his counsel were in a

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position to request any further information or explanations from him that they required.

Thus it cannot legitimately be argued that the production of new documents and their consideration by the psychiatric expert were capable of infringing the rights of the defence.

At all events, in view of the outcome of the oral examination at the hearing, it does not seem essential for the establishment of the truth to seek a second psychiatric opinion.

Consequently, there is no cause for the proceedings to be adjourned ..."

35. The Assize Court also rejected the applicant's application for release.

36. On 15 March 1997 the Assize Court sentenced the applicant to eighteen years' imprisonment for a number of counts of raping his niece, a child under 15, sexually assaulting a girl under 15 and sexually assaulting his nephews. The sentences imposed on the three other co-defendants were less severe (ten years' imprisonment, a fully suspended five-year prison sentence with probation, and a five-year prison sentence, one year of which was suspended with probation).

37. The applicant appealed on points of law. In his first ground of appeal he argued that the Assize Court's consenting to file the documents produced by the prosecution amounted to a violation of his right to a fair trial, particularly the principle of equality of arms, since his lawyer had only had half a day to study the documents in issue whereas the prosecution had had them for some time. Relying also on Article 6 of the Convention, the applicant submitted another plea regarding the Assize Court's refusal to order a second opinion. He argued that the examination by the expert of the new documents that had been produced at the hearing, which had made him radically change his initial submissions, required an effective second opinion for the sentence imposed to satisfy the legal requirement that it must be suited to the personality of the defendant.

38. In a judgment of 11 February 1998 the Criminal Division of the Court of Cassation rejected the appeal in its entirety. Regarding the grounds of appeal based on an infringement of the right to a fair trial, the Court of Cassation stated as follows:

"When, after the decision committing the defendant for trial had been read out, the advocate-general produced various documents including the records of a number of discontinued proceedings relating to the defendant, the defence objected and requested that those documents should not be filed.

As justification for its rejection of that request, the Assize Court stated that the prosecution, like every other party to criminal proceedings, is entitled to produce at the trial any documents that appear to afford assistance in establishing the truth in so far as they relate to the offences of which the defendants stand accused and shed light on their personality. If they have been communicated to all the parties so that there has

been an opportunity for adversarial argument about them, the production of such documents cannot legitimately be said to have any adverse effect on the rights of the defence.

In ruling to that effect, the Assize Court provided a legal basis for its decision without laying itself open to the objection raised in the ground of appeal because, the adversarial principle having been respected, no statutory or treaty provision prevented documents relating to offences subject to limitation but not covered by an amnesty being filed in that way. ...

As justification for its refusal to order the second expert opinion sought by the defence, the Court, having deferred its decision on the examination of that application, held, after taking evidence, that the requested measure was not indispensable for the establishment of the truth.

In ruling to that effect, the Assize Court, which was not obliged to respond to mere arguments in submissions, determined a matter over which it alone had jurisdiction, deciding that there was no reason to allow the application."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Hearings before assize courts

1. The Code of Criminal Procedure

39. The relevant provisions of the Code of Criminal Procedure on hearings before assize courts provide as follows:

Article 283

"If the investigation appears to him to be incomplete or if new evidence has emerged since its closure, the president may order any further inquiries he deems necessary. ..."

Article 287

"The president may, of his own motion or on an application by the public prosecutor, order cases which do not seem to him to be ready to be tried during the session in which they have been listed for hearing to be adjourned to a subsequent session."

Article 309

"The president shall be responsible for the proper management of the trial and shall direct the proceedings.

He shall reject anything that is calculated to undermine their dignity or prolong them without creating the hope of more certain results."

Article 310

"The president is vested with a discretionary power under which he may, on his honour and according to his conscience, take any steps that he believes may assist in establishing the truth. He may, if he deems it appropriate, place the matter before the court, which shall rule in accordance with the conditions set out in Article 316.

During the trial he may summon any person, where necessary by means of a warrant, and examine him, or demand to see any new evidence which he considers likely, in the light of argument at the trial, to assist in establishing the truth. Witnesses called in this way shall not be required to take an oath and their statements shall be regarded as being solely for information purposes."

Article 316
(in its wording prior to the Act of 15 June 2000 enhancing the presumption of innocence and victims' rights)

"All interlocutory issues shall be decided by the court, after the prosecution, the parties or their lawyers have been heard.

Interlocutory judgments may not prejudge the merits.

They may be challenged by means of an appeal on points of law, but only at the same time as the judgment on the merits."

Article 346

"Once the evidence has been heard, civil parties or their lawyers shall be heard. The prosecution shall make its submissions.

The defendant and his lawyer shall submit their defence pleadings.

Civil parties and the prosecution have the right to reply but the defendant or his lawyer shall always speak last."

2. Relevant case-law

40. According to the established case-law of the Criminal Division of the Court of Cassation (*Cass. crim.*) (see, in particular, *Cass. crim.* 13 May 1976, *Bulletin criminel* (*Bull. crim.*) no. 157, and *Cass. crim.* 4 May 1988, *Bull. crim.* no. 193):

"The prosecution shall be free to decide the content of its submissions. It shall be entitled to produce any documents and provide any explanations that it considers necessary, subject to the right of the parties concerned to reply."

41. According to other established precedents of the Criminal Division of the Court of Cassation (see, in particular, *Cass. crim.* 19 April 1972, *Bull. crim.* no. 132, and *Cass. crim.* 5 February 1992, *Bull. crim.* no. 51):

> "Under Article 287 of the Code of Criminal Procedure, defendants are not entitled *before* the opening of the trial to file an application for the case relating to them to be adjourned to a subsequent session."

B. Evidence given to trial courts by experts

42. Evidence given by experts is governed by the following provisions of the Code of Criminal Procedure:

Article 168

> "Experts shall, if necessary, give evidence in court on the results of their technical investigations, after swearing to assist the court on their honour and according to their conscience. When giving evidence, they may consult their report and its annexes.
>
> The president may, of his own motion or at the request of the prosecution, the parties or their counsel, ask experts any questions falling within the sphere of the task assigned to them.
>
> Following their statement, experts shall attend the hearing unless the president authorises them to withdraw."

Article 169

> "If at the hearing of a trial court a person heard as a witness or for information purposes contradicts the conclusions of an expert report or provides new technical insights, the president shall ask the experts, the prosecution, the defence and, if the case arises, the civil party, to submit their observations. The court shall declare in a reasoned decision either that the contradiction shall be disregarded or that the case shall be adjourned to a subsequent date. In the latter case, the court may order any measure it deems necessary with regard to the expert opinion."

C. Records of proceedings before assize courts

43. The provisions of the Code of Criminal Procedure relating to such records provide as follows:

Article 378

> "To ensure that the required formalities have been carried out, the registrar shall draw up a record which shall be signed by the president and the registrar.
>
> The record shall be drawn up and signed within three days at the latest of the delivery of judgment."

Article 379

"Unless the president orders otherwise, of his own motion or at the request of the prosecution or the parties, the record shall include neither the defendants' replies nor the content of depositions, subject nonetheless to the implementation of Article 333 regarding additions, changes or variations in witnesses' statements."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 AND 3 (b) OF THE CONVENTION

44. The applicant alleged violations of Article 6 §§ 1 and 3 (b) of the Convention, the relevant provisions of which provide:

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

...

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

...

(b) to have adequate time and facilities for the preparation of his defence;

..."

A. Submissions of the parties

45. The applicant complained that the principles of equality of arms and a fair trial had been infringed when the prosecution produced new evidence at the beginning of the trial at the Assize Court.

46. The applicant did not criticise the production of that evidence in itself but complained that his lawyer had not been given reasonable time to defend him properly in the light of the content of the documents produced. He pointed out in that connection that his lawyer had been granted only a 35-minute adjournment in which to prepare submissions calling for rejection of all the new evidence and then only half a day in which to study the documents in issue while at the same time having to follow the continuing proceedings. The applicant further observed that during the three and a half years of preliminary investigation, neither the prosecution nor the investigating judge had deemed it necessary to conduct any inquiries into the applicant's past. He also argued that the documents in issue, relating to

accusations levelled against him when he was a minor or had only just reached his majority, had shed a new and radically different light on his conduct, as evidenced by the reaction of the expert heard during the trial.

47. The applicant further submitted, with regard to the conditions in which the expert had been examined on the evidence, that, although the formal, written rules had been respected, the seeming respect had in fact led to a violation of the rights of the defence on account of the derisory length of time that the expert had been given – a quarter of an hour during the trial and without any real adjournment of the proceedings – to comment on new documents which had prompted him to change his mind so abruptly.

48. Lastly, the applicant submitted that the rejection of his application for a second opinion had constituted a breach of the rights of the defence because a second opinion had been essential in view both of the expert's volte-face and of the influence that the latter's abrupt change of mind might have had in establishing the defendant's criminal responsibility and deciding on the sentence most suited to him personally. On the latter point, the applicant noted that the sentence imposed on him (eighteen years' imprisonment) had been heavier than that imposed on the three other co-defendants (ten years' imprisonment, a five-year fully suspended prison sentence with probation and a five-year prison sentence one year of which was suspended with probation).

49. The applicant considered therefore that the proceedings before the Assize Court had been unfair.

50. Regarding the filing of documentary evidence by the prosecution, the Government argued that each party was free to submit whatever arguments it wished to the Assize Court. The latter did not decide the case on the written evidence but on the evidence adduced in court. While the defendant was free to choose his defence, the prosecution had the right to produce new evidence in support of its argument. The documents in issue in the instant case had been intended to provide information about the applicant's personality. The Government pointed out that the Assize Court had confirmed that possibility in its interlocutory judgment of 13 March 1997 and stated that the documents in issue had been communicated to the parties and there had been an opportunity to examine them adversarially.

