880)

SCSL-04-15-T
(31917 — 31954)

SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE

TRIAL CHAMBER I

31917

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

Registrar: Mr. Herman von Hebel

Date filed: 14th November 2007

THE PROSECUTOR

v.

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

SESAY AND GBAO JOINT MOTION FOR VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF JUSTICE BANKOLE THOMPSON FROM THE RUF CASE

Office of the Prosecutor
Mr. Peter Harrison
Mr. Reginald Fynn
Mr. Charles Hardaway
Mr. Vincent Wagona

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

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

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

INTRODUCTION

1. On the 2nd August 2007, Trial Chamber I returned verdicts against the CDF Accused Moinina Fofana and Allieu Kondewa (the "CDF Accused"). The majority (Honourable Justices Boutet and Itoe) returned verdicts of guilt on Counts 2, 4, 5, and 7 in respect of the Accused Moinina Fofana and Counts 2, 4, 5, 7, and 8 in respect of the Accused Allieu Kondewa.[1]

2. The Honourable Justice Thompson issued a separate concurring and partially dissenting judgement in which Fofana and Kondewa were found not guilty and acquitted on all counts (the "Separate Opinion").[2] The Learned Judge *inter alia*:

   (i) "hold[s] that, on a reasonable interpretation of the evidence, as a whole, [the CDF Accused's] legal guilt in respect of Counts on which they have been convicted is excusable in the eyes of the law on the grounds of the defence of necessity";[3] and
   (ii) "entertain[s] more than serious doubts whether in the context of the uniquely peculiar facts and circumstances of this case a tribunal should hold liable persons who volunteered to take up arms and risk their lives and those of their families to prevent anarchy and tyranny from taking a firm hold in their society, their transgressions of the law notwithstanding".[4]

Application

3. Counsel for Issa Sesay and Augustine Gbao submit that, pursuant to Rule 15 of the Rules of Procedure and Evidence of the Special Court ("the Rules"),[5] the Honourable Justice Bankole Thompson should permanently withdraw from the case *Prosecutor against Issa Sesay, Morris Kallon, and Augustine Gbao*. The Learned Judge, in acquitting the CDF Accused, has reached conclusions of fact and law that give rise to reasonable doubts concerning his impartiality and/or the express conclusions evince a strong commitment to the Prosecution's cause/case which gives rise to an appearance of bias.[6]

---

[1] *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Doc. No. SCSL-04-14-T-785, Judgement, Trial Chamber I, 2 August 2007, Part VII, Disposition ('CDF Judgement').
[2] *Id.*, Annex C: Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute.
[3] *Id.*, at para. 92.
[4] *Id.*, at para. 101.
[5] Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended on 14 May 2007.
[6] *Regina* v. *Bow Street Metropolitan Stipendiary Magistrates and others, ex parte Pinochet Ugarte* (No 2) (House of Lords) (2000) 1 AC 119 at pages 1 & 2 "...the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge's decision would lead to a promotion of a cause in which he was involved together with one of the parties...that in order to maintain the absolute impartiality of the judiciary there had to be a rule which automatically disqualified a judge who was involved...in promoting the same causes...as was a party to the suit".

The Overall Findings and Arguments

4. In his separate opinion, Justice Thompson *inter alia* concludes:

   (i) That the preservation of democratic rule is a vital interest of individual states and the international community[7] in general worthy to be "protect[ed] at all costs in the face of rebellion, anarchy and tyranny";[8]
   (ii) The CDF were acting with "patriotism and altruism"[9] against the forces of "rebellion, anarchy and tyranny";
   (iii) That members of the Armed Forces Revolutionary Counsel (AFRC) constituted the forces of rebellion, anarchy and tyranny;[10]
   (iv) That this rebellion, anarchy and tyranny constituted an "immediate threat of harm purportedly feared, to wit, fear, utter chaos, widespread violence of immense dimensions",[11] was "dominated by utter chaos, fear, alarm and despondency"[12], or both;
   (v) That the civilians of Sierra Leone were "gravely imperilled" by this "prevailing state of affairs";[13]
   (vi) That the forces of rebellion, anarchy and tyranny constituted an "evil"[14] which was "so pressing that normal human instincts [cried] out for action and [made] counsel of patience unreasonable";[15] and
   (vii) That the choice the CDF faced was their evil of the commission of war crimes upon Sierra Leonean civilians (unlawful killings, violence to life, health and physical well-being of persons, pillage, collective punishments and the enlisting of children into armed groups), or the greater evil of harm to civilians that would have resulted should the AFRC remain in power.[16]

5. The Separate Opinion characterises the CDF as fighting against the imminent evil, anarchy, and tyranny to the citizens of Sierra Leone brought by the Armed Forces Revolutionary Council ("AFRC") (the so-called marriage between the rebel Sierra Leone Army and the RUF). Those statements and opinions appear to express political and judicial support for any armed force engaged in combat with the RUF, including the CDF and all its members, presenting their actions as a manifestation of a "normal human instinct"[17] against a great evil. Furthermore, Justice Thompson ostensibly overlooks the war crimes committed by the CDF, including the mistreatment and sometimes killing of innocent civilians as well enlistment of children as CDF soldiers because he perceived it as necessary to prevent the continued

---

[7] Separate Opinion, para. 87(6).
[8] *Id.*, para. 69.
[9] *Id.*, para. 90.
[10] *Id.*, paras. 87(6), 97 and 101.
[11] *Id.*, para. 91(ii).
[12] *Id.*, para. 90.
[13] *Id.*, para. 100(i).
[14] *Ibid,* paras. 71, citing Bankole Thompson, *The Criminal Law of Sierra Leone* (Maryland: University Press of America Inc., 1999), pp. 267-68; para. 73, citing John Ladd (trans), The Metaphysical Elements of Justice, by Immanuel Kant (Indianapolis: Bobbs-Merrill) 1965, p. 41; para. 78, citing P.J. Richardson et al., Archbold, Criminal Pleading, Evidence and Practice (London: Sweet and Maxwell, 1997) paras. 17-132; para. 80; para. 87(2), citing Larry Alexander in Jules Coleman and Shapiro, Scott (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law [Oxford: Oxford University Press, 2004], p. 844; para. 87(3), citing *Id.* and para. 87(4).
[15] *Id.*, para. 79.
[16] *Id.*, para. 80, citing Section 3.02 of the Model Penal Code (other citations omitted).
[17] *Id.*, para. 75, citing *Perka* v. *The Queen* (1989), 2 SCR 234, p. 248.

existence of the AFRC/RUF whose actions, as a group and as individuals, created an immediate and compelling threat of harm, widespread violence of immense dimensions, and intense discomfiture to the citizenry of Sierra Leone.

6. The factual and legal findings implicitly indict the RUF as a criminal organisation, with no legitimate aims and with no intent but to harm the Sierra Leone citizenry, which leaves little room for doubt or alternative view. The cumulative effect of the conclusions of fact and law in the Separate Opinion creates the appearance that the Learned Judge has prejudged many of the essential issues in the RUF case and has aligned himself with the Prosecution case and their cause. Furthermore, the forthright views expressed concerning the criminality of the AFRC/RUF would give a reasonable fair-minded person an apprehension that the Learned Judge is now unable to adjudicate fairly on the guilt or innocence of any member of the RUF. Consequently, it is respectfully submitted that the Learned Judge must voluntarily withdraw from the case involving the RUF Accused. If he does not do so, the Defence requests that, pursuant to Rule 15(B) he be disqualified for the remainder of the proceedings.

APPLICABLE LAW

7. Rule 15 of the Rules states *inter alia* that "[a] Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground". It continues by stating that "[a]ny party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground". This principle is an extension of the immutable presumption of innocence and is fundamental to the preservation of the integrity of all civilised legal institutions and courts throughout the modern world.[18]

The Test of Bias

8. The Appeals Chamber of the Special Court for Sierra Leone has previously held in *Prosecutor v Issa Sesay* that:

> "The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages [of Judge Robertson's book] will have a legitimate reason to fear that [the Judge] lacks impartiality. In other words, whether one can apprehend bias".[19]

---

[18] *See, for eg.,* Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("ICTR"); Rule 14 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"); Rule 34(1) of the Rules of Procedure and Evidence of the International Criminal Court ("ICC"); Article 41 of the Statute of the ICC; Article 23 of the Constitution of Sierra Leone of 1991; 28 U.S.C. section 455 of the United States Code; Article 668 of the French Code of Criminal Proceedings. *See also Prosecutor* v. *Jean Paul Akayesu,* Case No. ICTR-96-4, Appeals Chamber, 1st June 2001, para. 91; *Prosecutor* v. *Anto Furundzija,* Case No. IT-95-17/1-A, Appeals Chamber, 21st July 2000, para. 179 ("*Furundzija Appeals Judgement*"); *Prosecutor* v. *Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo,* Case No. IT-96-21-A, "Judgement", Appeals Chamber, 20th February 2001, ("*Celibici Appeals Judgement*") para. 697-99, 707.

[19] *Prosecutor* v. *Sesay et al.,* SCSL-04-15-AR15-58, Decision on Defence Motion Seeking Disqualification of

9. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") recognised that it was a general rule that "a judge might not bring an impartial and unprejudiced mind to a case if there is proof of actual bias or an appearance of bias":[20]

> "The court has found that this requires that a tribunal is not only genuinely impartial, but also *appears to be impartial*. Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society. The Court considers that it must determine whether or not there are ascertainable facts which may raise doubts as to...impartiality. In doing so, it has found that in deciding whether in a given case there is legitimate reason to fear that the particular judge lacks impartiality the standpoint of the accused is important but not decisive...what is decisive is whether this fear can be held objectively justified".[21]

SUBMISSIONS

10. For the reasons listed below, the Defence submits that an independent bystander or a reasonable person would have a legitimate reason to fear that the Honourable Justice Thompson lacks impartiality.

