

In the case of Bulut v. Austria (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
 Mr F. Matscher,
 Mr C. Russo,
 Mr J. De Meyer,
 Mr I. Foighel,
 Mr J.M. Morenilla,
 Mr L. Wildhaber,
 Mr D. Gotchev,
 Mr P. Jambrek,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 26 October 1995 and 23 January 1996,

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

Notes by the Registrar

1. The case is numbered 59/1994/506/588. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.
2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

PROCEDURE

1. The case was referred to the Court on 19 December 1994 by the Government of the Republic of Austria ("the Government"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 17358/90) against Austria lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by a Turkish national, Mr Mikdat Bulut, on 5 October 1990.

The Government's application referred to Article 48 (art. 48) and its object was to obtain a decision as to whether the facts of the case disclosed a breach of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant designated the lawyer who would represent him (Rule 31).

The Turkish Government, who had been informed by the Registrar of their right to intervene (Article 48 (b) of the Convention and Rule 35 para. 3 (b) of Rules of Court B) (art. 48-b), did not indicate any intention of so doing.

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 January 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr C. Russo, Mr J. De Meyer, Mr I. Foighel, Mr J.M. Morenilla, Mr L. Wildhaber, Mr D. Gotchev and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 11 August 1995. In a letter of 2 August 1995 the Government had informed the Court that they did not wish to submit a written memorial. The Secretary to the Commission subsequently informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 4 October 1995 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 October 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr W. Okresek, Head of the International Affairs Division, Constitutional Service, Federal Chancellery,	Agent, Counsel,
Ms I. Gartner, Federal Ministry of Justice,	
Ms E. Bertagnoli, Human Rights Division, International Law Department, Federal Ministry of Foreign Affairs,	Adviser;

(b) for the Commission

Mr M.P. Pellonpää,	Delegate;
--------------------	-----------

(c) for the applicant

Mr W.L. Weh, Rechtsanwalt,	Counsel.
----------------------------	----------

The Court heard addresses by Mr Pellonpää, Mr Weh, Mr Okresek and Ms Gartner and also replies to its questions.

AS TO THE FACTS

I. Circumstances of the case

7. Mr Mikdat Bulut, the applicant, is a waiter. He was born in 1969 and lives in Innsbruck.

8. In 1990 he faced charges of attempting to bribe staff of the Innsbruck Employment Agency. He had offered money to two civil servants as an inducement to issue him false certificates.

9. On 6 March 1990, before the trial at the Innsbruck Regional Court (Landesgericht) had begun, the presiding judge, Mr Werus, sent a note to Mr Heiss, the applicant's lawyer at the time, informing him that one of the members of the court, Judge Schaumburger, had taken part in the questioning of two witnesses during the preliminary investigation. Mr Heiss was asked to inform the court by 16 March 1990 whether he wanted to challenge Judge Schaumburger on that ground. Mr Heiss did not reply.

10. The trial took place on 23 March 1990. Before the court began to hear evidence, the presiding judge again mentioned that Mr Schaumburger had acted as investigating judge for part of the preliminary proceedings. The record of the trial states that the parties waived the right to raise this point as a ground of nullity ("Auf Geltendmachung dieses Umstandes als Nichtigkeitsgrund wird allseits verzichtet").

11. In a statutory declaration (eidesstattliche Erklärung) submitted during the proceedings before the European Commission of Human Rights, Mr Heiss stated that he had answered the question whether he was prepared to waive the right to raise the point as a ground of nullity by saying that, in his view, it was not possible to waive the right to raise questions relating to the disqualification of a judge. He considered that it was only possible to waive a challenge to a judge if it was for partiality. In a document which was likewise submitted to the Commission Mr Werus stated that the waiver had been made as recorded. He added that he remembered Mr Heiss adding words to the effect that he did not consider the waiver to be valid.