51. In that connection, the Government observed that although, in his initial application, the applicant had criticised the filing of evidence taken from proceedings long before, he had narrowed the scope of that complaint in his further observations, merely alleging a lack of time to prepare his defence. The Government pointed out that the complaint in question had never been raised before the Assize Court. It was only after the expert had made his submissions, and having regard to the possible impact of his statements, that the applicant's lawyer applied for the investigation to be reopened and the hearing to be adjourned to a subsequent session.

52. As to the legality of the prosecution's conduct, the Government considered that the rights of the defence had been respected in the instant case. They noted in that connection that copies of the documents in issue had been distributed to each of the lawyers of the civil parties and the defence lawyers. Moreover, the examination of the applicant as to his background had been adjourned until the afternoon to give the applicant and his counsel the time they needed to study the new evidence. The applicant's lawyer had also been granted an adjournment to prepare his application to reject the documents in issue and had thus been able to criticise them. The defence had also been able to present its version of the facts on the second and third days of the trial and had been given the last word, in accordance with the provisions of Article 346 of the Code of Criminal Procedure. At all events, the Government pointed out that the applicant had not been unaware of the existence of those documents and that his sexual problems in adolescence had already been mentioned in the report on his personality drawn up by the investigating judge. No evidence had therefore been concealed.

53. Furthermore, with regard to the psychiatrist's evidence at the trial, the Government pointed out that psychiatric experts played no part in establishing whether defendants had committed the offences of which they were accused since their sole function was to help the court to arrive at a more informed opinion about the personality of the accused, so that it could determine, *inter alia*, his degree of responsibility at the material time. The expert's comments on the documents in issue came within the scope of his freedom of expression. The Government also pointed out that, as a skilled professional, the expert was entirely at liberty to assess the time he required to familiarise himself with the documents on the file that would provide him with useful information and form an opinion on their potential impact on his previous diagnosis. If the expert had thought the adjournment was not long enough, he would have asked for an extension or even for an adjournment until the following morning in view of the late hour at which he was examined. Moreover, it was impossible to know exactly what the expert had said in evidence because all proceedings before the Assize Court were oral. At all events and contrary to what the applicant asserted, the Government considered that the expert's oral evidence had not conflicted with his report, which had already pointed to the accused's psychopathic traits and signs of sexual perversion.

54. The Government also pointed out that the applicant had had an opportunity to contradict the psychiatric expert's comments freely because he had been able to exercise his right to examine him in accordance with Article 168 of the Code of Criminal Procedure. The Assize Court had not considered it necessary to allow the applicant's application for a second opinion to be ordered because nine other witnesses had been heard after the psychiatric expert. The Government argued that the right to a second

opinion was not an absolute right under the requirements of the Convention, the national courts being free to judge for themselves whether it was appropriate to order a second opinion.

55. Lastly, the Government asserted that the applicant's conviction had not been based solely on the expert's evidence at the trial and that the applicant had been able to put his arguments to the jury throughout the proceedings and make use of the remedies available to him. The documents in issue and the expert's oral evidence had been only a part of the evidence submitted to the jury.

B. The Court's assessment

56. The applicant complained under Article 6 §§ 1 and 3 (b) of the Convention that he had not had a fair trial before the Assize Court. The complaint can be divided into three parts: firstly, the applicant alleged an infringement of the principle of equality of arms and the rights of the defence on account of the circumstances in which the prosecution had filed new documents at the beginning of the trial in the Assize Court and the lack of time that his lawyer had had to prepare his defence thereafter; secondly, he complained that the expert had had only a quarter of an hour to study the new evidence, which nonetheless had caused him to effect a complete volte-face in his submissions; finally, the applicant considered it unfair of the Assize Court to reject his application for a second opinion when the expert's change of mind had strongly influenced the jury's opinion in a direction that was unfavourable to him.

57. Bearing in mind that the requirements of paragraph 3 (b) of Article 6 of the Convention amount to specific elements of the right to a fair trial guaranteed under paragraph 1, the Court will examine all the complaints under both provisions taken together (see, in particular, *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252, p. 16, § 31).

58. The Court reiterates that the principle of equality of arms relied on by the applicant – which is one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among many other authorities, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 107-08, § 23, and *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 102, ECHR 2000-VII).

59. The Court also points out that it is not within the province of the European Court to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which

evidence was taken, were fair (see the following judgments: *Edwards v. the United Kingdom*, 16 December 1992, Series A no. 247-B, pp. 34-35, § 34; *Mantovanelli v. France*, 18 March 1997, *Reports* 1997-II, pp. 436-37, § 34; and *Bernard v. France*, 23 April 1998, *Reports* 1998-II, p. 879, § 37).

1. The time afforded to the applicant's lawyer to prepare his defence following the production of new evidence by the prosecution

60. The Court notes that it was entirely lawful for the prosecution, at the beginning of the trial, to file new documents relating to the applicant's personality; these were communicated to the defence and subsequently examined adversarially. It also notes that the applicant himself did not criticise the production of those documents in itself. It finds therefore that this did not in itself give rise to any infringement of the principle of equality of arms between the parties.

61. The Court has also carefully analysed the sequence of events described in the record of proceedings before the Assize Court, noting that it was at the beginning of the trial, at 10 a.m. on 13 March 1997, that the deputy public prosecutor produced the new evidence, which the applicant's lawyer unsuccessfully asked the court to refuse to place in the file. On 13, 14 and 15 March there followed the examination of the defendants, the hearing of the witnesses and the expert, the civil parties' pleadings, the deputy public prosecutor's submissions, the pleadings of the co-defendants' lawyers and finally the pleadings by the lawyer of the main defendant, namely the applicant, which were submitted from 7.05 to 8.45 p.m. on 15 March 1997 and brought the hearing to a close (the court and the jury then retired to discuss the verdict, which they delivered some three hours later at 11.45 p.m.).

62. In that connection, the Court points out that it is not true that the applicant's lawyer had only half a day to read the new evidence (while following the continuing proceedings), as the applicant submitted. The half day in question was only the time between the production of the evidence and the beginning of the expert's evidence, the importance of which must be examined separately (see paragraphs 68 et seq. below).

63. In view of the foregoing, the Court considers that the applicant had adequate time and facilities to prepare his defence when faced with the new evidence and finds that in the instant case there has been no violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (b) on that account.

2. The time afforded to the expert to study the new evidence filed and the Assize Court's refusal to order a second opinion

64. The Court notes that the hearing of Dr Gautier, one of the experts appointed during the investigation, began in the late afternoon of 13 March

when he read out his written report. In that connection, the Court would point out that the psychiatric opinion ordered during the investigation was intended to determine whether the applicant suffered from any kind of mental or psychological anomaly and, if so, whether there was a link between that disorder and the offences of which he stood accused. It was also supposed to assess how dangerous the defendant was. The two experts appointed by the investigating judge concluded that the offences with which the applicant had been charged, and of which his nephews and niece, the alleged victims, had accused him, were linked with a state of sexual perversion. They stated, however, that it was difficult to assess the extent and nature of that perversion – in so far as the applicant presented the facts as isolated incidents – or to gauge the applicant's potential for rehabilitation since a cure would be possible only if his underlying sexual problems were more clearly identified. The experts also asserted that the applicant was not dangerous in the psychiatric sense of that term. Consequently, their written report was, though not favourable towards the applicant, at least mitigated.

65. The Court further notes that in the middle of his evidence to the Assize Court Dr Gautier was granted a fifteen-minute adjournment to examine the new documents produced by the prosecution relating, in particular, to the applicant's sexual conduct at the age of 16 and 17. The expert was thus able to study a statement dating from 1979 in which the applicant spontaneously admitted to having sexually interfered with young children of both sexes on a dozen or so occasions.

66. The applicant asserted that when the hearing resumed, the expert expressed a totally damning opinion about him that was entirely at odds with the written report he had prepared three and a half years earlier. The expert is alleged to have stated as follows:

> "G.B. is a paedophile, for whom psychotherapy is necessary but would be ineffective because G.B. would have no feelings of guilt. The length of a prison sentence has no effect on an individual of this type and there is a high risk that he will reoffend."

67. The Court concedes that it is impossible to know exactly what the expert said in evidence since there are no written records of hearings before assize courts. However, it notes that the Government have never disputed that the expert had a brief opportunity to study the new documents in the middle of his evidence or that he made the comments attributed to him by the applicant; they have merely pointed out that the written report had already drawn attention to the defendant's psychopathic traits and signs of sexual perversion.

68. The Court would point out that the mere fact that an expert expresses a different opinion to that in his written statement when addressing an assize court is not in itself an infringement of the principle of a fair trial (see, *mutatis mutandis*, *Bernard*, cited above, p. 880, § 40). Similarly, the right to a fair trial does not require that a national court should appoint, at the

request of the defence, a further expert even when the opinion of the expert appointed by the defence supports the prosecution case (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 22, § 46). Accordingly, the refusal to order a second opinion cannot in itself be regarded as unfair.

69. The Court notes, however, that in the instant case the expert not only expressed a different opinion when addressing the court from that set out in his written report – he completely changed his mind in the course of one and the same hearing (see, by way of contrast, *Bernard*, cited above). It also notes that the application for a second opinion lodged by the applicant followed this "volte-face" which the expert had effected having rapidly perused the new evidence, adopting a highly unfavourable stance towards the applicant. While it is difficult to ascertain what influence an expert's opinion may have had on the assessment of a jury, the Court considers it highly likely that such an abrupt turnaround would inevitably have lent the expert's opinion particular weight.

70. Having regard to these particular circumstances, namely the expert's volte-face, combined with the rejection of the application for a second opinion, the Court considers that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (b) of the Convention taken together.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. Article 41 of the Convention provides:

> "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

72. The applicant claimed 500,000 French francs (FRF) in respect of non-pecuniary damage.

73. The Government submitted that if the Court were to find a violation, that finding would in itself constitute sufficient compensation for the non-pecuniary damage sustained by the applicant.

74. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicant as having suffered a loss of real

opportunities (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). To this has to be added the non-pecuniary damage which the finding of a violation of the Convention in the present judgment is not sufficient to make good. Ruling on an equitable basis, in accordance with Article 41, it awards him FRF 90,000.

B. Costs and expenses

75. The applicant did not make any claim in this respect.

76. The Government expressed no view on the matter.

77. This being the case, the Court concludes that it is not necessary to reimburse the applicant's costs and expenses.

C. Default interest

78. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (b) of the Convention;

2. *Holds* that the respondent State is to pay the applicant, within three months, FRF 90,000 (ninety thousand French francs) in respect of non-pecuniary damage plus simple interest at an annual rate of 4.26% from the expiry of the above-mentioned three months until settlement;

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

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

S. DOLLÉ
Registrar

W. FUHRMANN
President

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF ATLAN v. THE UNITED KINGDOM

(*Application no. 36533/97*)

JUDGMENT

STRASBOURG

19 June 2001

FINAL

19/09/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

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In the case of Atlan v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 10 October 2000 and 29 May 2001,

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

PROCEDURE

1. The case originated in an application (no. 36533/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Armand Atlan ("the first applicant") and his son, Thierry Atlan ("the second applicant"), on 28 February 1997. The second applicant died in July 1998.

2. The applicants were represented before the Court by Mr H. Brown, a lawyer practising in Ruislip, Middlesex. The United Kingdom Government ("the Government") were represented by their Agent, Mr H. Llewellyn, Foreign and Commonwealth Office. On 13 October 2000 the French Government were informed of the application but they declined to intervene.

3. The applicants alleged that they had been denied a fair trial in breach of Article 6 § 1 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 10 October 2000 the Chamber declared the application admissible and decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. On 5 July 1991, at the Crown Court at Isleworth, Middlesex, the applicants and another man, Jean-Pierre Terrasson, were convicted of illegally importing 18 kilograms of cocaine (with a street value of GBP 2-3 million) into Heathrow Airport, London, on 3 November 1990.

8. The applicants and Mr Terrasson had been under surveillance by officers of Her Majesty's Customs and Excise for some five weeks prior to their arrest on 3 November 1990. On 29 September the three men were observed travelling to Copenhagen Airport. They did not leave the airport and almost immediately after arriving they checked in their luggage and returned to Heathrow. The second applicant (henceforth, "Thierry") and Mr Terrasson travelled to Brazil on 30 September, and the first applicant ("Armand") went to Los Angeles on 1 October. The two applicants returned to London on 30 October, when Armand was observed arriving at Heathrow carrying a black suitcase. On 2 November 1990 he met Thierry (who had been in France) and Mr Terrasson (coming from Brazil) at Heathrow.

9. On 3 November 1990 a man named Willi Smolny flew from Brazil to London via Copenhagen. He had with him a black suitcase containing 18 kilograms of cocaine.

10. That morning, the applicants went to Mr Terrasson's London hotel. Thierry was seen carrying a black suitcase similar to Mr Smolny's. Shortly thereafter he and Mr Terrasson left the hotel by taxi for Heathrow, carrying the black and a grey suitcase. At the airport they boarded a flight for Copenhagen, checking in the black suitcase in Mr Terrasson's name and the grey suitcase in Thierry's name. Immediately on their arrival in Copenhagen they checked themselves on to a return flight to Heathrow. Mr Smolny was also on this flight, although there was no evidence of contact between Mr Smolny, Thierry and Mr Terrasson.

11. When the aeroplane reached Heathrow, customs officers intercepted the luggage. They found that the two black suitcases were indeed very similar. Mr Smolny's suitcase was to contain 18 kilograms of cocaine. It was almost twice as heavy as the suitcase checked in by Mr Terrasson, which had a number of identifying tags attached to it.

12. The officers put the two suitcases back with the other luggage from the flight which passed for collection on to the carousel. One of the officers saw Thierry take Mr Smolny's suitcase from the carousel and put it onto Mr Terrasson's trolley. Mr Terrasson took this suitcase through the green,

"nothing to declare", channel at customs. Thierry also collected the grey suitcase, which he took through the green channel. The other black suitcase, which had been checked on to the flight by Mr Terrasson, was not collected from the carousel.

13. Mr Terrasson and Thierry were arrested by customs officers. Armand, who had not been on the flight or at the airport, was arrested later that day at the home of a relative in South London. All three men were interviewed and denied any knowledge of or participation in the offence. Armand said that he was an emerald and diamond dealer in England for a short time on his way to Antwerp. He claimed not to know Mr Terrasson and stated that he did not know anything about his son's trip to Copenhagen. Thierry said that he had previously travelled to Copenhagen in connection with the purchase of some jewels, but said that he had made the most recent trip to see a girlfriend. He also denied knowing Mr Terrasson, until customs officers told him that Mr Terrasson's credit cards had been found in the grey suitcase. Thierry then conceded that he had had a brief encounter with Mr Terrasson in Copenhagen. Mr Terrasson denied knowing either of the applicants or Mr Smolny. He said that he had travelled alone to Copenhagen, taking with him a black suitcase, to meet a married woman friend. He was unable to meet her because her husband was home, so he returned immediately to London. He claimed to have taken his own, not Mr Smolny's, black suitcase from the carousel. Mr Smolny was arrested later in Zurich. He said in interview that he had been instructed by a man called Mr Morgan to bring the black suitcase, which he believed to contain antiques, from Sao Paolo to Heathrow and to leave it on the luggage carousel.

14. In January 1991 "old-style" committal proceedings (requiring the prosecution witnesses to give oral evidence) were held at the Uxbridge Magistrates Court. Under cross-examination by the defence counsel, the customs case-officer claimed that the only relevant evidence held by the prosecution which had not been disclosed to the defence was two tapes of interviews with the applicants' South London relatives, two or three interpreters' statements and some material taken from the house where Armand had been arrested.

15. At the trial, which started in May 1991, the prosecution case was that Armand had organised the importation, using Mr Smolny as the courier from Brazil to Copenhagen and London, and that he had instructed Mr Terrasson, with Thierry as "minder", to collect Mr Smolny's suitcase at Heathrow as if in mistake for his own. There was no forensic, photographic or video evidence to substantiate the prosecution case, which relied to a large extent on the accounts given by customs officers of what they had observed.

16. All four defendants pleaded not guilty and gave evidence. The applicants maintained that Armand worked principally as a jewel trader, but

that he did not keep written records because he systematically avoided paying taxes and duties in Brazil. The illegality of his jewel trading had motivated their lies during their initial interviews with customs officers. The applicants' defence centred around a dispute between Armand and a rival jewel trader based in Brazil called Rudi Steiner. They stated that Armand had paid Mr Steiner USD 200,000 in advance for diamonds, which Mr Steiner had failed to deliver to the applicants as agreed in Copenhagen on three occasions: 28 August, 29 September and 3 November 1990. On this last occasion, since, as before, Mr Steiner did not appear, Thierry and Mr Terrasson, who had gone together to collect the diamonds, returned immediately to Heathrow, where Thierry removed Mr Terrasson's, not Mr Smolny's, suitcase from the carousel. The applicants contended that Mr Steiner was an informer for Customs and Excise. They claimed that, in order to avoid repaying his debt and for fear that the applicants would discredit him amongst other Brazilian traders following the non-delivery of the diamonds, he had arranged falsely to implicate them in the importation of cocaine. However, they had no evidence to connect Mr Steiner to Mr Molny's suitcase full of drugs or to substantiate the suggestion that he was a Customs and Excise informer.

17. Under cross-examination the customs officers involved in the case refused either to confirm or deny whether or not they had used an informer. No evidence relating to an informer or to Rudi Steiner was served on the defence or put before the judge.

18. In his summing up the judge summarised the defence by saying, *inter alia*:

> "...Steiner had long since either directly or through the Brazilian authorities informed British Customs and Excise that Armand Atlan and Thierry Atlan and Mr Terrasson were preparing to smuggle cocaine to England, and in that way had induced the Customs and Excise here to mount a prolonged and labour-intensive observation of those three men.
>
> On the Saturday, 3rd of November, Steiner sprang his trap. He got Morgan to send Smolny off with the suitcase ... with the drugs in it, believing it, of course, to be antiques and works of art.
>
> He got Armand Atlan to believe that it was worthwhile going for the third time to Copenhagen for a delivery of the diamonds and he notified Customs of the itinerary of the various people which was to be foreseen from these arrangements, and that is how the incident you have heard about on the afternoon of that day and indeed the observations of that day, came about.
>
> It follows from that account – if it is an accurate one – that Mr Steiner had some luck: firstly, Terrasson had a suitcase just like Morgan's. Possibly someone had observed Terrasson's suitcase and given a very exact description to Morgan or Steiner and they were able to get a duplicate.
>
> It would be difficult for Steiner to ask the British Customs and Excise about Terrasson's suitcase for that purpose, you may think, without revealing that he himself was engaged in setting them up.
>
> You may think that British Customs and Excise in Britain would agree – you may want to consider whether they would agree to co-operate on that basis in framing an

innocent group of foreigners of good character at the behest of an unknown Brazilian businessman like Steiner. ...

Just consider in your mind what it would be like to try and induce the British Customs Service, even as an English subject, to co-operate with you in such a way. ...

[I]t is worth just looking at the costs to Mr Steiner if Mr Atlan's story is right ... to see what was in it for Mr Steiner.

His costs: he provided initially some samples [of diamonds] worth seven or eight thousand ... US dollars. ... He lost the cost of sending [his representative] diagonally across the world and back [with the sample] with a bit of time in a hotel. ...

He lost the cost of Mr Smolny's fare in the Euro-class Sao Paolo/Copenhagen/London return, and he lost the cost of Mr Smolny's London hotel ... .

[T]he case is that he lost all those things and whatever is the cost of 18 kilograms of 90 plus percent pure cocaine in Brazil.