Justice Thompson's Conclusion and Findings

11. There is little, if any, real support for the use of the necessity defence to justify serious violations of international humanitarian law. Two judges at the announcement of the sentencing judgement for the CDF Defendants supported this position, noting that using this defence to justify serious international humanitarian law transgressions would "compromise the objectives which International Humanitarian law seeks to achieve".[22] It would "negate the resolve and determination of the international community to combat those crimes which have the common characteristics of being heinous, gruesome, or degrading of innocent victims or of the civilian population that it intends to protect".[23] Notwithstanding this lack of international and judicial support (for the availability of the defence) and the fact that it was never raised by the CDF Defendants,[24] Justice Thompson unilaterally invoked the defence on their behalf.[25] While not inherently problematic to support a novel argument in international criminal law (even one unilaterally made), it creates the impression that the Learned Judge's

---

Justice Robertson from the Appeals Chamber, Appeals Chamber, 13th March 2004, para. 15. ('Appeals Chamber Decision on Judge Robertson').

[20] *Furundzija Appeals Judgement*, para. 179; *see also Prosecutor* v. *Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-PT, "Bureau Decision", 4th May 1998.

[21] *Furundzija Appeals Judgement*, para. 182; *see also* para. 189, which states that "there should be nothing in the circumstances which objectively gives rise to an appearance of bias".

[22] *See* CDF case, Transcripts of 9th October 2007 (Sentencing Judgement), pp. 23-24.

[23] *Id.*, at p. 24.

[24] *See* CDF Transcripts of 19th September 2007 (Sentencing Hearing) p. 55; CDF case, Transcripts of 9th October 2007 (Sentencing Judgment) pp. 20-21.

[25] Separate Opinion, paras. 68-70.

views concerning the inherent legitimacy of the CDF and the overriding criminality of the AFRC/RUF are firmly and powerfully rooted.

12. The language used in the Separate Opinion is clear and unambiguous. The AFRC/RUF, and inferentially its members (particularly its senior commanders), appear to be characterised as an "evil" seven times.[26] Of note, the Learned Judge posits the question "Was what the [CDF] Accused did actually necessary to avoid the evil in question?"[27] There can be no doubt that the evil the Learned Judge had in mind was any member of the AFRC and any motive or objective therein. On 4 occasions, the Learned Judge seems to present the AFRC/RUF as acting in "rebellion" and provoking "anarchy" and "tyranny".[28] Beyond these assertions, the Learned Judge implicitly argues that the AFRC/RUF were acting with "lesser values"[29] and "gravely imperilled"[30] the lives of Sierra Leoneans by spreading "fear, utter chaos [and] widespread violence".[31]

13. These characterisations, whether accurate or not, stand in stark contrast to his interpretation of the CDF actions. According to the Separate Opinion, the CDF acted with "patriotism and altruism"[32] in an effort to preserve the safety of the Sierra Leoneans[33] and acted solely to preserve democratic rule.[34] Thus, it was legitimate for them to "take up arms"[35] and take *whatever* action they perceived necessary to combat this "evil".

14. The language used is reminiscent of the emotive views expressed by the Prosecution during the opening of their case in July 2004 who also characterised the RUF as "evil"[36] claiming that the sole preoccupation of the AFRC/RUF was violence and anarchy.[37] The remarks made by the Prosecution and the Learned Judge are in essence the same, although arguably the

---

[26] *Id.* at paras. 71, citing Bankole Thompson, *The Criminal Law of Sierra Leone* (Maryland: University Press of America Inc., 1999), pages 267-68; para. 73, citing John Ladd (trans), *The Metaphysical Elements of Justice*, by Immanuel Kant (Indianapolis: Bobbs-Merrill) 1965, page 41; para. 78, citing P.J. Richardson et al., *Archbold, Criminal Pleading, Evidence and Practice* (London: Sweet and Maxwell, 1997) paras. 17-132; para. 80; para. 87(2), citing Larry Alexander in Jules Coleman and Shapiro, Scott (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* [Oxford: Oxford University Press, 2004], page 844; para. 87(3), citing *The Oxford Handbook*; and para. 87(4).
[27] Separate Opinion, at para. 78.
[28] *Id.*, at paras. 69, 87(6), 97 and 101.
[29] *Id.*, at para. 89.
[30] *Id.*, at para. 100(i).
[31] *Id.*, at para. 91(ii).
[32] *Id.*, at para. 90.
[33] *Id.*, at paras. 97, 101.
[34] *Id.*, at paras. 69, 85, 87(5), 87(6), 90, 91(v) and 103.
[35] *Id.*, at para. 101.
[36] *See, for eg.,* Transcript of 5th July 2004, page 29, lines 32-36, which stated that "[t]hese crimes in our joint indictment against Sesay, Kallon and Gbao certainly defy any logic, any reason; the purely evil of the deeds of destruction are so horrific, terrible and devastating in their scope, words in any language do not describe the offences committed by these indicted".
[37] *Ibid.*, page 22, line 15 stating "Ruin was their motto, and destruction was their creed".

views expressed by the Prosecution are less condemnatory insofar as they do not lend support to the notion that the commission of war crimes against civilians was acceptable in furtherance of CDF goals.

15. The Learned Judge has found that the AFRC/RUF members shared a criminal enterprise that was marked by anarchy, tyranny and evil. In other words the views expressed appear to be a judicial finding that members of the AFRC/RUF did share a "common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone",[38] that the "joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimise resistance to geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise"[39] and that the crimes which resulted were "either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise".[40] No other reasonable interpretation is apparent from the views expressed.

16. The views expressed by Justice Thompson are quantitatively and qualitatively no different to those made by Justice Robertson, former President of the Special Court, which led to his disqualification from the RUF case.[41] The fact that Justice Thompson preferred not to refer specifically to the types of crimes of the AFRC/RUF which he considered to be evil or tyrannical (unlike Justice Robertson[42]) this does not alter the perception that the views are similar. It is instructive that Judge Thompson considers that the crimes of the AFRC were more serious than those which the majority found proven against Fofana and Kondewa, namely unlawful killings, violence to life, health and physical well-being of persons, pillage, collective punishments, and the enlisting of children into armed groups. Once again it is arguable that Justice Robertson's views concerning the RUF were more moderate, given that he considered it necessary to effect the capture and trial of the leaders of the RUF as a means by which the organisation could be defeated, as opposed to the commission of war crimes.

17. The Learned Judge's conclusions must be seen in the context of the countervailing norms of judicial reasoning and decision-making. This was discussed by the Appeals Chamber in the *Celebici* case in the International Tribunal for the Former Yugoslavia. In discussing the

---

[38] *See Prosecutor* v. *Sesay et al.*, SCSL-04-15-PT-619, Corrected Amended Consolidated Indictment, 2nd August 2006, para. 36.
[39] *Ibid,* at para. 37.
[40] *Ibid,* at para. 37.
[41] *See* Appeals Chamber Decision on Judge Robertson.
[42] *See Prosecutor v. Issa Hassan Sesay*, SCSL – 2003-05-PT-34, Defence Motion Seeking the Disqualification from the Appeals Chamber, 27 February 2004, para. 5.

subject of torture, it stated that:

> "[I]t is difficult to accept that any judge eligible for appointment to the Tribunal – and thus a person of 'high moral character, impartiality and integrity…' – would not be opposed to acts of torture. A reasonable and informed observer, knowing that torture is a crime under international and national laws would not expect judges to be morally neutral about torture. Rather, such an observer would expect judges to hold the view that persons responsible for torture should be prosecuted".[43]

18. Justice Thompson seems to be overlooking the human rights violations perpetrated against Sierra Leonean civilians, or at least subjecting it to some sort of balancing test. It is reasonable to assume, similarly to torture, that a judge would not be morally neutral about harming innocent Sierra Leonean civilians. The Learned Judge's reasoning and findings objectively demonstrate the loss of *that* requisite perspective. Instead what emerges is a demonstration of the depth of the Learned Judge's emotional and intellectual prejudgment of the RUF, its aims and objectives, and inferentially anyone who played a role within it. The Learned Judge appears to accept the legitimacy of *some* breaches of a nearly immutable body of law providing the perpetrators are engaged in combating the RUF.

Presumption of Innocence

19. Cardinal to any system of justice is the presumption that an Accused is innocent until proven guilty.[44] By noting the anarchic nature of the AFRC/RUF in such strong and unequivocal terms the Learned Judge creates the perception that the RUF Accused may be deprived of this sacrosanct right. The finding that members of the AFRC/RUF had agreed to take over the legitimate government and that the consequences of this was anarchy – which had to be prevented "at all costs"[45] – the RUF Accused are deprived of the benefit of any judicial doubt. This reflects an impermissible breach of Article 17(3) of the Statute.[46] However, the Learned Judge's findings seem to go much further than depriving the Accused of the presumption of innocence since the remarks criminalise the AFRC/RUF – including its High Command, its rank and file, and all its supporters – and logically lead to the creation of a substantial burden *against* the innocence of the RUF Accused. In light of the logical

---

[43] *Celibici Appeals Judgement*, para. 699.
[44] *See eg.* Article 7(1)(b) African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 October 1986; Article 8(2) American Convention on Human Rights, O.A.S. Treaty Series No. 36, 18 July 1998; Article 6(2) Convention for Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Council of Europe, 4 November 1950; Article 14(2) International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution 2000 A (XXI), U.N. Doc. A/6316 (1966), 23 March 1976; Article 11(1) Universal Declaration of Human Rights, adopted by UN General Assembly Resolution 217 A(III), U.N. Doc A/810 (1948), 10 December 1948.
[45] Separate Opinion, para. 87(6).
[46] Article 17(3) ensures that "[t]he accused shall be presumed innocent until proved guilty according to the provisions of the present Statute".

consequence of the Learned Judge's views and the shifting burden for the RUF to "prove" its innocence, the RUF Accused can expect to be convicted by the Learned Judge, irrespective of the law or the evidence.