12. The applicant was found guilty as charged and fined 25,200 Austrian schillings (ATS), suspended for three years.

13. Mr Bulut filed an appeal on grounds of nullity (Nichtigkeitsbeschwerde) and an appeal (Berufung) against sentence to the Supreme Court (Oberster Gerichtshof). In his appeal on grounds of nullity under Article 281 para. 1 (1) of the Code of Criminal Procedure (Strafprozeßordnung - see paragraph 19 below) the applicant alleged that he had been heard by a judge who was disqualified from sitting by law (ex lege). He further alleged breaches of Article 281 para. 1 (4), (5) and (9) (a). In connection with sub-paragraph (4) (see paragraph 19 below), the applicant complained that the trial court should have tested the witnesses' ability to recognise the applicant's voice over the telephone. Under sub-paragraph (5) (see paragraph 19 below) he further complained, inter alia, that the trial court had found two witnesses completely credible and had found that inconsistencies in their stories were easily explained as mistakes of memory. He alleged that the contradictions were fundamental and that there should have been a confrontation between the two witnesses and the applicant's brother, who had for a while been suspected of the offence. The prosecution also appealed against sentence.

14. On 29 June 1990, the Attorney-General (Generalprokurator) filed the following observations ("croquis") with the Supreme Court:

"In the view of the Attorney-General's Office, the appeal lodged by the accused, Mr Mikdat Bulut, meets the criteria for a decision under Article 285d of the Code of Criminal Procedure. A copy of the decision is

requested."

These observations were not disclosed to the defence.

15. On 7 August 1990 the Supreme Court rejected the applicant's appeal under Article 285d para. 1 of the Code of Criminal Procedure (see paragraph 20 below). After confirming that a disqualified judge had taken part in the trial, the Supreme Court referred to the waiver entered in the record of the trial, and noted that Article 281 para. 1 (1) required a ground of nullity relating to Articles 67 and 68 of the Code of Criminal Procedure (see paragraph 18 below) first to have been raised at the trial itself. In respect of the grounds of nullity under Article 281 para. 1 (5), the Supreme Court found that the complaints were an attempt to challenge the assessment of the evidence made by the trial judges and as such inadmissible and insufficient to constitute a ground of nullity. Notwithstanding the applicant's assertion to the contrary, the Supreme Court also found that there had in fact been a confrontation between the two witnesses and the applicant's brother. The appeal on grounds of nullity was rejected. The Supreme Court remitted the applicant's appeal against sentence to the Innsbruck Court of Appeal (Oberlandesgericht).

16. On 3 October 1990, after a hearing, the Innsbruck Court of Appeal increased the applicant's sentence to nine months' imprisonment, suspended for three years.

II. Relevant domestic law and practice

17. By Article 90 para. 1 of the Federal Constitution,

"Hearings by trial courts in civil and criminal cases shall be oral and public. Exceptions may be prescribed by law."

18. Article 68 para. 2 of the Code of Criminal Procedure provides that a person shall be disqualified (ausgeschlossen) from participating in a trial if he has acted as investigating judge in the same case.

19. Article 281 para. 1 of the Code of Criminal Procedure lays down the specific circumstances in which an appeal on grounds of nullity may be made, including:

"1. if the court was not properly constituted, ... or if a judge took part in the decision who was disqualified (under Articles 67 and 68), unless the ground of nullity was known to the appellant before or during the trial and was not raised by him at the beginning of the trial or as soon as he became aware of it;

...

4. if during the trial no decision was given on an application by the appellant or in an interlocutory decision rejecting an application or objection by him the court disregarded or incorrectly applied laws or rules of procedure with which compliance is required by the very nature of a procedure which affords safeguards to the prosecution and the defence;

5. if the judgment of the trial court in respect of decisive facts is unclear, incomplete or

self-contradictory; ...

..."

20. Article 285d para. 1 of the Code of Criminal Procedure provides:

"During the private deliberations, an appeal on grounds of nullity may be rejected immediately:

1. if it ought to have been rejected by the court at first instance under Article 285a ...;
2. if it is based on the grounds of nullity enumerated in Article 281 para. 1 (1-8 and 11) and if the Supreme Court unanimously finds that the complaint should be dismissed as manifestly ill-founded without any need for further deliberation."

21. Following the Brandstetter v. Austria judgment of 28 August 1991 (Series A no. 211) and since 1 September 1993, Article 35 para. 2 of the Code of Criminal Procedure reads as follows:

"If the public prosecutor at an appellate court submits observations on an appeal on grounds of nullity ..., the appellate court shall communicate those observations to the accused (person concerned), advising him that he may submit comments on them within a reasonable period of time that it shall determine. Such communication may be dispensed with if the prosecutor confines himself to opposing the appeal without adducing any argument, if he merely supports the accused or if the accused's appeal is upheld."