No doubt that cost is very, very much less than it would be in London, but ... you may think that 18 kilograms of high quality cocaine like that would cost a substantial sum, albeit nowhere near three million pounds, in the providing country.

I put those bits and pieces of information together because it is not altogether obvious when one just runs through the story that that is what the information amounts to, but you may think it does, and it may be relevant to considering the likelihood of somebody behaving in the way Mr Steiner is said to have done."

19. On 5 July 1991 the jury, by a majority of ten to one, convicted the applicants and Mr Terrasson of importing the cocaine. Mr Smolny was acquitted. On 12 October 1991, after an inquiry by the judge under the Drug Trafficking Proceedings Act 1986, Armand was sentenced to eighteen years' imprisonment and a confiscation order of GBP 1,918,489.60 with a further ten years' imprisonment to be served in default of payment. Thierry and Mr Terrasson both received sentences of thirteen years' imprisonment and Thierry was also ordered to pay a confiscation order of GBP 6,140.66 or serve a further six months in prison.

20. On 8 August 1991 the first applicant applied for leave to appeal against conviction. On 8 November 1991 the single judge refused his application. The first applicant renewed it before the Full Court of Appeal and the second applicant applied directly to that Court for leave to appeal against conviction. On 8 February 1994 a summary of the case was prepared by the Criminal Appeal Office.

21. In spring 1994 the applicants learned from the French press (*Libération*) that a Swiss undercover police officer, Commissioner Cattaneo, had written a report, called "the Mato Grosso Report", concerning his 1991 investigation into drug trafficking between Brazil and Europe. In early 1995 the applicants' solicitor obtained a copy of the report. It mentioned Rudi Steiner, describing him as one of three regular informers of the Brazilian, Danish and French police. He was said to have an interest in stolen jewels and a long-term involvement in the traffic from Brazil to Europe of large quantities of cocaine, which he was able freely to obtain from the Brazilian police. In a letter dated 4 December 1995, the Swiss Federal Police Office informed the applicants' solicitors that the report was

the property of the Tessin cantonal police and that in 1991 a meeting was held at Federal Police headquarters in Bern concerning the Mato Grosso investigation but that it was not possible to provide any further information in this connection. The applicants provided a copy of the report to the prosecution, which declined to confirm or deny its authenticity or the truth of its contents, and repeated that there was no undisclosed material relevant to the issues at trial.

22. The applicants added a further ground of appeal coupled with an application for leave to call fresh evidence. They maintained that the Mato Grosso Report substantiated their suggestion at trial that Mr Steiner had access both to stolen jewels and cocaine and that he had an established relationship with law enforcement agencies in Europe. In their submission, the fact that the jury had not had before it evidence relating to these matters, and the fact that the judge, ignorant of the true facts, had characterised Mr Steiner in his summing up as an unknown Brazilian businessman, rendered their convictions unsafe.

23. On or about 19 October 1995 the prosecution informed the defence that, contrary to earlier statements, unserved unused material did in fact exist, which the prosecution wished to place before the Court of Appeal in the absence of the applicants or their lawyers. The prosecution then applied *ex parte* to the Court of Appeal for a ruling whether it was entitled, on grounds of public interest immunity, not to disclose this material. The applicants objected to the holding of an *ex parte* hearing, in writing on 27 November 1995 and orally before the Court of Appeal on 7 December 1995, submitting *inter alia* that the court was a tribunal of both fact and law and could be adversely influenced by material which was wrong or inaccurate.

24. The Court of Appeal dismissed the objections and heard the prosecution's *ex parte* application. It decided not to rule on the application unless or until such time that, having considered the applicants' application to introduce new evidence, it became necessary to do so.

25. The hearing of the applications for leave to appeal against conviction and to bring new evidence commenced on 18 December 1995. The Court of Appeal indicated its view that the Mato Grosso Report would not be admissible in evidence because, *inter alia*, its author could not be found to vouch for its accuracy and be cross-examined on its contents.

26. At the applicants' request the hearing was adjourned on 19 December 1995 and legal aid was granted to enable their solicitor to travel to Italy where, it was believed, Rudi Steiner was in custody awaiting trial on a charge of smuggling cocaine. However, the Italian authorities were unwilling to assist the applicants without the backing of a formal letter of request from a competent authority. The applicants therefore applied to the Court of Appeal for a letter requesting the Italian authorities to give their solicitor access to the criminal proceedings there. On 10 June 1996 a

different constitution of the Court of Appeal ruled that in principle it had jurisdiction to issue such a letter of request. On 19 July 1996, however, the originally constituted court decided that the applicants' proposed request to the Italian authorities was too wide-ranging and, even if more restrictively drawn, unlikely to elicit information which would be either admissible or of assistance in the appeal. It therefore decided that it was not in the public interest to issue a letter of request, and adjourned the case until after the conclusion of Mr Steiner's trial in Italy in the Autumn of 1996. In the event, however, Mr Steiner was released on bail and his whereabouts were unknown at the time of the applicants' appeal hearing in February 1997.

27. The applicants' solicitor was able to obtain a number of documents relating to the Italian proceedings, including transcripts of interviews with Mr Steiner, arrest warrants and a list of his previous convictions. He was also able to obtain a statement from Commissioner Cattaneo, the Swiss police officer who had prepared the Mato Grosso Report. In his statement the Commissioner confirmed the authenticity of the report. He stated that he had been introduced to Mr Steiner by a Danish police officer and had become Mr Steiner's "handler", passing information to the British authorities during the investigation into the applicants. According to the Commissioner's statement, his British "contact" had been a customs officer named Martin Crago, whom he had contacted at the British Embassy in Brasilia. He believed that Mr Steiner had spoken to Mr Crago several times and had sought payment for information he had given him. The Commissioner concluded by indicating that he would be willing to appear as a witness in the Court of Appeal.

28. On 10 January 1997 the applicants added a further ground of appeal, alleging that the prosecution had failed to make full disclosure of the evidence in its possession concerning Mr Steiner, and that the lack of full disclosure rendered their convictions unsafe.

29. The day before the hearing of the appeal, Commissioner Catteneo informed the defence lawyers that his superiors in the Swiss Police Force had refused him authorisation to attend. The applicants' counsel suggested to the Court of Appeal that this decision might have resulted from communication between British Customs and Excise and the Swiss authorities, but there is no evidence in support of this. Mr Crago was called by the defence to give evidence. He denied that he had been Commissioner Cattaneo's contact and declined to answer any question about Mr Steiner.

30. On 16 February 1997, after hearing the applicants' application to admit new evidence and holding an *ex parte* hearing in the absence of the defence lawyers, the Court of Appeal ruled that justice did not require disclosure by the Crown of the public interest immunity evidence. The applicants and their lawyers were not permitted to be present when the court delivered its judgment on disclosure.

31. On 20 February 1997 the court dismissed the application for leave to appeal. It observed:

"Little, if any, of the material [put before the Court of Appeal by the applicants' counsel] would have been admissible at the trial. That is not only because it is largely hearsay and unspecific as to events and dates, but simply because much of it is wholly irrelevant to the central issue in this case, namely whether British Customs and Excise officers conspired with Steiner to 'frame' the Atlans.

However, in considering all the information put before us, we have not been able to avoid taking a view of its effect if, and to the extent that it were admissible and credible, on the outcome of this appeal, that is, whether ... it '[might] afford any ground for allowing the appeal'. We have tested that by assuming for the purpose:

(1) that Steiner ... was charged in Italy, with others, on a charge of smuggling a large quantity of cocaine from South America to Italy in February 1995;

(2) that his role in the importation of the drug to Italy is said to have been as a participating informer to the Italian police;

(3) that since at least 1980 he had been concerned in the smuggling of large quantities of cocaine from Brazil to Europe;

(4) that for many years before the November 1990 importation of cocaine he had been an informer to various law enforcement agencies in Europe, though there is nothing to suggest that he had any contact with the United Kingdom Customs and Excise before that importation;

(5) that at the time of the November 1990 importation he had access to large quantities of cocaine in Brazil at little or no cost;

(6) that he had provided information to a European law enforcement agency which led to the United Kingdom Customs and Excise observations of the Atlans before the November 1990 importation; and

(7) that, as alleged by Armand at the trial, Steiner may have had a grudge against him arising out of some previous dealing between them. ...

[Prosecuting counsel] suggested that the only way Steiner could have been sure of achieving such an end would have been to persuade the officers to 'plant' the drug on, or falsely attribute it to, Thierry or Terrasson. Such a conspiracy between Steiner and the officers would have been hard for them to organise to an assured outcome. ... [H]ow could they have organised it so that Terrasson had a suitcase almost identical to that of Smolny? And what possible motive or reason could the officers have had to lend themselves to such a disgraceful enterprise whether Steiner was a known informer or not?

In the Court's view, there is force and hard logic in those submissions. There are also a number of other questions indicating the impossibility of the Atlans' defence. Why, if they thought they were to collect diamonds from Steiner, not drugs, did Thierry and Terrasson immediately check their luggage onto the return flight without apparently enquiring by telephone why he had not turned up or whether he had been delayed? Why did Smolny and the two of them make no contact in Copenhagen and ignore each other on the plane to Heathrow? Why did Thierry and Terrasson separate as Terrasson boarded a taxi at Heathrow with the case containing the cocaine? Why did the Atlans tell so many lies on arrest and in interview about their activities together before the flight to Copenhagen and about the reason for it? Why did Thierry lyingly state that he had travelled on his own on the return flight to Copenhagen and that he did not know Terrasson? Why did they later give wholly different accounts in evidence at their trial? Why did Smolny make indirect telephone contact with someone on Armand's telephone number in Brazil on the day of the importation?

In the Court's view, none of its assumptions, some of which go well beyond the new information relied upon by the Atlans, detracts in any way from the

overwhelming strength of the prosecution case identified in those various questions or provides any material support for the possibility of a conspiracy between the Customs and Excise officers and Steiner or anyone else to 'frame' the Atlans. The jury, by its verdict, clearly rejected Thierry and Terrasson's suggestion of it. Although Armand did not then suggest such a conspiracy, it was his only possible line of defence, though, for the reasons we have given, a wholly unrealistic one.