Reasonable Appearance of Bias

20. There can be no doubt that the Learned Judge's reasoning and findings objectively create an appearance of bias. This is clear from the matters referred to above. A reasonable fair minded person, properly informed, confronted by a judge, who has expressed such clear-cut, wide-ranging and unequivocal findings about the object, purpose, and activities of the AFRC/RUF would likely apprehend bias. This reasonable person would conclude that any further proceedings will be indelibly marked by the appearance of unfairness and prejudgement to the RUF Accused.

REQUEST

21. It is imperative that justice should be done as well as manifestly seen to have been done. In light of Justice Thompson's conclusions, it is respectfully submitted that neither seems possible. There appears no other objective reading of the conclusions/findings in Justice Thompson's Separate Opinion.

22. Thus, Counsel for Sesay and Counsel for Gbao arrive at the regrettable conclusion that it is in the best interests of their clients to jointly request that Justice Thompson voluntarily withdraw from any further involvement in the RUF proceedings. In the alternative, if Justice Thompson is unwilling to withdraw, the Defence requests that, pursuant to Rule 15(B), he be disqualified for the remainder of the proceedings and appropriate action is taken according to Article 12(4) of the Statute and Rule 16.

Dated 14 November 2007

Wayne Jordash (Lead Counsel for Sesay)
Sareta Ashraph (Co-counsel for Sesay)

pp. John Cammegh (Lead Counsel for Gbao)

Table of Authorities

I. Special Court for Sierra Leone

- Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended on 14 May 2007. Rule 15 and 26 *bis*.
- Statute of the Special Court for Sierra Leone. Article 17, especially paragraphs 2, 3 and 4.
- *Prosecutor v. Issa Hassan Sesay*, SCSL–2003-05-PT-34, Defence Motion Seeking the Disqualification from the Appeals Chamber, 27 February 2004. Paragraph 5.
- *Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Doc. No. SCSL-2004-15-AR15-58, Decision on Defence Motion Seeking Disqualification of Justice Robertson from the Appeals Chamber, Appeals Chamber, 13 March 2004. Paragraph 15.
- *Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Transcript of 5 July 2004. Pages 22 and 29.
- *Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Doc. No. SCSL-2004-15-PT-619, Corrected Amended Consolidated Indictment, 2 August 2006. Paragraphs 36 and 37.
- *Prosecutor v. Moinina Fofana and Allieu Kondewa,* Doc. No. SCSL-04-14-T-785, Judgement, Trial Chamber I, 2 August 2007. Paragraphs 293 and 294, part VII.
- *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Doc. No. SCSL-04-14-T-785, Annex C of the Judgement: Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute Trial Chamber I, 2 August 2007,. Paragraphs 68, 69, 70, 71, 72, 73, 75, 76, 78, 79, 80, 85, 87(2), 87(3), 87(4), 87(6), 89, 90, 91, 92, 97, 100(i), 101, 103.
- *Prosecutor v. Moinina Fofana and Allieu Kondewa,* Transcripts of 19 September 2007 (Sentencing Hearing). Page 55.
- *Prosecutor v. Moinina Fofana and Allieu Kondewa,* Transcripts of 9 October 2007 (Sentencing Judgement). Pages 20, 21, 23 and 24.

II. International Criminal Tribunal for Rwanda

- Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda. Rule 15.
- *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4, Judgement, Appeals Chamber, 1 June 2001. Paragraph 91.

III. International Criminal Tribunal for the Former Yugoslavia

- Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia. Rule 14.

- *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-PT, Bureau Decision on Application Requesting Disqualification of Judges Jorda and Riad, 4 May 1998.

- *Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000. Paragraphs 179, 182 and 189.

- *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* ('Celibici case'), Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001. Paragraphs 697-699, 707.

IV. International Criminal Court

- Statute of the International Criminal Court. Article 41.

- Rules of Procedure and Evidence of the International Criminal Court. Rule 34(1).

V. International Human Rights Instruments

- Universal Declaration of Human Rights, adopted by UN General Assembly Resolution 217 A(III), U.N. Doc A/810 (1948), 10 December 1948. Article 11(1).

- Convention for Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Council of Europe, 4 November 1950. Article 6(2).

- International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution 2000 A (XXI), U.N. Doc. A/6316 (1966), 23 March 1976. Article 14(2).

- African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 October 1986. Article 7(1)(b)

- American Convention on Human Rights, O.A.S. Treaty Series No. 36, 18 July 1998. Article 8(2).

VI. Other Documents

- Sierra Leonean Criminal Procedure Act of 1965. Section 178.

- Constitution of Sierra Leone of 1991. Article 23.

- United States Code 28 U.S.C. Section 455; Available at http://www4.law.cornell.edu/uscode/html/uscode28/usc_sec_28_00000455----000-.html

- French Code of Criminal Proceedings. Article 668. Available in English at http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm

- Regina v. Bow Street Metropolitan Stipendiary Magistrates and others, ex parte Pinochet Ugarte (No 2) (House of Lords) (2000) 1 AC 119 at pp. 1 & 2.

[2000] 1 AC 119

REGINA v BOW STREET METROPOLITAN STIPENDIARY

MAGISTRATE and Others, Ex parte PINOCHET UGARTE (No. 2)

[HOUSE OF LORDS]

[2000] 1 AC 119

HEARING-DATES: 15, 16, 17, December 1998, 15 January 1999

15 January 1999

CATCHWORDS:
Natural Justice - Bias - Judge in own cause - Request for extradition of former head of state for human rights crimes - Applicant claiming immunity - Human rights body joined as party to proceedings - Judge unpaid director and chairman of charity closely linked to human rights body - Connection not disclosed to parties - Whether judge automatically disqualified - Whether appearance of bias

HEADNOTE:
The applicant, a former head of state of Chile who was on a visit to London, was arrested under warrants issued pursuant to section 8(1) of the Extradition Act 1989 following receipt of international warrants of arrest issued by a Spanish court alleging various crimes against humanity, including murder, hostage-taking and torture, committed during the applicant's period of office and for which he was knowingly responsible. The Divisional Court quashed the warrants on the ground, inter alia, that as a former head of state he was immune from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state. The quashing of the second warrant was stayed pending an appeal to the House of Lords by the prosecuting authorities on the issue of the immunity enjoyed by a former head of state. Before the main hearing A.I., a human rights body which had campaigned against the applicant, obtained leave to intervene in the appeal and was represented by counsel in the proceedings. The appeal was allowed by a majority of three to two and the second warrant was restored pending a decision by the Home Secretary whether to issue an authority to proceed pursuant to section 7(1) of the Act. Subsequently the applicant's advisers discovered that one of the judges who had been part of the majority was, although not a member of A.I., an unpaid director and chairman of A.I.C. Ltd., a charity which was wholly controlled by A.I. and carried on that part of its work which was charitable. One of the objects of A.I.C. Ltd. was to procure the abolition of torture, extra-judicial execution and disappearance. The Home Secretary signed the authority to proceed.

On a petition by the applicant for the House of Lords to set aside its previous decision on the ground of apparent bias on the part of the judge: -

Held, granting the petition, that as the ultimate court of appeal the House had power to correct any injustice caused by one of its earlier orders; that the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge's decision would lead to the promotion of a cause in which he was involved together with one of the parties; that, although the judge could not personally be regarded

as having been a party to the appeal, A.I., which had been a party with the interest of securing the extradition of the applicant to Spain, and A.I.C. Ltd. were both parts of a movement working towards the same goals; that in order to maintain the absolute **impartiality** of the judiciarythere had to be a rule which automatically disqualified a judge who was involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as was a party to the suit; and that, accordingly, the earlier decision of the House would be set aside (post, pp. 132D, 134B-E, 135A-F, 139B-140A,142E-143F, 146E-F).

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) applied.

Decision of the House of Lords [2000] 1 A.C. 61 [1998] 3 W.L.R. 1456; [1998] 4 All E.R. 897 set aside.

INTRODUCTION:
Petition

This was an application by Senator Augusto Pinochet Ugarte to set aside the decision of the House of Lords (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) of 25 November 1998 allowing an appeal by the Commissioner of Police of the Metropolis and the Government of Spain against a decision of the Divisional Court (Lord Bingham C.J., Collins and Richards JJ.) dated 28 October 1998 granting an order of certiorari to quash a warrant issued pursuant to section 8(1) of the Extradition Act 1989 at the request of the Central Court of Criminal Proceedings No. 5, Madrid, by Ronald Bartle, Bow Street Metropolitan Stipendiary Magistrate. The ground of the application was that the links between Lord Hoffmann and Amnesty International, an intervener in the proceedings, were such as to give the appearance that he might have been biased against the applicant. Leave to intervene was given to Amnesty International.

The facts are stated in the opinion of Lord Browne-Wilkinson.

COUNSEL:
Clive Nicholls Q.C., Clare Montgomery Q.C., Helen Malcolm, James Cameron and Julian B.Knowles for the applicant.