PROCEEDINGS BEFORE THE COMMISSION

22. Mr Bulut applied to the Commission on 5 October 1990. He relied on Article 6 para. 1 (art. 6-1) of the Convention, complaining that the trial court had included a judge disqualified from sitting by law. He further complained that no hearing had been held in the Supreme Court, that the Attorney-General had submitted to the Supreme Court observations which had not been made available to the defence and that the Supreme Court had divulged the name of the judge rapporteur to the Attorney-General contrary to the relevant legal provisions.

23. The Commission declared the application (no. 17358/90) admissible on 2 April 1993. In its report of 8 September 1994 (Article 31) (art. 31), it expressed the opinion that:

(a) there had been no violation on account of Judge Schaumburger's participation in the trial (twenty-five votes to one), or on account of the Supreme Court's failure to hold a hearing (unanimously), or on account of the fact that the name of the judge rapporteur was communicated to the Attorney-General (unanimously);

(b) there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention on account of the Attorney-General's submission to the Supreme Court of observations of which the applicant was not aware (twenty-five votes to one).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

24. At the hearing the Agent of the Government requested the Court to hold that there had been no violation of Article 6 (art. 6) of the Convention.

The applicant invited the Court to hold that the Convention had been breached on three accounts: Judge Schaumburger's participation in the trial; the Supreme Court's failure to hold a hearing and the Attorney-General's passing of undisclosed observations to the Supreme Court.

AS TO THE LAW

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

25. The applicant alleged a breach of Article 6 para. 1 (art. 6-1) of the Convention, which, in so far as relevant, provides:

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

The Court will deal with each of the applicant's three individual complaints. They concern the participation in the trial of a judge who had previously participated in the preliminary investigation; the Supreme Court's failure to hold a hearing and the submission of observations by the Attorney-General ("croquis") of which the applicant was not aware and on which he did not have an opportunity to comment.

The applicant's further complaint that the Supreme Court had divulged the name of the judge rapporteur to the Attorney-General, contrary to the relevant domestic legal provisions, which was declared admissible by the Commission (see paragraph 23 above), was abandoned before the Court, which sees no reason to entertain it of its own motion.

A. Participation of Judge Schaumburger in the trial

26. The applicant submitted that Article 68 para. 2 of the Code of Criminal Procedure (see paragraph 18 above) clearly provided that a judge who had acted in the preliminary investigation of a case was disqualified from taking part in the trial. Since this ground of disqualification was mandatory, no discretion being conferred on the accused, no "waiver" could lawfully be made. At all events, in the instant case, notwithstanding the contents of the record of the trial (see paragraph 10 above), the defence lawyer did not waive the right to raise the issue of Judge Schaumburger's participation in the

trial as a ground of nullity. On the contrary, he expressly stated that such a waiver would be legally impossible. In conclusion, the applicant submitted that he had been tried by a court that was neither "impartial" nor "established by law" within the meaning of Article 6 (art. 6) of the Convention and Article 68 para. 2 of the Code of Criminal Procedure.

27. In the Government's submission, Article 68 para. 2 did not constitute a ground for automatic disqualification. It should be read together with Article 281 para. 1 (1) of the Code of Criminal Procedure (see paragraph 19 above), which provided that the participation of a disqualified judge in the trial only rendered the judgment null and void if it was challenged by the defendant immediately after he learned about it. In the present case, the presiding judge had informed the defence before the trial that one of the members of the court had taken part in the investigation proceedings. He had then invited the applicant's lawyer to say whether he wished to challenge that judge on that account. The applicant's lawyer had not replied (see paragraph 9 above). At the hearing, before the court began to take evidence, the presiding judge had again enquired whether the parties had any objection to Judge Schaumburger's participation. The record of the trial showed that the parties had waived their right to raise this point as a ground of nullity (see paragraph 10 above). No request was filed for an amendment or rectification of the record of the trial.