[Prosecuting counsel's] submission, which echoes considerations voiced by the judge to the jury in the summing up, provides a logical and complete answer to the complaint based on Steiner's alleged role as an informer and drug smuggler. If the jury had had before it information matching our assumptions, it might have led them to conclude that Steiner may have provided some information, direct or indirect, to the United Kingdom Customs and Excise, but it could not have left them with any doubt as to the Atlans' knowing and deliberate involvement in the importation of cocaine into the United Kingdom. The evidence against them, which had been thoroughly and robustly tested at the trial, was overwhelming: the Customs and Excise officers' observation of their various and highly expensive international air flights, for which there was no plausible explanation or documentation suggesting any legitimate business; the officers' observation of their movements and meetings in London and of the two strange return trips to and from Copenhagen; their various handling of what was to become Terrasson's suitcase used for the switch; their lies on arrest and in interview. All that activity pointed only to their involvement in the high value and high risk activity of drug smuggling, not some black market dealing in gems under Brazilian law. Whatever Steiner's possible role as an informer, the Atlans' guilty participation in cocaine smuggling is clear. ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

32. At common law, the prosecution has a duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial. The duty also extends to statements of any witnesses potentially favourable to the defence.

33. In December 1981 the Attorney-General issued Guidelines, which did not have the force of law, concerning exceptions to the common law duty to disclose to the defence certain evidence of potential assistance to it ([1982] vol. 74 Criminal Appeal Reports p. 302: "the Guidelines"). The Guidelines attempted to codify the rules of disclosure and to define the prosecution's power to withhold "unused material". Under paragraph 1, "unused material" was defined as:

> "(i) All witness statements and documents which are not included in the committal bundle served on the defence; (ii) the statements of any witnesses who are to be called to give evidence at the committal and (if not in the bundle) any documents referred to therein; (iii) the unedited version(s) of any edited statements or composite statement included in the committal bundles."

Under paragraph 2, any item falling within this definition was to be made available to the defence if "it has some bearing on the offence(s) charged and the surrounding circumstances of the case".

According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was "sensitive" material which, because of its sensitivity, it would not be in the public interest to disclose. "Sensitive material" was defined as follows:

> "... (a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those services once his identity became known; (b) it is by, or discloses the identity of an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he is a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier – e.g. a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him; (g) it contains details of private delicacy to the maker and/or might create risk of domestic strife."

According to paragraph 8, "in deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence". The decision as to whether or not the balance in a particular case required disclosure of sensitive material was one for the prosecution, although any doubt should be resolved in favour of disclosure. If either before or during the trial it became apparent that a duty to disclose had arisen, but that disclosure would not be in the public interest because of the sensitivity of the material, the prosecution would have to be abandoned.

34. Subsequent to the applicants' trial in 1992, but before the appeal proceedings in 1997, the Guidelines were superseded by the common law. In *R. v. Ward* ([1993] vol. 1 Weekly Law Reports p. 619) the Court of Appeal dealt with the duties of the prosecution to disclose evidence to the defence and the proper procedure to be followed when the prosecution claimed public interest immunity. It stressed that the court and not the prosecution was to be the judge of where the proper balance lay in a particular case, because:

> "... [When] the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. Policy considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence. If, in a wholly exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned."

35. In *R. v. Davis, Johnson and Rowe* ([1993] vol. 1 Weekly Law Reports p. 613), the Court of Appeal held that it was not necessary in every case for the prosecution to give notice to the defence when it wished to claim public interest immunity, and outlined three different procedures to be adopted. The first procedure, which had generally to be followed, was for the prosecution to give notice to the defence that they were applying for a ruling by the court and indicate to the defence at least the category of the material which they held. The defence then had the opportunity to make representations to the court. Secondly, however, where the disclosure of the category of the material in question would in effect reveal that which the prosecution contended should not be revealed, the prosecution should still notify the defence that an application to the court was to be made, but the category of the material need not be disclosed and the application should be *ex parte*. The third procedure would apply in an exceptional case where to reveal even the fact that an *ex parte* application was to be made would in effect be to reveal the nature of the evidence in question. In such cases the prosecution should apply to the court *ex parte* without notice to the defence.

The Court of Appeal observed that although *ex parte* applications limited the rights of the defence, in some cases the only alternative would be to require the prosecution to choose between following an *inter partes* procedure or declining to prosecute, and in rare but serious cases the abandonment of a prosecution in order to protect sensitive evidence would be contrary to the public interest. It referred to the important role performed by the trial judge in monitoring the views of the prosecution as to the proper balance to be struck and remarked that even in cases in which the sensitivity of the information required an *ex parte* hearing, the defence had "as much protection as can be given without pre-empting the issue". Finally, it emphasised that it was for the trial judge to continue to monitor the position as the trial progressed. Issues might emerge during the trial which affected the balance and required disclosure "in the interests of securing fairness to the defendant". For this reason it was important for the same judge who heard any disclosure application also to conduct the trial.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

36. The applicants complained that they were deprived of a fair trial, in breach of Article 6 §§ 1 and 3 (d), which state:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal; ...

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

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

37. The Government acknowledged that the applicants' case was similar in some respects to that of Rowe and Davis v. the United Kingdom (judgment of 16 February 2000), in that the trial preceded the Court of Appeal's judgments in *R. v. Ward* and *R. v. Davis, Johnson and Rowe,* and no consideration was given by the trial judge to the material which was the subject of the public interest immunity consideration in the Court of Appeal. However, in the Government's submission these similarities did not lead to the conclusion that the applicants' Article 6 rights had been violated, since the facts of the applicants' case could be distinguished on a number of grounds:

First, while the nature of the evidence for which the prosecution claimed public interest immunity was unknown, it could not be assumed that it was relevant to the applicants' defence at trial. This followed from the fact that the Court of Appeal expressly linked the resolution of the disclosure and fresh evidence issues, and then decided that there was nothing in the fresh evidence which rendered the convictions unsafe. Secondly, the applicants only produced the Mato Grosso Report after the trial. To the extent that the disclosure issues were raised by the report, therefore, it would not have been possible for the trial judge to deal with them. Thirdly, the Court of Appeal held over the disclosure question pending submissions on and a resolution of the application to enter fresh evidence. The court therefore had a full understanding of the issues based on submissions from both prosecution and defence counsel. Finally, it was to be noted that the Court of Appeal considered the issues before it on the basis of a series of assumptions which were favourable to the defence.

38. The applicants submitted that the Court's Rowe and Davis judgment was designed to avert the very injustice which occurred in their case. The trial judge was in the best position to weigh the public interest in non-disclosure against the rights of the defence. Moreover, the prosecution's failure to disclose evidence to the judge led him to misdirect the jury on vital factual issues, namely the role played by Mr Steiner, which was central to the defence case. Although the applicants were only able to produce the Mato Grosso Report after their trial, the facts contained in it must have been known to the prosecution at the time of the trial, but no disclosure was made and the prosecution witnesses refused to answer any questions about Mr Steiner. The applicants' representatives were not in a position to assist the Court of Appeal in determining the question of public interest immunity,

because they were excluded from the disclosure procedure before the Court of Appeal.

39. The Court recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see the above-mentioned Rowe and Davis judgment, § 59). In the circumstances of the case it finds it unnecessary to examine the applicants' allegations separately from the standpoint of paragraph 3 (b) and (d), since they amount to a complaint that the applicants did not receive a fair trial. It will therefore confine its examination to the question whether the proceedings in their entirety were fair (ibid.).

40. The Court further recalls that in its above-mentioned Rowe and Davis judgment it held that while Article 6 § 1 requires in principle that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused, it may in some cases be necessary to withhold certain evidence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (ibid., §§ 60-61).

41. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. Instead, the Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (ibid., § 62).

42. The applicants' defence at trial was that they had been falsely implicated in the importation of cocaine by a man known to them as Rudi Steiner, whom they believed to be a Customs and Excise informer. No evidence relating to an informer or to Mr Steiner was served on the defence or put before the judge and under cross-examination the customs officers involved in the case refused either to confirm or deny whether or not they had used an informer or heard of Mr Steiner. Before and during the trial the prosecution had asserted that there was no further unused material evidence in their possession which had not been served on the defence (see paragraphs 14 and 17 above).

43. However, over four years after the applicants' conviction and prior to the hearing of their appeal following discovery by the defence of new evidence about Mr Steiner's activities, the prosecution informed them that, contrary to earlier statements, unserved, unused material did in fact exist. Following an *ex parte* hearing, the Court of Appeal decided that it was not

necessary to disclose this evidence to the applicants (see paragraphs 23-24 and 30-31 above).

44. It is clear to the Court, and the Government do not seek to dispute, that the repeated denials by the prosecution at first instance of the existence of further undisclosed relevant material, and their failure to inform the trial judge of the true position, were not consistent with the requirements of Article 6 § 1 (see the above-mentioned Rowe and Davis judgment, § 63).

45. The issue before the Court is whether the *ex parte* procedure before the Court of Appeal was sufficient to remedy this unfairness at first instance.

Although the nature of the undisclosed evidence has never been revealed, the sequence of events raises a strong suspicion that it concerned Mr Steiner, his relationship with British Customs and Excise, and his role in the investigation and arrest of the applicants. It is true that the applicants did not have the Mato Grosso Report at the time of their trial in the Crown Court. However, their allegations concerning Mr Steiner were central to their defence, and they expressly asked the prosecution if they had any undisclosed, unused material relevant to this issue. For the reasons set out in the above-mentioned Rowe and Davis judgment, the Court considers that the trial judge is best placed to decide whether or not the non-disclosure of public interest immunity evidence would be unfairly prejudicial to the defence (ibid., § 65). Moreover, in this case, had the trial judge seen the evidence he might have chosen a very different form of words for his summing up to the jury.