Montgomery Q.C. The jurisdiction of the House to hear the application was not in any real dispute. The decision had international implications and required acceptance by the wider international community. The links between the judge and Amnesty International, which were not disclosed prior to the hearing and not known to the applicant's legal advisors, were such as to undermine confidence in the decision. For examples of Amnesty International's charitable objectives: see McGovern v. Attorney-General [1982] Ch. 321. For an example of how the non-charitable parts of Amnesty International have continuously campaigned against the applicant: see Ex parte Amnesty International, The Times, 11 December 1998.

A failure of disclosure is a relevant factor in deciding whether justice was seen to be done although it does not necessarily vitiate the decision. It cannot be seriously suggested that there is a duty on the applicant'ssolicitors to trawl around for information and request disclosure: see Shetreet, Judges on Trial (1976), pp. 305-306, 308, 311; In the marriage of Kennedy and Carhill (1995) F.L.C. 92-605.

It is doubtful whether the test established in Reg. v. Gough [1993] A.C. 646, of a real "danger of bias" meets the objective of the common law rule which is to preserve the appearance of non-bias rather than the fact of non-bias as determined by the court (see how the test in Gough has been interpreted in, for example, Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, 151, 161). The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the

bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969): see Harris, O'Boyle, Warbrick, Law of the European Convention on Human Rights (1995), p. 235; Hauschildt v. Denmark (1989) 12 E.H.R.R. 266; Langborger v. Sweden (1989) 12 E.H.R.R. 416 and Holm v. Sweden (1993) 18 E.H.R.R. 79. **Impartiality** and independence are different concepts, one is sub group of the other. The position under article 6(1) should be the position under English law: see Reg. v. Sultan Khan [1997] A.C. 558 and Porter v. Magill (1997) 96 L.G.R. 157.

The New Zealand courts have preferred to follow the Australian case of Webb v. The Queen (1994) 181 C.L.R. 41 rather than Reg. v. Gough [1993] A.C. 646: see B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd. [1997] N.Z.A.R. 49. For the Canadian approach see: Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193. The court in Reg. v. Gough [1993] A.C. 646 was not referred to the Australian authorities nor even to the Scottish case of Bradford v. McLeod, 1986 S.L.T. 244.

A high standard should apply to the higher courts. At the lower levels local interests can involve everyone in the area at the higher level there is no need for any conflict of interest.

The applicant could not be said to have waived any objection he had to the judge by his subsequent actions. The connection with Amnesty International was not a matter of public record and the parties had been entitled to assume there was no such connection. Even if there was a waiver there is the issue of public interest in seeing that the judiciary is acting fairly and a duty on the House to see that confidence is maintained.

The application cannot be regarded as an abuse of process by reason of delay. Between the date of knowledge of the connection to the point of issuing proceedings there were practical problems and time was spent in investigating the facts.

The appropriate test is whether a fair minded observer with knowledge of the relevant facts would have a suspicion of bias. Non-disclosure alone is a procedural impropriety which is sufficient to raise such suspicion.

Alun Jones Q.C., David Elvin, James Lewis, Campaspe Lloyd-Jacob and James Maurici for the Commissioner of Police and the Government of Spain. The applicant raised the issue of bias with the Secretary of State before issuing the present petition. Very strong representations were made to the Secretary of State urging him to disregard the decision of the House and refuse to issue an authority to proceed. All the facts which theapplicant relies on now were known to his advisers then yet the submissions to the Secretary of State suggest that he is the only person who can uphold this point.

In effect by taking that course of action the applicant had elected to pursue his grievance before the Secretary of State rather than the House: see Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142; Reg. v. Nailsworth Licensing Justices, Ex parte Bird [1953] 1 W.L.R. 1046; Thomas v. University of Bradford (No. 2) [1992] 1 All E.R. 964 and Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41. It was only after the Secretary of State had made his decision that the current petition was issued. This raises issues of waiver, abuse of process and acquiescence.

The applicant's advisers had denied having any knowledge of the link between the judge and Amnesty International yet it is clear that at least two of them had some knowledge of the connection. That is surely relevant to the discretionary aspects of relief because if one is complaining about non-disclosure one should have regard to ones own position.

Applying the "real danger of bias" test laid down in Reg. v. Gough [1993] A.C. 646 to the facts in the case it was clear that there was no such danger. The duty of disclosure is

subsumed in the Gough test. The test propounded in Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193 of a "reasonable apprehension of bias" is effectively the same as the Gough test. That case also establishes that it is accepted that a judge brings his attitudes, experiences and views to the job.

The judge's involvement with the Amnesty International charity is an embodiment of his broader approach to the law which he brings to his decision making. Being against torture can hardly be regarded as bias. The applicant's real objection is to the judge's perceived liberal instincts. The fact that the subject matter of the complaint has a personal link with an organisation which has interests in the outcome of the decision is not determinative of there being a "real danger" of bias: see Reg. v. Chairman of the Town Planning Board, Ex parte Mutual Luck Investment Ltd. (1995) 5 H.K.P.L.R. 328; Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304.

New Zealand, Canada and Hong Kong have all applied and followed the Gough approach. See also the discussion in Shetreet, Judges on Trial (1976), pp. 305-306.

Elvin following. The requirement of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms reflects principles already deeply embodied in the common law. Accordingly, nothing of substance is added by invocation of article 6(1). This can be seen from consideration of the two interrelated elements of article 6(1), the requirements for a tribunal which is both independent and impartial. The requirement of independence has an objective test and focuses on the structural and compositional aspects of the tribunal. **Impartiality** means lack of prejudice or bias and has a subjective test.

The European Court of Human Rights has not suggested that there is a duty of disclosure. It has said that if there is a ground for concern (after consideration of the objective and subjective tests) the judge must withdraw. As such it is the equivalent of the actual bias test under English law as described in Reg. v. Gough [1993] A.C. 646: see Campbell and Fellv. United Kingdom (1984) 7 E.H.R.R. 165; De Cubber v. Belgium (1984) 7 E.H.R.R. 236; Gregory v. United Kingdom (1997) 25 E.H.R.R. 577, 584; Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73, 88; Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304. The European Court of Human Rights has ruled that the right to an impartial tribunal may be waived: see Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692.

Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and B. v. W.(Wardship: Appeal) [1979] 1 W.L.R. 1041 were straightforward cases of failure to disclose evidence and do not have any wider application.

The Gough test concerns the appearance of bias to a reasonable observer not to one of the parties. Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142 and Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193 are both consistent with the Gough test.

Peter Duffy Q.C., Owen Davies and David Scorey for Amnesty International. There are many differences between Amnesty International and Amnesty International Charity Ltd.: see McGovern v. Attorney-General [1982] Ch. 321. For the sum total of Amnesty International's activities which are charitable see Reg. v. Radio Authority, Ex parte Bull [1998] Q.B.294.

Amnesty International supports the position of challenging trials vitiated by bias. The issue is: what constitutes bias? It is in the public benefit for judges to be involved with charities. It cannot be that if a judge is involved with a charity which is concerned with grave human rights violations he is thereby excluded from sitting in a case in which human rights issues arise. The issue of disclosure only arises if there is an issue which needs to be disclosed. Is it necessary or desirable that a ritual should be gone through whereby judges disclose their connections with every human rights body? Charitable objectives are by definition

nonpolitical and in the public interest. A judges relationship with a charity and support for its objectives should not be investigated or under suspicion.

Montgomery Q.C. in reply. The whole argument about waiver or election is based on the false premise that the Secretary of State is an alternative remedy to petitioning the House. They are in fact parallel remedies involving different standards and tests.

The provision of an impartial tribunal is a duty and cannot therefore be waived. Rights can be waived not duties: see Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692.

The House has indulged in no investigation of the background facts. The House cannot therefore declare on what actually occurred and has to deal only with the appearance of what occurred. A judge must not hear a case involving a matter which a charity of which he is a director is sworn to abolish in circumstances where a company closely related to that charity is an intervener in the case.

The duty of disclosure is established by practice. It is not just one of the incidents of a fair trial but lies at the heart of the matter: see Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73. The test must be that information should be disclosed which would give rise to the apprehension of bias on the part of a reasonable man in the shoes of oneof the parties. That is a free standing ground on which relief should be granted. Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and B. v. W.(Wardship: Appeal) [1979] 1 W.L.R.1041 show that a failure to disclose relevant information can undermine a decision.

There is an important distinction between the appearance of bias (the actuality) and the apprehension of bias (the subjective view). Reg. v. Gough [1993] A.C. 646 has plainly been misunderstood as it is taken to mean that the relevant issue is only the actuality rather than the appearance. However, it is the appearance of bias to the public and the party concerned which is relevant. If that fear of bias is justified, even if knowledge of the facts would vitiate that fear, then the test of bias has been satisfied. In the instant case the judge was identified or apparently identified with the policy objectives of one side's case: see Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193, 227. That appearance of bias cannot stand.

Their Lordships took time for consideration.

17 December 1998. Their Lordships granted the application for reasons to be given later.

15 January 1999.

PANEL: Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead and Lord Hutton

JUDGMENTBY-1: Lord Browne-Wilkinson

JUDGMENT-1:
Lord Browne-Wilkinson: . My Lords,

Introduction

This petition has been brought by Senator Pinochet to set aside an order made by your Lordships on 25 November 1998. It is said that the links between one of the members of the Appellate Committee who heard the appeal, Lord Hoffmann, and Amnesty International ("A.I.") were such as to give the appearance that he might have been biased against Senator Pinochet. On 17 December 1998 your Lordships set aside the order of 25 November 1998 for reasons to be given later. These are the reasons that led me to that conclusion.

Background facts

Senator Pinochet was the head of state of Chile from 11 September 1973 until 11 March 1990. It is alleged that during that period there took place in Chile various crimes against humanity (torture, hostage taking and murder) for which he was knowingly responsible.