Contrary to what occurred in the case of Pfeifer and Plankl v. Austria (judgment of 25 February 1992, Series A no. 227, pp. 16-17, paras. 35-39), in which the Court took the view that the waiver was invalid, the offer of waiver in the present case, as the record of the trial shows, was accepted by experienced legal counsel in an unequivocal manner.

28. The Commission, while finding the stringency with which Austrian law precluded an investigating judge from participating in a trial to be in line with Article 6 (art. 6) of the Convention, noted that the presence of an investigating judge at the trial was not so undesirable that an accused should not be permitted to accept that judge's participation, provided that the accused was able to consent on the basis of all the relevant information and without undue pressure. Otherwise, the Commission agreed with the main thrust of the Government's arguments and found that the applicant was entitled to, and validly did, waive his right to challenge Judge Schaumburger.

29. As regards the question whether the trial court was a tribunal "established by law", the Court notes at the outset that there appears to be an inconsistency between Article 68 para. 2, under which an investigating judge is disqualified from participating in the trial by the automatic operation of law, and Article 281 para. 1 (1), in which the same situation only gives rise to a ground of nullity. However, it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, *mutatis mutandis*, the *Casado Coca v. Spain* judgment of 24 February 1994, Series A no. 285-A, p. 18, para. 43). In the instant case the Court observes that both the Innsbruck Regional Court and the Supreme Court interpreted the law as meaning that a waiver could lawfully be made (see paragraph 15 above). The Court sees no reason to call into question the resolution of this issue by the Austrian courts.

30. Regardless of whether a waiver was made or not, the Court

has still to decide, from the standpoint of the Convention, whether the participation of Judge Schaumburger in the trial after taking part in the questioning of witnesses at the pre-trial stage could cast doubt on the impartiality of the trial court.

31. When the impartiality of a tribunal for the purposes of Article 6 para. 1 (art. 6-1) is being determined, regard must be had not only to the personal conviction of a particular judge in a given case - the subjective approach - but also whether he afforded sufficient guarantees to exclude any legitimate doubt in this respect - the objective approach (see, among many other authorities, the Piersack v. Belgium judgment of 1 October 1982, Series A no. 53, p. 14, para. 30).

32. There has been no suggestion in the present case of any prejudice or bias on the part of Judge Schaumburger. It follows that the Court cannot but presume his personal impartiality (see the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, p. 25, para. 58).

There thus remains the application of the objective test.

33. In the instant case the fear that the trial court might not be impartial was based on the fact that one of its members had questioned witnesses during the preliminary investigation. Undoubtedly, this kind of situation may give rise to misgivings on the part of the accused as to the impartiality of the judge. However, whether these misgivings should be treated as objectively justified depends on the circumstances of each particular case; the mere fact that a trial judge has also dealt with the case at the pre-trial stage cannot be held as in itself justifying fears as to his impartiality (see, *mutatis mutandis*, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, pp. 21-22, paras. 49-50, and the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, p. 15, para. 33).

34. In contrast to the facts of the Hauschildt case (cited above), it has not been suggested that Judge Schaumburger was responsible for preparing the case for trial or for deciding whether the accused should be brought to trial. In fact, it has not been established that he had to take any procedural decisions at all. His role was limited in time and consisted of questioning two witnesses. It did not entail any assessment of the evidence by him nor did it require him to reach any kind of conclusion as to the applicant's involvement.

In this limited context, the applicant's fear that the Innsbruck Regional Court lacked impartiality cannot be regarded as objectively justified (see, *mutatis mutandis*, the Nortier judgment cited above, p. 16, para. 37). In any event, it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained from doing so.

There has therefore been no violation of Article 6 para. 1 (art. 6-1) of the Convention as far as the applicant's first complaint is concerned.

B. No hearing in the Supreme Court

35. The applicant also complained that there had been no

adversarial hearing before the Supreme Court. He submitted that the grounds of nullity under Article 281 para. 1 (4) and (5) of the Code of Criminal Procedure (see paragraph 19 above) went essentially to questions concerning the ascertainment of various facts and that therefore he was entitled to a hearing by virtue of Article 6 para. 1 (art. 6-1).

The applicant contended that Austria's reservation in respect of Article 6 (art. 6) was of a general character and hence invalid for failure to comply with Article 64 (art. 64) of the Convention.