46. In conclusion, therefore, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial.

It follows that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

> "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

48. The first applicant claimed that the breach of Article 6 had denied him the opportunity effectively to conduct his defence and was directly relevant to his conviction. He claimed non-pecuniary damages in respect of

the ten years he had spent in prison of GBP 125,000 to GBP 200,000, together with pecuniary damages resulting from his conviction of GBP 2 million.

49. The Government submitted that the applicants were convicted of serious offences on the basis of strong evidence and that no causal connection could be established between the alleged violation of the Convention and the damage claimed.

50. The Court is unable to speculate as to whether the applicants would have been convicted had the violation not occurred. It considers that the finding of a violation constitutes in itself sufficient just satisfaction for any pecuniary or non-pecuniary damage which the applicants may have suffered (see the above-mentioned Rowe and Davis judgment, § 70).

B. Costs and expenses

51. The applicant claimed the legal costs of the Convention proceedings, including solicitors' costs of GBP 13,832.44 (exclusive of value added tax, "VAT"), and two counsels' fees of GBP 8,125 (plus VAT) and GBP 8,824.45 (plus VAT) respectively.

52. The Government submitted that the costs claimed were excessive and that it had been quite unreasonable and unjustified to instruct two counsel in addition to incurring substantial solicitors' costs. They considered that GBP 10,000 in total for counsels' fees, together with GBP 7,000 for solicitors' costs, in both cases inclusive of VAT, would be reasonable.

53. Making an assessment on an equitable basis, the Court awards to the applicants the sum of GBP 15,000.00, plus any VAT which may be payable.

C. Default interest

54. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5 % per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

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

3. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, GBP 15,000 (fifteen thousand pounds sterling) for costs and expenses, plus any value-added tax that may be chargeable;

(b) that simple interest at an annual rate of 7.5 % shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 June 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

25/136

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF KRASKA c. SUISSE

(Application no. 13942/88)

JUDGMENT

STRASBOURG

19 April 1993

25137

In the case of Kraska v. Switzerland*,

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

Mr R. RYSSDAL, *President*,
Mr F. MATSCHER,
Mr J. DE MEYER,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,

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

Having deliberated in private on 28 October 1992 and 24 March 1993,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1991 and by the Government of the Swiss Confederation ("the Government") on 13 February 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13942/88) against Switzerland lodged with the Commission under Article 25 (art. 25) by a Swiss national, Mr Martin Kraska, on 2 April 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the

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* The case is numbered 90/1991/342/415. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

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

3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 January 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr J. De Meyer, Mrs E. Palm, Mr R. Pekkanen, Mr J.M. Morenilla, Mr A.B. Baka and Mr M.A. Lopes Rocha (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the memorials of the Government and the applicant on 10 and 11 August 1992 respectively. On 17 September the Secretary to the Commission informed the Registrar that the Delegate would submit oral observations; he had previously produced various documents requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 October 1992. The Court had held a preparatory meeting beforehand, in the course of which it rejected a request made in the applicant's memorial for it to hear witnesses.

There appeared before the Court:

- for the Government

Mr P. BOILLAT, Head
of the European Law and International Affairs Section, Federal Office of Justice, *Agent*,

Mr C.H. BRUNSCHWILER, judge
at the Federal Court,

Mr F. SCHÜRMANN, Deputy Head
of the European Law and International Affairs Section, Federal Office of Justice, *Counsel*;

- for the Commission

Mr L. LOUCAIDES, *Delegate*;

- for the applicant

Mr J. LOB, avocat, *Counsel*.

The Court heard addresses by Mr Boillat for the Government, Mr Loucaides for the Commission and Mr Lob for the applicant, as well as their replies to its questions. Mr Lob lodged various documents.

AS TO THE FACTS

6. Mr Martin Kraska is a Swiss national and lives in Zurich. He obtained his diploma in medicine in 1981 and has since practised mostly as an assistant doctor (Assistenzarzt), for which activity he does not require an authorisation in the Canton of Zurich.

A. Proceedings before the Zurich authorities and courts

7. On 19 October 1982 he received the authorisation to practise independently in the canton. The authorisation was, however, withdrawn by the Health Authority (Gesundheitsdirektion) on 26 April 1983 on the ground that, having moved to another canton, he had not used it.

8. The applicant lodged an administrative appeal (Rekurs) which the Cantonal Government (Regierungsrat) of Zurich rejected on 17 August 1983 for the following reasons: the possibility that a new authorisation would be granted as soon as he returned to Zurich was not sufficient to confer on the applicant a legally protected interest; in any event the authorisation in question was not of general validity, but related to a specific activity; as it was, Mr Kraska no longer lived in the canton.

9. From 6 August to 17 September 1984 the applicant worked as an assistant doctor in the emergency service of the District of Zurich Medical Association (Ärztlicher Notfalldienst des Ärzteverbandes des Bezirks Zurich).

10. On 28 August 1984 he fetched a partially paralysed patient from a private old peoples' home and took her back to her flat, where he treated her. Shortly afterwards he drew up a bill on an emergency service form for 7,447.80 Swiss francs and sent it to the guardian (gesetzlicher Vertreter) of the patient, who had been placed in guardianship on a temporary basis on 13 September 1984. The sum in question was to be paid directly into the applicant's post office account and not that of the medical association.

A prosecution was subsequently brought against Mr Kraska for fraud and various infringements of the Zurich Public Health Act 1962; in particular it was alleged that he had treated the patient without being in possession of an authorisation to practise medicine independently as was required under section 7 para. 1 (a) of that Act.

The Zurich District Court (Bezirksgericht) acquitted him on 13 January 1986, finding inter alia that the indictment had not indicated in sufficiently specific terms the medical treatment involved.

11. In the meantime, on 31 January 1985, the applicant had attempted to obtain a new authorisation. On 11 September 1985 the Zurich Health Authority had refused his request on the ground that he was not "trustworthy" within the meaning of section 8 para. 1 of the Public Health Act.

On 1 October 1986 the Zurich Cantonal Government dismissed the applicant's appeal. It took the view that he had infringed section 7 para. 1 (a) of the Act by submitting a bill for the treatment in question and that his acquittal by the District Court made no difference in this respect. The Cantonal Government noted in particular that in his bill the applicant had himself classified the treatment as medical acts.

12. In an appeal (Beschwerde) to the Zurich Administrative Court (Verwaltungsgericht) the applicant again sought the authorisation to practise his profession independently. The court dismissed his appeal on 11 March 1987. It also directed that he should wait until the beginning of 1988 before re-applying.

B. Proceedings in the Federal Court

1. The public-law appeal

13. By a memorial of seventy-three pages Mr Kraska's lawyer lodged with the Federal Court (Bundesgericht) a public-law appeal (staatsrechtliche Beschwerde), on which five judges deliberated at a public hearing on 22 October 1987 (section 17 para. 1 of the Federal Courts Act). The applicant's lawyer was present in the courtroom, but was not allowed to address the court. Judge X submitted his report; Judge Y, who did not in fact have the status of co-rapporteur attributed to him at paragraph 68 of the Commission's opinion, stated that he was unable to accept the conclusions of the report and proposed a solution contrary thereto. During the discussion which followed, a third judge put forward a counter proposal, which was adopted by the majority.

In a letter to his client, the lawyer described the course of the deliberations. According to him, Judge X had proposed that the applicant's public-law appeal should be allowed in full and that he should be granted the authorisation to practise. Judge Y had stated that he had been irritated by the length of the memorial, of which he had been able to read only thirty or so pages, and had complained that it had not been possible for him to study the file because, owing to an error on the part of the registry, he had not received it until a day before the hearing; he had then called for the dismissal of the appeal, basing his view exclusively on the above-mentioned decisions of 11 September 1985, 1 October 1986 and 11 March 1987 (see paragraphs 11-12 above).

14. The Federal Court gave judgment on the same day. By four votes to one, that of Judge X, it quashed the decision in so far as it imposed a waiting period on the applicant but dismissed the remainder of the appeal.

It first declared a number of the applicant's complaints inadmissible. It stated, nevertheless, that in cases of this kind, in the event of the appeal's succeeding, it could by way of exception not only quash the contested

decision, but also grant the authorisation sought, if all the other conditions were satisfied.

The Federal Court then noted that, according to its case-law, the right to freedom of commerce and industry, guaranteed by Article 31 of the Federal Constitution, embraced the right to practise medicine on a professional basis.

Having examined the criticisms levelled by the health authorities, it formed the opinion that at least two of them appeared material to assessing the applicant's honesty: he had carried out a medical act without the necessary authorisation; in addition, the bill relating thereto dealt with both medical and non-medical acts and he had drawn it up on an emergency service form, thereby giving the impression that it concerned only the former.

15. On 8 December 1987 the Health Authority of the Canton of Zurich granted Mr Kraska's third application for a new authorisation.

2. The applications to reopen the proceedings

16. On 6 November 1987 Mr Kraska requested the Federal Court to re-examine its judgment of 22 October 1987, complaining that it had given its decision without sufficient knowledge of the file.

His application was dismissed on 14 March 1988 on the ground, inter alia, that there was no legal basis for reopening the proceedings. The Federal Court summarised the contested deliberations as follows:

> "On the occasion of the public deliberations one judge expressed his dissatisfaction that the documents had not been available for a sufficiently long time (they had been sent first to a substitute judge); he had therefore been able to read thoroughly only the first thirty-five pages of the - much too long - appeal memorial which comprised seventy-three pages."

17. Mr Kraska subsequently filed three other applications for the reopening of the proceedings in the Federal Court; they were dismissed on 5 May and 23 August 1988 and on 6 June 1989.