In October 1998 Senator Pinochet was in this country receiving medical treatment. In October and November 1998 the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face trial for those alleged offences. The Spanish Supreme Court has held that the courts of Spain have jurisdiction to try him. Pursuant to those international warrants, on 16 and 23 October 1998 metropolitan stipendiary magistrates issued two provisional warrants for his arrest under section 8(1)(b) of the Extradition Act 1989. Senator Pinochet was arrested. He immediately applied to the Queen's Bench Divisional Court to quash the warrants. The warrant of 16 October was quashed and nothing further turns on that warrant. The second warrant of 23 October 1998 was quashed by an order of the Divisional Court of theQueen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) However, the quashing of the second warrant was stayed to enable an appeal to be taken to your Lordships' House [2000] 1 A.C. 61 on the question certified by the Divisional Court as to "the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state."

As that question indicates, the principle point at issue in the main proceedings in both the Divisional Court and this House was as to the immunity, if any, enjoyed by Senator Pinochet as a past head of state in respect of the crimes against humanity for which his extradition was sought. The Crown Prosecution Service ("C.P.S.") (which is conducting the proceedings on behalf of the Spanish Government) while accepting that a foreign head of state would, during his tenure of office, be immune from arrest or trial in respect of the matters alleged, contends that once he ceased to be head of state his immunity for crimes against humanity also ceased and he can be arrested and prosecuted for such crimes committed during the period he was head of state. On the other side, Senator Pinochet contends that his immunity in respect of acts done whilst he was head of state persists even after he has ceased to be head of state. The position therefore is that if the view of the C.P.S. (on behalf of the Spanish Government) prevails, it was lawful to arrest Senator Pinochet in October and (subject to any other valid objections and the completion of the extradition process) it will be lawful for the Secretary of State in his discretion to extradite Senator Pinochet to Spain to stand trial for the alleged crimes. If, on the other hand, the contentions of Senator Pinochet are correct, he has at all times been and still is immune from arrest in this country for the alleged crimes. He could never be extradited for those crimes to Spain or any other country. He would have to be immediately released and allowed to return to Chile as he wishes to do.

The court proceedings

The Divisional Court having unanimously quashed the provisional warrant of 23 October on the ground that Senator Pinochet was entitled to immunity, he was thereupon free to return to Chile subject only to the stay to permit the appeal to your Lordships' House. The matter proceeded to your Lordships' House with great speed. It was heard on 4, 5 and 9-12 November 1998 by a committee consisting of Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann. However, before the main hearing of the appeal, there was an interlocutory decision of the greatest importance for the purposes of the present application. Amnesty International ("A.I."), two other human rights bodies and three individuals petitioned for leave to intervene in the appeal. Such leave was granted by a committee consisting of Lord Slynn, Lord Nicholls and Lord Steyn subject to any protest being made by other parties at the start of the main hearing. No such protest having been made A.I. accordingly became an intervener in the appeal. At the hearing of the appeal

A.I. not only put in written submissions but was also represented by counsel, Professor Brownlie, Michael Fordham, Owen Davies andFrances Webber. Professor Brownlie addressed the committee on behalf of A.I. supporting the appeal.

The hearing of this case, both before the Divisional Court and in your Lordships' House, produced an unprecedented degree of public interest not only in this country but worldwide. The case raises fundamental issues of public international law and their interaction with the domestic law of this country. The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. There are many Chileans and supporters of human rights who have no doubt as to his guilt and are anxious to bring him to trial somewhere in the world. There are many others who are his supporters and believe that he was the saviour of Chile. Yet a third group believe that, whatever the truth of the matter, it is a matter for Chile to sort out internally and not for third parties to interfere in the delicate balance of contemporary Chilean politics by seeking to try him outside Chile.

This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions. In the eyes of very many people the issue was not a mere legal issue but whether or not Senator Pinochet was to stand trial and therefore, so it was thought, the cause of human rights triumph. Although the members of the Appellate Committee were in no doubt as to their function, the issue for many people was one of moral, not legal, right or wrong.

The decision and afterwards

Judgment in your Lordships' House was given on 25 November 1998. The appeal was allowed by a majority of three to two and your Lordships' House restored the second warrant of 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity: Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal. Lord Slynn and Lord Lloyd each gave separate speeches setting out the reasons for their dissent.

As a result of this decision, Senator Pinochet was required to remain in this country to await the decision of the Home Secretary whether to authorise the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989. The Home Secretary had until 11 December 1998 to make that decision, but he required anyone wishing to make representations on the point to do so by the 30 November 1998.

The link between Lord Hoffmann and A.I.

It appears that neither Senator Pinochet nor (save to a very limited extent) his legal advisers were aware of any connection between Lord Hoffmann and A.I. until after the judgment was given on 25 November. Two members of the legal team recalled that they had heard rumours that Lord Hoffmann's wife was connected with A.I. in some way. During the Newsnight programme on television on 25 November, an allegation tothat effect was made by a speaker in Chile. On that limited information the representations made on Senator Pinochet's behalf to the Home Secretary on 30 November drew attention to Lady Hoffmann's position and contained a detailed consideration of the relevant law of bias. It then read:

"It is submitted therefore that the Secretary of State should not have any regard to the decision of Lord Hoffmann. The authorities make it plain that this is the appropriate approach to a decision that is affected by bias. Since the bias was in the House of Lords, the Secretary of State represents the senator's only domestic protection. Absent domestic protection the senator will have to invoke the jurisdiction of the European Court of Human Rights."

After the representations had been made to the Home Office, Senator Pinochet's legal advisers received a letter dated 1 December 1998 from the solicitors acting for A.I. written in response to a request for information as to Lord Hoffmann's links. The letter of 1 December, so far as relevant, reads as follows:

"Further to our letter of 27 November, we are informed by our clients, Amnesty International, that Lady Hoffmann has been working at their international secretariat since 1977. She has always been employed in administrative positions, primarily in their department dealing with press and publications. She moved to her present position of programme assistant to the director of the media and audio visual programme when this position was established in 1994. Lady Hoffmann provides administrative support to the programme, including some receptionist duties. She has not been consulted or otherwise involved in any substantive discussions or decisions by Amnesty International, including in relation to the Pinochet case."

On 7 December a man anonymously telephoned Senator Pinochet's solicitors alleging that Lord Hoffmann was a director of the Amnesty International Charitable Trust. That allegation was repeated in a newspaper report on 8 December. Senator Pinochet's solicitors informed the Home Secretary of these allegations. On 8 December they received a letter from the solicitors acting for A.I. dated 7 December which reads, so far as relevant, as follows:

"On further consideration, our client, Amnesty International have instructed us that after contacting Lord Hoffmann over the weekend both he and they believe that the following information about his connection with Amnesty International's charitable work should be provided to you. Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ('A.I.C.L.'), a registered charity incorporated on 7 April 1986 to undertake those aspects of the work of Amnesty International Ltd. ('A.I.L.') which are charitable under U.K. law. A.I.C.L. files reports with Companies House and the Charity Commissioners as required by U.K. law. A.I.C.L. funds a proportion of the charitable activities undertaken independently byA.I.L. A.I.L.'s board is composed of Amnesty International's Secretary General and two Deputy Secretaries General. Since 1990 Lord Hoffmann and Peter Duffy Q.C. have been the two directors of A.I.C.L. They are neither employed nor remunerated by either A.I.C.L. or A.I.L. They have not been consulted and have not had any other role in Amnesty International's interventions in the case of Pinochet. Lord Hoffmann is not a member of Amnesty International. In addition, in 1997 Lord Hoffmann helped in the organisation of a fund raising appeal for a new building for Amnesty International U.K. He helped organise this appeal together with other senior legal figures, including the Lord Chief Justice, Lord Bingham. In February your firm contributed oe1,000 to this appeal. You should also note that in 1982 Lord Hoffmann, when practising at the Bar, appeared in the Chancery Division for Amnesty International U.K."

Further information relating to A.I.C.L. and its relationship with Lord Hoffmann and A.I. is given below. Mr. Alun Jones for the C.P.S. does not contend that either Senator Pinochet or his legal advisers had any knowledge of Lord Hoffmann's position as a director of A.I.C.L. until receipt of that letter.

Senator Pinochet's solicitors informed the Home Secretary of the contents of the letter dated 7 December. The Home Secretary signed the authority to proceed on 9 December 1998. He also gave reasons for his decision, attaching no weight to the allegations of bias or apparent bias made by Senator Pinochet.

On 10 December 1998, Senator Pinochet lodged the present petition asking that the order of 25 November 1998 should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that Lord Hoffmann's links with A.I. were such as to give the appearance of possible bias. It is important to stress that Senator Pinochet makes no allegation of actual bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being

done. There is no allegation that any other member of the committee has fallen short in the performance of his judicial duties.

Amnesty International and its constituent parts

Before considering the arguments advanced before your Lordships, it is necessary to give some detail of the organisation of A.I. and its subsidiary and constituent bodies. Most of the information which follows is derived from the directors' reports and notes to the accounts of A.I.C.L. which have been put in evidence.

A.I. itself is an unincorporated, non-profit-making organisation founded in 1961 with the object of securing throughout the world the observance of the provisions of the Universal Declaration of Human Rights in regard to prisoners of conscience. It is regulated by a document known as the statute of Amnesty International. A.I. consists of sections in different countries throughout the world and its international headquarters in London. Delegates of the sections meet periodically at the international council meetings to coordinate their activities and to elect an internationalexecutive committee to implement the council's decisions. The international headquarters in London is responsible to the international executive committee. It is funded principally by the sections for the purpose of furthering the work of A.I. on a worldwide basis and to assist the work of sections in specific countries as necessary. The work of the international headquarters is undertaken through two United Kingdom registered companies, Amnesty International Ltd. ("A.I.L.") and Amnesty International Charity Ltd. ("A.I.C.L.").