36. Austria's reservation in respect of Article 6 (art. 6) of the Convention reads as follows:

"The provisions of Article 6 (art. 6) of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitutional Law [see paragraph 17 above]."

37. Article 64 para. 2 (art. 64-2) of the Convention provides that any reservation to the Convention shall contain a brief statement of the law concerned.

38. The Government submitted that the complaint at issue came within the purview of Austria's reservation to Article 6 (art. 6). In the alternative, they pleaded that the requirements of Article 6 para. 1 (art. 6-1) were satisfied inasmuch as the Supreme Court's task was not to decide on factual matters, nor in particular to review the evidence assessed by the court of first instance, but only to examine whether the grounds of nullity were manifestly ill-founded or not. The question was thus of a legal nature. Accordingly, no hearing was required.

39. In the Commission's view, the applicant's appeal on grounds of nullity did not raise any question of fact which would have called for a hearing.

40. The Court recalls that the manner of application of Article 6 (art. 6) to proceedings before appellate courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see, as the most recent authority, the *Kerojärvi v. Finland* judgment of 19 July 1995, Series A no. 322, p. 15, para. 40, as well as the authorities cited therein).

41. The Court has held on a number of occasions that, provided that there has been a public hearing at first instance, the absence of "public hearings" at a second or third instance may be justified by the special features of the proceedings at issue. Thus proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 (art. 6) even where the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see, among other authorities, the *Monnell and Morris v. the United Kingdom* judgment of 2 March 1987, Series A no. 115, p. 22, para. 58, and the *Sutter v. Switzerland* judgment of 22 February 1984, Series A no. 74, p. 13, para. 30).

42. In the instant case, the Court notes that a public hearing was held at first instance. It further notes that the

Supreme Court rejected Mr Bulut's appeal pursuant to Article 285d para. 1 of the Code of Criminal Procedure (see paragraph 20 above). Under this provision the Supreme Court, in summary proceedings, may refuse further consideration of an appeal which it unanimously regards as manifestly lacking any merit. The nature of the review can therefore be compared to that of proceedings for leave to appeal. Moreover, the Court is not satisfied that the grounds of nullity under Article 281 para. 1 (4) and (5) of the Code of Criminal Procedure, as formulated by the applicant (see paragraph 13 above), raised questions of fact bearing on the assessment of the applicant's guilt or innocence that would have necessitated a hearing. They essentially challenged the trial court's assessment of the available evidence, a challenge which the Supreme Court considered inadmissible.

Accordingly, the Court finds no violation as regards the Supreme Court's failure to hold a hearing.

43. It follows that the Court is not required to determine the question of the validity of Austria's reservation in respect of Article 6 (art. 6) of the Convention.

C. Attorney-General's submission of observations to the Supreme Court

44. The applicant further complained that, after he had lodged his appeal with the Supreme Court, the Attorney-General submitted observations ("croquis") which were not served on the defence.

45. In the Government's submission, Austrian law provided that, as a general rule, observations filed by the prosecution in an appeal on grounds of nullity should be served on the accused together with a notice giving him the opportunity to comment within a specified time (see paragraph 21 above). However, this obligation did not apply in cases like the one at issue, where the prosecution merely opposed the appeal without giving any reasons. In that case, it was assumed that there was no need for the accused to amend his appeal.

The Government further submitted that in the instant case the Attorney-General merely expressed the opinion that it was appropriate to deal with the appeal in the manner prescribed in Article 285d of the Code of Criminal Procedure (see paragraph 14 above). These observations were of a purely procedural nature; they contained no arguments as to the merits of the appeal. In those circumstances, there had been no new elements for the defence to comment on and no infringement of the equality-of-arms requirements.

46. The Commission, on the other hand, considered that it is inherently unfair for the prosecution to make submissions to a court without the knowledge of the defence and on which the defence has no opportunity to comment.

47. The Court recalls that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent (see the *Dombo Beheer B.V. v. the Netherlands* judgment of 27 October 1993, Series A no. 274, p. 19, para. 33). In this context, importance is attached to appearances as well as to the increased sensitivity to the fair

administration of justice (see, *mutatis mutandis*, the *Borgers v. Belgium* judgment of 30 October 1991, Series A no. 214-B, p. 31, para. 24, and the authorities cited therein).