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Kraska lodged his application with the Commission on 2 April 1988. He complained of a violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention, and of Article 3 (art. 3). A member of the Federal Court had allegedly expressed his view on the applicant's public-law appeal without having examined the file; the Federal Court had, he maintained, found a violation of the Zurich Public Health Act despite the judgment of 13 January 1986 acquitting him; finally he claimed that the proceedings

conducted before the competent authorities and courts had constituted inhuman and degrading treatment.

19. On 4 October 1990 the Commission declared the complaint based on Article 6 para. 1 (art. 6-1) admissible, but found the remainder of the application (no. 13942/88) inadmissible. In its report of 15 October 1991 (made under Article 31) (art. 31), the Commission expressed the opinion by fourteen votes to five that there had been a violation of that provision. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

20. In their memorial the Government requested the Court to "find that Switzerland did not violate the ... Convention ... in respect of the facts that gave rise to Mr Martin Kraska's application".

AS TO THE LAW

21. Mr Kraska claimed that he had not had a fair trial in the Federal Court on 22 October 1987 inasmuch as one of the judges had not been able to read the whole file. He relied on Article 6 para. 1 (art. 6-1) of the Convention, according to which:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing by ... [a] ... tribunal ..."

The Government contested this allegation, whereas the Commission accepted it in substance.

22. In his oral pleadings the applicant's lawyer questioned whether the Court had jurisdiction to rule on various points raised by the Government concerning the facts of the case, the establishment of which, he argued, fell to the Commission and to the Commission alone.

The Court cannot accept this argument, which is not consistent either with Article 45 (art. 45) of the Convention, or with Rule 41 et seq. of the Rules of Court, or with its case-law and practice. The Court is vested with full jurisdiction within the limits of the case as referred to it and is competent, inter alia, to take cognisance of any question of fact which may

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 254-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

arise in the course of consideration of the case. Admittedly it has recourse to this power fairly exceptionally, in view of the primary role in this sphere which Articles 28 para. 1 and 31 (art. 28-1, art. 31) of the Convention entrust to the Commission, but it is not bound by the findings in the Commission's report; it remains free to make its own assessment of these findings and, where appropriate, to depart from them, in the light of all the material which is before it or which, if necessary, it obtains (see, among other authorities, the De Wilde, Ooms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 12, p. 29, para. 49, and the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 29, para. 74).

A. Applicability of Article 6 para. 1 (art. 6-1)

23. In the Government's contention, Article 6 para. 1 (art. 6-1) does not apply to the examination of an application for an authorisation to practise medicine. The grant of such an authorisation was, they maintained, an administrative act which was subject to certain conditions and conferred no individual right; it was accordingly impossible to speak in the instant case of a dispute (contestation) concerning a "right". In the alternative, if there were such a right, it was not a "civil right", on account of the public-law features inherent in the exercise of the profession in question.

In addition, the Government requested the Court to rule on the applicability of Article 6 para. 1 (art. 6-1) where the Federal Court gives judgment, on a public-law appeal, as a constitutional court.

24. The Court notes in the first place that Article 31 of the Swiss Constitution guarantees the freedom of professional activity, construed by the Federal Court as embracing the medical profession (see paragraph 14 above). The dispute therefore concerned the very existence of a right which could be said, on arguable grounds, to be recognised under domestic law (see, inter alia, the H. v. Belgium judgment of 30 November 1987, Series A no. 127-B, p. 31, para. 40). In addition, the dispute was genuine and of a serious nature (see, among other authorities, the Benthem v. the Netherlands judgment of 23 October 1985, Series A no. 97, p. 15, para. 32). As Mr Kraska had obtained a medical diploma in 1981, he was entitled to apply for an authorisation to practise independently in Zurich once he satisfied the conditions laid down by law; he had held one in 1982 and 1983, but had subsequently lost it because he no longer lived in the canton (see paragraphs 6-7 above).

25. On the question of whether the right in issue was a "civil right", the Court refers to its case-law concerning the medical profession (the König v. Germany judgment of 28 June 1978, Series A no. 27, p. 31, paras. 91-92; the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, p. 20, paras. 44-45; and the Albert and Le

Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 14, para. 27). It is true that in Switzerland this profession has features which are undeniably of a public-law nature: it is subject to administrative rules, enacted in the public interest, and its exercise depends on the issue of an authorisation by the Cantonal Health Authority. Nevertheless, the applicant wished to work in the private sector, on the basis of contracts concluded between him and his patients (see, mutatis mutandis, the H. v. Belgium judgment, cited above, Series A no. 127-B, p. 33, para. 47 (a)). The dispute between him and the Zurich Government therefore concerned a "civil right".

26. As to whether Article 6 para. 1 (art. 6-1) also applied to the examination of Mr Kraska's public-law appeal, the Court reiterates that proceedings come within the scope of this provision, even if they are conducted before a constitutional court, where their outcome is decisive for civil rights and obligations (see, inter alia, the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 39, para. 94, and the Le Compte, Van Leuven and De Meyere judgment, cited above, p. 20, para. 44); in order to determine whether this is so in a given case, it is necessary to have regard to all the circumstances (see, among other authorities, mutatis mutandis, the Bock v. Germany judgment of 29 March 1989, Series A no. 150, p. 18, para. 37).

The applicant complained that the Zurich Administrative Court had denied him the right to practise medicine independently. Moreover, it was open to the Federal Court not only to quash the contested judgment, but also - albeit exceptionally - to grant the authorisation which the applicant was seeking (see paragraph 14 above). Indeed he was able to obtain the authorisation on 8 December 1987 as a result of the Federal Court's decision to annul the waiting period imposed on 11 March 1987 (see paragraphs 12, 14 and 15 above). The direct effect of its judgment of 22 October 1987 on the recognition of the right claimed is consequently beyond question.

27. In short, Article 6 para. 1 (art. 6-1) is applicable in the instant case.

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

28. Mr Kraska inferred from certain remarks made by Judge Y during the public deliberations in the Federal Court that the judge must have given his opinion without thorough knowledge of the file (see paragraphs 13 and 16 above). In his submission, there would only have been a fair trial if each of the members of the court had been able to examine the available documents at length.

29. The Commission stressed the particular importance of the document which the judge had been unable to finish reading, namely the appeal memorial or the document instituting the proceedings in the Federal Court.

30. It falls to the Court to decide whether the contested proceedings considered as a whole were fair within the meaning of the Convention. The effect of Article 6 para. 1 (art. 6-1) is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see, among other authorities, mutatis mutandis, the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 31, para. 68). It has to be determined whether this condition was satisfied in the instant case.

31. As the Government pointed out, the Health Authority, the Cantonal Government and the Administrative Court of Zurich had carefully studied Mr Kraska's application for an authorisation. Once the matter was brought before the Federal Court, the judges assigned to sit in the case all had access to the file of the cantonal proceedings and the rapporteur communicated to them his opinion a few days before the deliberations. They were also able, in principle, to consult their own court's file and in particular the appeal memorial. However, one of them, Judge Y, complained, at the public deliberations on 22 October 1987, that he had received it only the previous day and that he had been able to read thoroughly only half of the memorial, which was moreover much too long in his view (see paragraphs 13 and 16 above). Mr Kraska's lawyer was left with the impression that the judge did not have sufficient knowledge of the case.

32. The Court has already stressed on numerous occasions the importance of appearances in the administration of justice, but it has at the same time made clear that the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified (see, among other authorities, mutatis mutandis, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 48).

In the present case Judge Y took an active part in the deliberations; he went so far as to propose a solution contrary to that recommended by the rapporteur and showed that he was familiar with the case. Ultimately the Federal Court adopted neither of these two opinions; it chose a third possibility, put forward by one of the other three judges (see paragraphs 13-14 above). All things considered, there is no evidence to suggest that its members failed to examine the appeal with due care before taking their decision. One fact, to which the Government rightly drew attention, appears significant in this respect: neither Judge Y, nor any of his four colleagues, requested the adjournment of the deliberations, although they could have done so, in accordance with the practice of the Federal Court, if they had felt the need to acquaint themselves further with the file.

33. In the light of all of these circumstances, Mr Kraska's complaint does not prove to be well-founded. Even though Judge Y's comment is open to

criticism, the manner in which the Federal Court dealt with the case does not give rise to any reasonable misgivings.

34. There has therefore been no violation of Article 6 para. 1 (art. 6-1).

FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 6 para. 1 (art. 6-1) applies in this case;

2. Holds by six votes to three that there has been no violation of that provision.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 April 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Ryssdal, Mrs Palm and Mr Pekkanen;

(b) concurring opinion of Mr Matscher,

(c) concurring opinion of Mr De Meyer.

R. R.
M.-A. E.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, PALM AND PEKKANEN

1. According to Article 6 para. 1 (art. 6-1) of the Convention everyone is entitled to a fair trial by an impartial tribunal. The right to a fair hearing includes, inter alia, the right for the parties to the proceedings to submit to the court observations which they regard as relevant to their case. This right is, however, effective only if the submissions made to the court are also duly considered by the court.

2. The Court has on many occasions stressed the importance of appearances in the administration of justice. The courts in a democratic society must inspire confidence in the public and, above all, in the parties to the proceedings. The perceptions of the persons involved in the proceedings are important, but not decisive; any doubts as to the unfairness of the hearing must also be objectively justified (see, among others, mutatis mutandis, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 48).

3. According to a summary made by the Federal Court on 14 March 1988, one of the judges of that court expressed dissatisfaction during the public deliberations of the case on 22 October 1987 that the documents had not been available for a long enough period of time; he had therefore been able to read thoroughly only the first thirty-five pages of the over-lengthy public-law appeal statement which comprised seventy-three pages (see paragraph 16 of the Court's judgment). After this statement the judge proceeded to take part in the deliberations and decision on the appeal.

In a letter to his client describing the deliberations of the Federal Court, Mr Kraska's lawyer indicated that he had misgivings as to the fairness of the hearing since the judge in question had called for the dismissal of the appeal without having had the possibility to study the file which he had received only a day before (see paragraph 13 of the Court's judgment).