A.I.L. is an English limited company incorporated to assist in furthering the objectives of A.I. and to carry out the aspects of the work of the international headquarters which are not charitable.

A.I.C.L. is a company limited by guarantee and also a registered charity. In McGovern v. Attorney-General [1982] Ch. 321, Slade J. held that a trust established by A.I. to promote certain of its objects was not charitable because it was established for political purposes; however the judge indicated that a trust for research into the observance of human rights and the dissemination of the results of such research could be charitable. It appears that A.I.C.L. was incorporated on 7 April 1986 to carry out such of the purposes of A.I. as were charitable. Clause3 of the memorandum of association of A.I.C.L. provides:

"Having regard to the statute for the time being of Amnesty International, the objects for which the company is established are: (a) To promote research into the maintenance and observance of human rights and to publish the results of such research. (b) To provide relief to needy victims of breaches of human rights by appropriate charitable (and in particular medical, rehabilitational or financial) assistance. (c) To procure the abolition of torture, extra-judicial execution and disappearance ..."

Under article 3(a) of A.I.C.L. the members of the company are all the elected members for the time being of the international executive committee of Amnesty International and nobody else. The directors are appointed by and removable by the members in general meetings. Since 8 December 1990 Lord Hoffmann and Mr. Duffy have been the sole directors, Lord Hoffmann at some stage becoming the chairperson.

There are complicated arrangements between the international headquarters of A.I., A.I.C.L. and A.I.L. as to the discharge of their respective functions. From the reports of the directors and the notes to the annual accounts, it appears that, although the system has changed slightly from time to time, the current system is as follows. The international headquarters of A.I. are in London and the premises are, at least in part, shared with A.I.C.L. and A.I.L. The conduct of A.I.'s international headquarters is (subject to the direction of the international executive committee) in the hands of A.I.L. A.I.C.L. commissions A.I.L. to undertake

charitable activities of the kind which fall within the objects of A.I. The directors of A.I.C.L. then resolve to expend the sums that they have received from A.I. sections or elsewhere in funding such charitable work as A.I.L. performs. A.I.L. then reports retrospectively to A.I.C.L. as to the moneys expended and A.I.C.L. votes sums to A.I.L. for such part of A.I.L.'s work as can properly be regarded as charitable. It was confirmedin the course of argument that certain work done by A.I.L. would therefore be treated as in part done by A.I.L. on its own behalf and in part on behalf of A.I.C.L.

I can give one example of the close interaction between the functions of A.I.C.L. and A.I. The report of the directors of A.I.C.L. for the year ended 31 December 1993 records that A.I.C.L. commissioned A.I.L. to carry out charitable activities on its behalf and records as being included in the work of A.I.C.L. certain research publications. One such publication related to Chile and referred to a report issued as an A.I. report in 1993. Such 1993 report covers not only the occurrence and nature of breaches of human rights within Chile, but also the progress of cases being brought against those alleged to have infringed human rights by torture and otherwise in the courts of Chile. It records that "no one was convicted during the year for past human rights violations. The military courts continued to claim jurisdiction over human rights cases in civilian courts and to close cases covered by the 1978 Amnesty law." It also records "Amnesty International continued to call for full investigation into human rights violations and for those responsible to be brought to justice. The organisation also continued to call for the abolition of the death penalty." Again, the report stated that "Amnesty International included references to its concerns about past human rights violations against indigenous peoples in Chile and the lack of accountability of those responsible." Therefore A.I.C.L. was involved in the reports of A.I. urging the punishment of those guilty in Chile for past breaches of human rights and also referring to such work as being part of the work that it supported.

The directors of A.I.C.L. do not receive any remuneration. Nor do they take any part in the policy-making activities of A.I. Lord Hoffmann is not a member of A.I. or of any other body connected with A.I.

In addition to the A.I. related bodies that I have mentioned, there are other organisations which are not directly relevant to the present case. However, I should mention another charitable company connected with A.I. and mentioned in the papers, namely, "Amnesty International U.K. Section Charitable Trust" registered as a company under number 3139939 and as a charity under 1051681. That was a company incorporated in 1995 and, so far as I can see, has nothing directly to do with the present case.

The parties' submissions

Miss Montgomery in her very persuasive submissions on behalf of Senator Pinochet contended (1) that, although there was no exact precedent, your Lordships' House must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety; (2) that (applying the test in Reg. v. Gough [1993] A.C. 646) the links between Lord Hoffmann and A.I. were such that there was a real danger that Lord Hoffmann was biased in favour of A.I. or alternatively (applying the test in Webb v. The Queen (1994) 181 C.L.R. 41) that such links give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased.

On the other side, Mr. Alun Jones accepted that your Lordships had power to revoke an earlier order of this House but contended that there was no case for such revocation here. The applicable test of bias, he submitted, was that recently laid down by your Lordships in Reg. v. Gough and it was impossible to say that there was a real danger that Lord Hoffmann had been biased against Senator Pinochet. He further submitted that, by relying on the allegations of bias in making submissions to the Home Secretary, Senator Pinochet had

elected to adopt the Home Secretary as the correct tribunal to adjudicate on the issue of apparent bias. He had thereby waived his right to complain before your Lordships of such bias. Expressed in other words, he was submitting that the petition was an abuse of process by Senator Pinochet. Mr. Duffy for A.I. (but not for A.I.C.L.) supported the case put forward by Mr. Alun Jones.

Conclusions

1. Jurisdiction

As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Broome v. Cassell & Co. Ltd. (No. 2) [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

2. Apparent bias

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge isnot a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, Judges on Trial (1976), p. 303; De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed. (1995), p. 525. I will call this "automatic disqualification."

In Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to your Lordships' House on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised, at p. 786, that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit. This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell said, at p. 793:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." (Emphasis added.)

On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a party to the suit: see, for example, Reg. v. Rand (1866) L.R. 1 Q.B. 230; Reg. v. Gough [1993] A.C. 646, 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the Dimes case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited. That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome.

The importance of this point in the present case is this. Neither A.I., nor A.I.C.L., have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit toanyone. The interest of A.I. in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice A.I. became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of A.I. and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, A.I. One of the constituent parts of that unincorporated association is A.I.C.L. A.I.C.L. was established, for tax purposes, to carry out part of the functions of A.I. those parts which were charitable which had previously been carried on either by A.I. itself or by A.I.L. Lord Hoffmann is a director and chairman of A.I.C.L., which is wholly controlled by A.I., since its members (who ultimately control it) are all the members of the international executive committee of A.I. A large part of the work of A.I. is, as a matter of strict law, carried on by A.I.C.L. which instructs A.I.L. to do the work on its behalf. In reality, A.I., A.I.C.L. and A.I.L. are a close-knit group carrying on the work of A.I.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to A.I. but he is not in fact A.I. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running A.I. Lord Hoffmann, A.I.C.L. and the

executive committee of A.I. are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing A.I. to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, A.I., shares with the government of Spain and the C.P.S., not a financial interest but an interest to establish that there is no immunity for ex-heads of state in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial a non-pecuniary interest. So far as A.I.C.L. is concerned, clause 3(c) of its memorandum provides that one of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance." A.I. has, amongst other objects, the same objects. Although A.I.C.L., as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, A.I.C.L. plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that A.I.C.L. had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a director of A.I.C.L., was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of A.I. he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr. Duffy.

Can it make any difference that, instead of being a direct member of A.I., Lord Hoffmann is a director of A.I.C.L., that is of a company which is wholly controlled by A.I. and is carrying on much of its work? Surely not. The substance of the matter is that A.I., A.I.L. and A.I.C.L. are all various parts of an entity or movement working in different fields towards the same goals. If the absolute **impartiality** of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart C.J.'s famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done:" see Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259.

Since, in my judgment, the relationship between A.I., A.I.C.L. and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of Lady Hoffmann as an employee of A.I. and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear (if I

have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his directorship of A.I.C.L., a company controlled by a party, A.I.

For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in Reg. v. Gough [1993] A.C. 646 ("is there in the view of the court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in Reg. v. Gough, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fairminded and informed member of the public that the judge was not impartial: see, for example, the High Court of Australia in Webb v. The Queen, 181 C.L.R. 41. It has also been suggested that the test in Reg. v. Gough in some way impinges on the requirement of Lord Hewart C.J.'s dictum that justice should appear to be done: see Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, 152a-b. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Finally on this aspect of the case, we were asked to state in giving judgment what had been said and done within the Appellate Committee in relation to Amnesty International during the hearing leading to the order of 25 November. As is apparent from what I have said, such matters are irrelevant to what we have to decide: in the absence of any disclosure to the parties of Lord Hoffmann's involvement with A.I., such involvement either did or did not in law disqualify him regardless of what happened within the Appellate Committee. We therefore did not investigate those matters and make no findings as to them.

Election, waiver, abuse of process

Mr. Alun Jones submitted that by raising with the Home Secretary the possible bias of Lord Hoffmann as a ground for not authorising the extradition to proceed, Senator Pinochet had elected to choose the Home Secretary rather than your Lordships' House as the arbiter as to whether such bias did or did not exist. Consequently, he submitted, Senator Pinochet had waived his right to petition your Lordships and, by doing so immediately after the Home Secretary had rejected the submission, was committing an abuse of the process of the House.