48. As regards the procureur général in the *Borgers* case (cited above, p. 32, para. 26) or the Attorney-General in the case of *Lobo Machado v. Portugal* (judgment of 20 February 1996, Reports of Judgments and Decisions 1996-I, pp. 206-07, paras. 29-31), the Court found that, while their objectivity could not be questioned, from the moment they recommended that an appeal be allowed or dismissed their opinion could not be regarded as neutral. In those circumstances, Article 6 para. 1 (art. 6-1) was seen to require that the rights of the defence and the principle of the equality of arms be respected. This applies *a fortiori* in the present case, where the Attorney-General's Office was the body charged with the prosecution.

49. As to the Government's plea that the Attorney-General's observations merely requested that the case be dealt with under Article 285d of the Code of Criminal Procedure without giving any reasons (see paragraph 14 above), it is perhaps worth pointing out that in the *Lobo Machado* case cited above, the Court, in the less stringent context of a social dispute, did not consider it admissible for the Attorney-General's representative to submit a final statement which briefly requested that the appeal court's decision should be upheld. In the present criminal appeal, the submission of the observations allowed the Attorney-General to take up a clear position as to the applicant's appeal, a position which was not communicated to the defence and to which the defence could not reply. In any event, as the Commission rightly pointed out, the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality. It is a matter for the defence to assess whether a submission deserves a reaction. It is therefore unfair for the prosecution to make submissions to a court without the knowledge of the defence.

50. In view of the above, the Court concludes that the principle of the equality of arms has not been respected. There has, therefore, been a violation of Article 6 para. 1 (art. 6-1) on account of the Attorney-General's submission of observations to the Supreme Court without the applicant's knowledge.

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

51. Article 50 (art. 50) of the Convention provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant sought compensation for pecuniary and non-pecuniary damage as well as reimbursement of legal costs and expenses incurred in the domestic proceedings and the proceedings before the Convention institutions.

A. Damage

52. The applicant claimed that as a result of his conviction he was subjected to different measures by the Immigration Department, including two periods of detention pending deportation, and that he and his family had been living in permanent fear of being deported from Austria ever since. He submitted that the costs of legal representation he had had to bear in connection with those proceedings were directly related to the facts in the instant case. He therefore claimed ATS 50,000 on account of the damage suffered and a total sum of ATS 331,710.28 in respect of the costs of legal representation in the deportation proceedings.

53. In the Government's submission, the deportation proceedings were the consequence of the conviction and were wholly unconnected with any possible breach of the Convention.

54. The Court agrees with the Government. No causal link has been established between the finding of a violation as regards the Attorney-General's observations submitted to the Supreme Court and the applicant's conviction, let alone the deportation proceedings. The claims must therefore be rejected.

B. Costs and expenses

55. The applicant claimed ATS 36,540 as compensation for the costs and expenses he had incurred in the domestic proceedings since "his case should have been heard by a court established in accordance with the law". He added a further ATS 219,627 on account of costs borne in connection with his representation before the Convention institutions.

56. The Government found the sum claimed excessive. They considered that the sum of ATS 138,432 would cover the applicant's overall costs in the Strasbourg proceedings. This amount should be adjusted in the light of the number of the applicant's complaints upheld by the Court, if any.

57. The Court notes that it has found a violation only in respect of the observations submitted to the Supreme Court by the Attorney-General. Any compensation should therefore reflect that fact.

With respect to legal costs in the domestic proceedings, the Court agrees with the Delegate of the Commission that it is difficult to see how any of the expenses for which compensation is claimed were incurred in order to prevent or rectify the particular violation established by the Court. It therefore rejects this head of the claim in its entirety.

With regard to the amounts claimed in respect of the proceedings before the Convention institutions, the Court, in the light of the criteria laid down in its case-law, awards the applicant ATS 75,000 for costs and expenses less 7,328 French francs already paid by way of legal aid. The resulting sum is to be increased by any value added tax that may be chargeable.

C. Default interest

58. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 6% per annum.