4. From these facts we can only draw the same conclusion as the Commission that the judge in question gave the impression by his remarks that he wanted to read the entire public-law appeal statement, but had not been able to do so, although he regarded the document as being pertinent to the case. Mr Kraska had been able to make his submissions to the court, but there was a doubt as to whether his observations had been given proper consideration by one member of the court. Since these misgivings were based on the admission of the judge himself no other objective justification is in our opinion necessary.

In our view the decisive fact in this case is the above-mentioned statement of the judge in question and the impression which it made on the parties as to the fairness of the hearing.

5. For these reasons we are of the opinion that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention with regard to Mr Kraska's right to a fair hearing.

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

While I agree with the conclusions of the majority concerning the finding of no violation of Article 6 para. 1 (art. 6-1), I wish to reaffirm my view (which I expressed in my dissenting opinions in the cases of König v. Germany, Series A no. 27, p. 45; Le Compte, Van Leuven and De Meyere v. Belgium, Series A no. 43, p. 34; and Albert and Le Compte v. Belgium, Series A no. 58, p. 26), that proceedings relating to the practice of medicine - or indeed the practice of any other profession governed by public law - are not proceedings concerning a civil right, as their outcome has only an indirect bearing on such a right, in this case the right to conclude (private law) contracts for medical treatment.

I recognise that it is also important for an individual to enjoy certain procedural guarantees in his relations with the administrative authorities, but this should be the subject of specific rules in the Convention, as Article 6 (art. 6), which was intended to apply to civil (and criminal) cases, constitutes a somewhat inappropriate basis for such protection.

If I did not vote against finding Article 6 para. 1 (art. 6-1) applicable, it was purely out of respect for the well-established case-law of the Court.

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

I. The right to engage in a professional activity must undoubtedly be regarded as a "civil right" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention.

In this connection it matters little that the status of the profession in question in this case "has features [in Switzerland] which are undeniably of a public-law nature" or that "the applicant wished to work in the private sector, on the basis of contracts concluded between him and his patients"[1].

The nature of the right in question would not have been any different if the applicant had wished to practise medicine on another "basis" or in the "public sector". Nor would it have been if the status of the medical profession did not embrace "public-law features"[2].

II. Similarly, the Court did not have to ask itself, yet again, whether it was "a right which could be said, on arguable grounds, to be recognised under domestic law" and whether the dispute "was genuine and of a serious nature"[3].

In the first place, it is not for us, but for the national courts to resolve questions of this type[4]. Secondly, the fact that a right does not seem to be recognised under the domestic legislation of a State cannot remove the latter's obligation, in respect of this right, to ensure that the principles laid down in Article 6 para. 1 (art. 6-1) are applied[5].

III. The right to a fair trial is so important that "there can be no justification for interpreting Article 6 para. 1 (art. 6-1) of the Convention restrictively"[6].

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[1] Paragragh 25 of the judgment.

[2] It is interesting to note that, in a recent case, the Court would seem to have begun to accept that, at least in the pensions field, the legal position of "public sector" employees is the same as that of "private sector" employees: judgment of 26 November 1992, Giancarlo Lombardo v. Italy, Series A no. 249-C, p. 42, para. 16.

[3] Paragraph 24 of the judgment.

[4] See in this connection my separate opinion annexed to the Allan Jacobsson v. Sweden judgment of 25 October 1989, Series A no. 163, p. 24.

[5] See on this point the concurring opinion of Mr Lagergren, annexed to the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, p. 27, and his separate opinion, approved by Mr Macdonald, annexed to the Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, p. 80, together with the joint separate opinion of Mr Lagergren, Mr Pinheiro Farinha, Mr Pettiti, Mr Macdonald, Mr Valticos and myself, annexed to the W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 39.

[6] Judgment of 13 October 1990, Moreira de Azevedo v. Portugal, Series A no. 189, p. 16, para. 66.

The effective enjoyment of this right must be secured each time that the determination of a right is in issue. That was the case in this instance; it was sufficient to note that this was so.

As regards the rest, I should like to be permitted to refer, mutatis mutandis, to what I said in this connection in my separate opinion in the cases of Pudas v. Sweden[7], H v. Belgium[8] and Allan Jacobsson v. Sweden[9].

I would simply add that what I was "inclined to think" in November 1987[10] as regards the "civil" character, within the meaning of the above-mentioned Article (art. 6-1), of rights and obligations has since become a profound conviction. All the rights and obligations which are not related more specifically to the determination of a "criminal charge" should be regarded as "civil rights".

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[7] Judgment of 27 October 1987, Series A no. 125, p. 21.
[8] Judgment of 30 November 1987, Series A no. 127-B, pp. 48-49.
[9] Judgment of 25 October 1989, cited above, loc. cit.
[10] Judgment of 30 November 1987, cited above, p. 49, para. 4.

THE APPEALS CHAMBER

BEFORE THE PRE-APPEAL JUDGE

Before: Judge Weinberg de Roca, Pre-Appeal Judge

Registrar: Mr. Adama Dieng

Decision of: 2 March 2004

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)
V.
THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

DECISION ON NGEZE'S MOTION FOR CLARIFICATION OF THE SCHEDULE AND SCHEDULING ORDER

Counsel for the Appellants
Mr. Jean-Marie Biju-Duval
Mr. Giacomo Barletta-Caldarera
Mr. John C. Floyd III

Counsel for the Prosecutor
Ms. Melanie Werrett

I, Inés Mónica Weinberg de Roca, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations

Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994;

NOTING the "Judgement and Sentence" rendered in the English language by Trial Chamber I in this case on 3 December 2003 ("Judgement");

BEING SEISED OF the "Motion for Clarification of the Schedule" filed on 13 February 2004 by counsel on behalf of Appellant Ngeze ("Motion"), which requests a clarification of the schedule for filing the appellant's brief;

CONSIDERING that although motions for clarification will be granted only in exceptional circumstances, a clarification of the briefing schedule for all three appellants may facilitate the efficient administration of justice;

NOTING the "Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and briefs" of 19 December 2003 ("First Decision"), which (i) ordered the Appellants Barayagwiza and Nahimana to file their Notices of Appeal no later than thirty days from the communication of the Judgement in the French language and to file their Appellants' Briefs no later than seventy-five days from the communication of the Judgement in the French language; and (ii) which granted the relief sought in the motion filed by counsel on behalf of Ngeze, and ordered the Appellant Ngeze to file his Notice of Appeal no later than 9 February 2004 and to file his Appellant's Brief no later than seventy-five days thereafter in accordance with Rule 109;

NOTING the subsequent "Decision on Ngeze's Motion for an Additional Extension of Time to File his Notice of Appeal and Brief" of 6 February 2004 ("Second Decision"), which granted the further extension requested by the Appellant Ngeze personally, and ordered the Appellant Ngeze to file his Notice of Appeal no later than thirty days from the communication of the Judgement in the French language and to file his Appellant's Brief no later than seventy-five days from the communication of the Judgement in the French language;

NOTING that on 7 February 2004, Counsel for Ngeze filed a Notice of Appeal in accordance with the First Decision;

NOTING FURTHER the "Notification de la demande d'annulation du Jugement rendu le 3 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T'" filed personally by Appellant Barayagwiza on 3 February 2004 ("Barayagwiza Motion for Annulment"), in which Appellant Barayagwiza seeks the annulment of the Judgement;

NOTING FURTHER the "Prosecution Response to Barayagwiza Motion for Annulment of Judgement Rendered on 3 December 2003" filed on 26 February 2004, in which the Prosecution argues that the Motion for Annulment should be dismissed because the Appeals Chamber is without jurisdiction to deal the issues raised therein by

way of interlocutory motion on appeal and to order that the issues be re-framed in Notice of Appeal pursuant Rule 108 of the Rules;

CONSIDERING that Rules 108 and 111 of the Rules of Procedure and Evidence ("Rules"), the Practice Direction on Formal Requirements for Appeals from Judgement of 16 September 2002, and the Practice Direction on the Length of Briefs and Motions on Appeal of 16 September 2002 contemplate that a party will file a single Notice of Appeal and a single Appellant's Brief within the page and time limits prescribed therein;

CONSIDERING that the Second Decision granted a further extension from the time limit for filing the single Notice of Appeal and the single Appellant's Brief of Appellant Ngeze;

CONSIDERING that although the Ngeze Notice of Appeal was filed before the time limit set in the Second Decision, the Appellant Ngeze may seek to vary the grounds of appeal by showing good cause pursuant to Rule 108 of the Rules, and that good cause has been shown by the apparent failure of communication between the Appellant Ngeze and counsel regarding the requests for extensions and the filing of the Notice of Appeal;

CONSIDERING FURTHER that the Barayagwiza Motion for Annulment challenges the legal and procedural basis of the Judgement and will therefore be treated as the Appellant's Notice of Appeal pursuant to Rule 108 of the Rules;

CONSIDERING that the Appellant Barayagwiza may seek to vary his grounds of appeal by showing good cause pursuant to Rule 108 of the Rules and that good cause has been demonstrated by the fact Appellant Barayagwiza filed his Motion for Annulment without knowing that it would be considered as a Notice of Appeal;

HEREBY ORDERS

1. Each Appellant to file his single Notice of Appeal no later than thirty days from the communication of the Judgement in the French language;
2. Each Appellant to file his single Appellant's Brief no later than seventy-five days from the communication of the Judgement in the French language;
3. That the Appellants' Ngeze and Barayagwiza may, if they so wish, amend the Notices of Appeal (including the Motion for Annulment) filed before 2 March 2004 at any time prior to the deadline for filing the Notice of Appeal set out in paragraph 1 above.

Done in French and English, the English text being authoritative.
Dated this 2nd day of March 2004,
At The Hague, The Netherlands.

Judge Inés Mónica Weinberg de Roca
Pre-Appeal Judge
[Seal of the International Tribunal]