This submission is bound to fail on a number of different grounds, of which I need mention only two. First, Senator Pinochet would only be put to his election as between two alternative courses to adopt. I cannot see that there are two such courses in the present case, since the Home Secretary had no power in the matter. He could not set aside the order of 25 November and as long as such order stood, the Home Secretary was bound to accept it as stating the law. Secondly, all three concepts - election, waiver and abuse of process - require that the person said to have elected etc. has acted freely and in full knowledge of the facts. Not until 8 December 1998 did Senator Pinochet's solicitors know anything of Lord

Hoffmann's position as a director and chairman of A.I.C.L. Even then they did not know anything about A.I.C.L. and its constitution. To say that by hurriedly notifying the Home Secretary of the contents of the letter from A.I.'s solicitors, Senator Pinochet had elected to pursue the point solely before the Home Secretary is unrealistic. Senator Pinochet had not yet had time to find out anything about the circumstances beyond the bare facts disclosed in the letter.

Result

It was for these reasons and the reasons given by my noble and learned friend, Lord Goff of Chieveley, that I reluctantly felt bound to set aside the order of 25 November 1998. It was appropriate to direct a rehearing of the appeal before a differently constituted committee, so that on the rehearing the parties were not faced with a committee four of whom had already expressed their conclusion on the points at issue.

JUDGMENTBY-2: Lord Goff of Chieveley

JUDGMENT-2:
Lord Goff of Chieveley: . My Lords, I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend, Lord Browne-Wilkinson. It was for the like reasons to those given by him that I agreed that the order of your Lordships' House in this matter dated 25 November 1998 should be set aside and that a rehearing of the appeal should take place before a differently constituted Committee. Even so, having regard to the unusual nature of this case, I propose to set out briefly in my own words the reasons why I reached that conclusion.

Like my noble and learned friend, I am of the opinion that the principle which governs this matter is that a man shall not be a judge in his own cause - nemo judex in sua causa: see Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759, 793, per Lord Campbell. As stated by Lord Campbell the principle is not confined to a cause to which the judge is a party, but applies also to a cause in which he has an interest. Thus, for example, a judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous Dimescase itself. In that case the then Lord Chancellor, Lord Cottenham, affirmed an order granted by the Vice-Chancellor granting relief to a company in which, unknown to the defendant and forgotten by himself, he held a substantial shareholding. It was decided, following the opinion of the judges, that Lord Cottenham was disqualified,by reason of his interest in the cause, from adjudicating in the matter, and that his order was for that reason voidable and must be set aside. Such a conclusion must follow, subject only to waiver by the party or parties to the proceedings thereby affected.

In the present case your Lordships are not concerned with a judge who is a party to the cause, nor with one who has a financial interest in a party to the cause or in the outcome of the cause. Your Lordships are concerned with a case in which a judge is closely connected with a party to the proceedings. This situation has arisen because, as my noble and learned friend has described, Amnesty International ("A.I.") was given leave to intervene in the proceedings; and, whether or not A.I. thereby became technically a party to the proceedings, it so participated in the proceedings, actively supporting the cause of one party (the Government of Spain, represented by the Crown Prosecution Service) against another (Senator Pinochet), that it must be treated as a party. Furthermore, Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ("A.I.C.L."). A.I.C.L. and Amnesty International Ltd. ("A.I.L.") are United Kingdom companies through which the work of the International Headquarters of A.I. in London is undertaken, A.I.C.L. having been incorporated to carry out those purposes of A.I. which are charitable under U.K. law. Neither Senator Pinochet nor the lawyers acting for him were aware of the connection between Lord

Hoffmann and A.I. until after judgment was given on 25 November 1998.

My noble and learned friend has described in lucid detail the working relationship between A.I.C.L., A.I.L. and A.I., both generally and in relation to Chile. It is unnecessary for me to do more than state that not only was A.I.C.L. deeply involved in the work of A.I., commissioning activities falling within the objects of A.I. which were charitable, but that it did so specifically in relation to research publications including one relating to Chile reporting on breaches of human rights (by torture and otherwise) in Chile and calling for those responsible to be brought to justice. It is in these circumstances that we have to consider the position of Lord Hoffmann, not as a person who is himself a party to the proceedings or who has a financial interest in such a party or in the outcome of the proceedings, but as a person who is, as a director and chairperson of A.I.C.L., closely connected with A.I. which is, or must be treated as, a party to the proceedings. The question which arises is whether his connection with that party will (subject to waiver) itself disqualify him from sitting as a judge in the proceedings, in the same way as a significant shareholding in a party will do, and so require that the order made upon the outcome of the proceedings must be set aside.

Such a question could in theory arise, for example, in relation to a senior executive of a body which is a party to the proceedings, who holds no shares in that body; but it is, I believe, only conceivable that it will do so where the body in question is a charitable organisation. He will by reason of his position be committed to the well-being of the charity, and to the fulfilment by the charity of its charitable objects. He may for that reason properly be said to have an interest in the outcome of the litigation, though he has no financial interest, and so to be disqualified from sitting as a judge in the proceedings. The cause is "a cause in which he has aninterest," in the words of Lord Campbell in the Dimes case, at p. 793. It follows that in this context the relevant interest need not be a financial interest. This is the view expressed in Shetreet, Judges on Trial (1976), p. 310, where he states that "[a] judge may have to disqualify himself by reason of his association with a body that institutes or defends the suit," giving as an example the chairman or member of the board of a charitable organisation.

Let me next take the position of Lord Hoffmann in the present case. He was not a member of the governing body of A.I., which is or is to be treated as a party to the present proceedings: he was chairperson of an associated body, A.I.C.L., which is not a party. However, on the evidence, it is plain that there is a close relationship between A.I., A.I.L. and A.I.C.L. A.I.C.L. was formed following the decision in McGovern v. Attorney-General [1982] Ch. 321, to carry out the purposes of A.I. which were charitable, no doubt with the sensible object of achieving a tax saving. So the division of function between A.I.L. and A.I.C.L. was that the latter was to carry out those aspects of the work of the international headquarters of A.I. which were charitable, leaving it to A.I.L. to carry out the remainder, that division being made for fiscal reasons. It follows that A.I., A.I.L. and A.I.C.L. can together be described as being, in practical terms, one organisation, of which A.I.C.L. forms part. The effect for present purposes is that Lord Hoffmann, as chairperson of one member of that organisation, A.I.C.L., is so closely associated with another member of that organisation, A.I., that he can properly be said to have an interest in the outcome of proceedings to which A.I. has become party. This conclusion is reinforced, so far as the present case is concerned, by the evidence of A.I.C.L. commissioning a report by A.I. relating to breaches of human rights in Chile, and calling for those responsible to be brought to justice. It follows that Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings.

It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependent on any bias or apparent bias on his part. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet. It arises simply from Lord Hoffmann's involvement in A.I.C.L.;

the close relationship between A.I., A.I.L. and A.I.C.L., which here means that for present purposes they can be regarded as being, in practical terms, one organisation; and the participation of A.I. in the present proceedings in which as a result it either is, or must be treated as, a party.

JUDGMENTBY-3: Lord Nolan

JUDGMENT-3:
Lord Nolan: . My Lords, I agree with the views expressed by noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. In my judgment the decision of 25 November had to be set aside for the reasons which they give. I would only add that in any case where the **impartiality** of a judge is in question the appearance of the matter is just as important as the reality.

JUDGMENTBY-4: Lord Hope of Craighead

JUDGMENT-4:
Lord Hope of Craighead: . My Lords, I have had the advantage of reading in draft the speeches which have been prepared by my noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. For the reasons which they have given I also was satisfied that the earlier decision of this House cannot stand and must be set aside. But in view of the importance of the case and its wider implications, I should like to add these observations.

One of the cornerstones of our legal system is the **impartiality** of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small. In London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99 the same question as that which arose in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759 was considered in an appeal from the Court of Session to this House. Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired.

In Sellar v. Highland Railway Co., 1919 S.C.(H.L.) 19 the same rule was applied where a person who had been appointed to act as one of the arbiters in a dispute between the proprietors of certain fishings and the railway company was the holder of a small number of ordinary shares in the railway company. Lord Buckmaster, after referring to the Dimes and Lindsay cases, gave this explanation of the rule, at pp. 20-21:

"The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured. In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside."

As my noble and learned friend, Lord Goff of Chieveley, said in Reg. v. Gough [1993] A.C. 646, 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits injudgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of partiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

In the present case we are concerned not with civil litigation but with a decision taken in proceedings for extradition on criminal charges. It is only in the most unusual circumstances that a judge who was sitting in criminal proceedings would find himself open to the objection that he was acting as a judge in his own cause. In principle, if it could be shown that he had a personal or pecuniary interest in the outcome, the maxim would apply. But no case was cited to us, and I am not aware of any, in which it has been applied hitherto in a criminal case. In practice judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as defendant or as prosecutor.

The ground of objection which has invariably been taken until now in criminal cases is based on that other principle which has its origin in the requirement of **impartiality.** This is that justice must not only be done; it must also be seen to be done. It covers a wider range of situations than that which is covered by the maxim that no one may be a judge in his own cause. But it would be surprising if the application of that principle were to result in a test which was less exacting than that resulting from the application of the nemo judex in sua causa principle. Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases. Article 6(1) of the European Convention on Fundamental Rights and Freedoms makes no distinction between civil and criminal cases in its expression of the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Your Lordships were referred by Miss Montgomery in the course of her argument to Bradford v. McLeod, 1986 S.L.T. 244. This is one of only two reported cases, both of them from Scotland, in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. The other is Doherty v. McGlennan, 1997 S.L.T. 444. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his **impartiality.**

The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in Reg. v. Gough [1993] A.C. 646 is whetherthere was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts. The aim, as Lord Woolf explained, at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias. In Scotland the High Court of Justiciary applies the test which was described in Gough as the reasonable suspicion test. In Bradford v. McLeod, 1986 S.L.T. 244, 247 it adopted as representing the law of Scotland the rule which was expressed by Eve J. in Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276, 289:

"Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's **impartiality,** those circumstances are themselves sufficient to disqualify although in fact no bias exists."