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention with regard to Judge Schaumburger's participation in the trial;
2. Holds by eight votes to one that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention on account of the Supreme Court's failure to hold a hearing;
3. Holds by eight votes to one that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention on account of the submission of observations by the Attorney-General's Office to the Supreme Court without communication to the defence;
4. Holds, unanimously,
 - (a) that the respondent State is to pay to the applicant, within three months, 75,000 (seventy-five thousand) Austrian schillings in respect of legal costs and expenses, together with any value added tax that may be chargeable, less 7,328 (seven thousand three hundred and twenty-eight) French francs already paid by way of legal aid, to be converted into Austrian schillings at the rate applicable on the date of delivery of the present judgment;
 - (b) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;
5. Dismisses, unanimously, the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 February 1996.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 55 para. 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

- (a) partly concurring, partly dissenting opinion of Mr Matscher;
- (b) separate opinion of Mr De Meyer;
- (c) partly dissenting opinion of Mr Morenilla.

Initialled: R. R.

Initialled: H. P.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

1. I agree with the Chamber's finding that

Judge Schaumburger's participation in the proceedings in the Innsbruck Regional Court, even though he had earlier played a minor role in the investigation of the case, did not mean that the court which tried the applicant lacked impartiality.

However, if the Chamber is of the opinion that the right in issue is one which the accused may waive (as, in a comparable situation, the Court held in substance in the case of Pfeifer and Plankl v. Austria, judgment of 25 February 1992, Series A no. 227, pp. 16-17, para. 37) and that in the instant case there was indeed a waiver of this right, in circumstances attended by the necessary safeguards, all those parts of the reasoning which go to prove in the instant case that impartiality was not in question either subjectively or objectively speaking seem to me to be unnecessary, even though they are in principle relevant.

Nevertheless, I should like to point out in this connection that Austrian law (reading Article 68 para. 2 with Article 281 para. 1 (1) of the Code of Criminal Procedure) is slightly equivocal, although it is formally correct and consistent.

2. I also agree with the Chamber's finding that the fact that the Supreme Court did not hold a public hearing when it heard the appeal on grounds of nullity did not offend against the principle that proceedings must be public which is embodied in Article 6 para. 1 (art. 6-1) of the Convention.

Here too a reference to point 2 of the reservation that Austria made when ratifying the Convention, whose validity in this respect has never been called in question by the Court, would have settled the issue without any need to explain that in view of the nature of the proceedings before the Supreme Court it was unnecessary to hold a public hearing in the instant case.

3. I cannot, on the other hand, agree with the finding that there has been a breach of Article 6 para. 1 (art. 6-1) on account of the fact that the Attorney-General's little memorandum, proposing that the appeal should be dismissed without a hearing as being ill-founded within the meaning of Article 285d of the Code of Criminal Procedure, was lodged with the Supreme Court without having been communicated to the applicant.

The history of the Attorney-General's observations, commonly known as a "croquis", and the doubts as to whether they comply with the principle of equality of arms are well known; these observations have long been a subject of scrutiny by the Convention institutions. In order to comply with the Strasbourg case-law, a provision (Rule 60 para. 7) was added to the Supreme Court Rules in 1980 to the effect that where the Attorney-General submitted "detailed observations" (ausgearbeitete Stellungnahme) on an appeal, they should automatically be sent to the defence. This was repeated in an instruction sent to all courts by the Ministry of Justice in 1992. Later, when the Code of Criminal Procedure was revised in 1993, a second paragraph was added to Article 35 making the above rule binding, on condition, however, that the observations of the Attorney-General's Office contained substantive matters or arguments. Otherwise, the defence can always inspect any written observations by the Attorney-General, either by consulting the court's file or by merely telephoning the court's registry to ask to be sent a copy of the observations.

It might be thought - and I for one think - that this

arrangement wholly satisfies the requirements of the Convention.

In accordance with the instructions and provisions that I have just cited, the Supreme Court in the instant case did not send the Attorney-General's memorandum to the defence, as it contained no substantive arguments; it was limited to suggesting to the Supreme Court that the appeal on grounds of nullity should be dismissed without a hearing as being manifestly ill-founded, as the defence must have been aware, seeing that the Attorney-General's Office had not lodged an appeal against the Innsbruck Regional Court's judgment and consequently would propose dismissal of the accused's appeal either at the hearing, if there was one, or in its written observations. Sending this memorandum to the defence would therefore not have provided them with any substantive information not already available to them. If the memorandum in question had been sent to the defence, they would not have been able to react otherwise than by stating that they considered their appeal to be well-founded (without being able to add anything more), and they had already done that by lodging their appeal. Furthermore, the defence could have enquired of the Supreme Court's registry whether the Attorney-General's Office had submitted any observations and, if so, asked to be sent them, if they had really been interested in them.