The Scottish system for dealing with criminal appeals is for all appeals from the courts of summary jurisdiction to go direct to the High Court of Justiciary in its appellate capacity. It is a simple, one-stop system, which absolves the High Court of Justiciary from the responsibility of giving guidance to inferior appellate courts as to how to deal with cases where questions have been raised about a tribunal's **impartiality.** Just as Eve J. may be thought to have been seeking to explain to members of the council of the chartered institute in simple language the test which they should apply to themselves in performing their judicial duty, so also the concern of the High Court of Justiciary has been to give guidance to sheriffs and lay justices as to the standards which they should apply to themselves in the conduct of criminal cases. The familiar expression that justice must not only be done but must also be seen to be done serves a valuable function in that context.

Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.

As for the facts of the present case, it seems to me that the conclusion is inescapable that Amnesty International has associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result because it also seeks to bring Senator Pinochet to justice. This distinguishes its position fundamentally from that of other bodies which seek to uphold human rights without extending their objects to issuesconcerning personal responsibility. It has for many years conducted an international campaign against those individuals whom it has identified as having been responsible for torture, extra-judicial executions and disappearances. Its aim is that they should be made to suffer criminal penalties for such gross violations of human rights. It has chosen, by its intervention in these proceedings, to bring itself face to face with one of those individuals against whom it has for so long campaigned.

But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Ltd. he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside.

JUDGMENTBY-5: Lord Hutton

JUDGMENT-5:
Lord Hutton: . My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. I gratefully adopt his account of the matters (including the links between Amnesty International and Lord Hoffmann) leading to the bringing of this petition by Senator Pinochet to set aside the order made by this House on 25 November 1996. I am in agreement with his reasoning and conclusions on the issue of the jurisdiction of this House to set aside that order and on the issues of election, waiver and abuse of process. In relation to the allegation made by Senator Pinochet, not that Lord Hoffmann was biased in fact, but that there was a real danger of bias or a reasonable apprehension or suspicion of bias because of Lord Hoffmann's links with Amnesty International, I am also in agreement with the reasoning and conclusion of Lord Browne-Wilkinson, and I wish to add some observations on this issue.

In the middle of the last century the Lord Chancellor, Lord Cottenham, had an interest as a shareholder in a canal company to the amount of several thousand pounds. The company filed a bill in equity seeking an injunction against the defendant who was unaware of Lord Cottenham's shareholding in the company. The injunction and the ancillary order sought were granted by the Vice-Chancellor and were subsequently affirmed by Lord Cottenham. The defendant subsequently discovered the interest of Lord Cottenham in the company and brought a motion to discharge the order made by him, and the matter ultimately came on for hearing before this House in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759. The House ruled that the decree of the Lord Chancellor should be set aside, not because in coming to his decision Lord Cottenham was influenced by his interest in the company, butbecause of the importance of avoiding the appearance of the judge labouring under the influence of an interest. Lord Campbell said, at pp. 793-794:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

In his judgment in Reg. v. Gough [1993] A.C. 646, 659 my noble and learned friend, Lord Goff of Chieveley, made reference to the great importance of confidence in the integrity of the administration of justice, and he said:

"In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'"

Then referring to the Dimes case, he said, at p. 661:

" ... I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a

judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in Reg. v. Rand (1866) L.R. 1 Q.B. 230, 232: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.' The principle is expressed in the maxim that nobody may be judge in his own cause (nemo judex in sua causa). Perhaps the most famous case in which the principle was applied is Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which thenproceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793: 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.' In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

Later in his judgment Lord Goff said, at p. 664f, agreeing with the view of Lord Woolf, at p. 673f, that the only special category of case where there should be disqualification of a judge without the necessity to inquire whether there was any real likelihood of bias was where the judge has a direct pecuniary interest in the outcome of the proceedings. However I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation. I find persuasive the observations of Lord Widgery C.J. in Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549, 552:

"There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the **impartiality** and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned."

A similar view was expressed by Deane J. in Webb v. The Queen, 181 C.L.R. 41, 74:

"The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment ... The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or personsinterested in, or otherwise involved in, the proceedings." (My emphasis.)

An illustration of the approach stated by Lord Widgery and Deane J. in respect of a non-pecuniary interest is found in the earlier judgment of Lord Carson in Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, 618 when he cited with approval the judgments of the Divisional Court in Reg. v. Fraser (1893) 9 T.L.R. 613. Lord Carson described Fraser's case as one:

"where a magistrate who was a member of a particular council of a religious body one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence, and the magistrate sat on the bench and took part in the decision. The court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed mala fides to the magistrate, but Cave J., in giving judgment, said: 'the question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?' Wright J. stated that although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a well settled principle of law, which affected the character of the administration of justice."

I have already stated that there was no allegation made against Lord Hoffmann that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links, described in the judgment of Lord Browne-Wilkinson, between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand. It was this reason and the other reasons given by Lord Browne-Wilkinson which led me to agree reluctantly in the decision of the Appeal Committee on 17 December 1998 that the order of 25 November 1998 should be set aside.

DISPOSITION:
Petition granted.

SOLICITORS:
Solicitors: Kingsley Napley; Crown Prosecution Service, Headquarters; Bindman & Partners.

B. L. S.

31957

U.S. Code collection

TITLE 28 > PART I > CHAPTER 21 > § 455

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small,

31952

or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

31953

Les codes en vigueur

CODE DE PROCEDURE PENALE
(Partie Législative)

Article 668

(Loi n° 2004-204 du 9 mars 2004 art. 88 Journal Officiel du 10 mars 2004)

Tout juge ou conseiller peut être récusé pour les causes ci-après :

1° Si le juge ou son conjoint ou son partenaire lié par un pacte civil de solidarité ou son concubin sont parents ou alliés de l'une des parties ou de son conjoint, de son partenaire lié par un pacte civil de solidarité ou de son concubin jusqu'au degré de cousin issu de germain inclusivement.

La récusation peut être exercée contre le juge, même au cas de divorce ou de décès de son conjoint, de son partenaire lié par un pacte civil de solidarité ou de son concubin, s'il a été allié d'une des parties jusqu'au deuxième degré inclusivement ;

2° Si le juge ou son conjoint ou son partenaire lié par un pacte civil de solidarité ou son concubin, si les personnes dont il est tuteur, subrogé tuteur, curateur ou conseil judiciaire, si les sociétés ou associations à l'administration ou à la surveillance desquelles il participe ont intérêt dans la contestation ;

3° Si le juge ou son conjoint ou son partenaire lié par un pacte civil de solidarité ou son concubin, est parent ou allié, jusqu'au degré indiqué ci-dessus, du tuteur, subrogé tuteur, curateur ou conseil judiciaire d'une des parties ou d'un administrateur, directeur ou gérant d'une société, partie en cause ;

4° Si le juge ou son conjoint ou son partenaire lié par un pacte civil de solidarité ou son concubin, se trouve dans une situation de dépendance vis-à-vis d'une des parties ;

5° Si le juge a connu du procès comme magistrat, arbitre ou conseil, ou s'il a déposé comme témoin sur les faits du procès ;

6° S'il y a eu procès entre le juge, son conjoint, son partenaire lié par un pacte civil de solidarité ou son concubin leurs parents ou alliés en ligne directe, et l'une des parties, son conjoint, ou ses parents ou alliés dans la même ligne ;

7° Si le juge ou son conjoint ou son partenaire lié par un pacte civil de solidarité ou son concubin, ont un procès devant un tribunal où l'une des parties est juge ;

8° Si le juge ou son conjoint ou son partenaire lié par un pacte civil de solidarité ou son concubin, leurs parents ou alliés en ligne directe ont un différend sur pareille question que celle débattue entre les parties ;

9° S'il y a eu entre le juge ou son conjoint ou son partenaire lié par un pacte civil de solidarité ou son concubin et une des parties toutes manifestations assez graves pour faire suspecter son impartialité.

31954

Article 668 Code of Criminal Proceedings, France.

Any first-instance or appeal judge may be challenged on the grounds stated below :

1° if the judge or his spouse are family members or relations by marriage to one of the parties, or of his spouse, up to the degree of cousin born of first cousin inclusively;

The challenge may be brought against the judge even in the case of divorce or death of the spouse, if the judge was related by marriage to one of the parties up to the second degree inclusively;

2° if the judge or his spouse, or any persons for whom he acts as guardian, deputy guardian, trustee or judicial counsel, or any companies or associations in the administration or supervision of which he is involved, have an interest in the dispute;

3° if the judge or his spouse are family members of, or related by marriage to, the guardian, deputy-guardian, trustee or judicial counsel of one of the parties or of an administrator, director or manager of a company party to a dispute, up to the degree stated above;

4° if the judge or his spouse are in a situation of dependency in relation to one of the parties;

5° if the judge was involved in the case in the capacity of judge or prosecutor, arbitrator or counsel or if he made a witness statement as to the facts of the case;

6° if legal proceedings have taken place between the judge, his spouse, their family members or relations by marriage in direct line, and any of the parties, his spouse or family members or relations by marriage in the same line;

7° if the judge or his spouse are involved in proceedings in which one of the parties is a judge;

8° if the judge or his spouse, their family members or relations by marriage in direct line are involved in a dispute on a question similar to that in dispute between the parties;

9° if anything has taken place between the judge or his spouse and one of the parties sufficiently serious to put his impartiality in question.