That being so - the defence having lodged an appeal on grounds of nullity, giving full reasons, and the Attorney-General having simply proposed dismissing this appeal, without adducing any argument - the principle of equality of arms seems to me to have been sufficiently complied with.

To find nevertheless that there has been a breach of Article 6 (art. 6) in the instant case on account of the failure to have the Attorney-General's innocuous observations sent to the defence amounts, in my view, to a perversion of the very wise maxim "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 16, para. 33, third sub-paragraph).

SEPARATE OPINION OF JUDGE DE MEYER

(Translation)

I. Judge Schaumburger's participation in the trial

A. Lawfulness of the tribunal

1. Judge Schaumburger was disqualified from taking part in the applicant's trial at the Innsbruck Regional Court in March 1990 by virtue of Article 68 para. 2 of the Austrian Code of Criminal Procedure. However, by Article 281 para. 1 of the same Code, the applicant could only put forward this ground of nullity if he had raised it at the beginning of the trial or as soon as he had become aware of it (1).

1. Paragraphs 18 and 19 of this judgment.

There is a dispute as to whether the applicant validly waived the right to argue that the proceedings were a nullity on this ground. What happened in this connection at the hearing on 23 March 1990 is not wholly clear (2).

2. Paragraphs 9-11 of this judgment.

At all events, the Austrian courts held that the waiver was valid. I agree with the Court's finding that there is no reason to call their ruling into question (3).

3. Paragraphs 15 and 29 of this judgment.

B. Impartiality of the tribunal

2. The present case has given me cause to ponder at length the problem which the exercise of different judicial functions in succession by one and the same judge in the same case poses as regards a criminal court's impartiality.

It is possible to gain the impression that our case-law on the matter is neither consistent nor clear and that, as in some other recent judgments, the one we are delivering today does little to dispel the confusion and uncertainty.

3. The course to be followed in this area seemed to have been set out clearly and unambiguously in 1982 in the Piersack judgment and in 1984 in the De Cubber judgment.

In the Piersack judgment the Court indicated that a judge could not take part in the trial of a case that he had already dealt with - even if only wholly superficially - when he was on the side of the prosecution. The principle of impartiality had been infringed in that the judge who presided over the Brabant Assize Court when it tried the case in question had, when he had been senior deputy procureur du Roi in Brussels, been head of the section of the public prosecutor's department responsible for the prosecution of the applicant; in that capacity he had signed or received certain (fairly innocuous) documents relating to the case (4).

4. Piersack v. Belgium judgment of 1 October 1982, Series A no. 53, p. 6, paras. 9-11, p. 7, para. 15, and p. 16, para. 31.

In the De Cubber judgment the Court held that the same applied if the judge participating in the trial of a case had already dealt with it as an investigating judge and had, in particular, issued a warrant for the arrest of the accused. This had been true of one of the three judges who had sat on the Oudenaarde Criminal Court when it tried the applicant (5).

5. De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 8, paras. 8-10, and pp. 15 and 16, paras. 29 and 30.

The Court thus seemed to have accepted that discharging prosecution functions, judicial-investigation functions or duties relating to pre-trial detention was incompatible with the subsequent discharge of the judicial function in the same case.

4. What it held in these two judgments seemed so convincing that in the Ben Yaacoub case the respondent Government preferred to conclude a friendly settlement rather than challenge the Commission's opinion that a judge who, sitting in the chambre du conseil of the Criminal Court, had ruled on the confirmation of a warrant for an accused's arrest, on the extension of his

detention on remand and on his committal for trial could not subsequently deal with the case as a member of the trial court 6); the Belgian Court of Cassation had already so held in another case after the De Cubber judgment (7).

6. Ben Yaacoub v. Belgium judgment of 27 November 1987, Series A no. 127-A, p. 7, paras. 9 and 10, p. 8, para. 14, and pp. 11-16.

7. Ibid., p. 9, para. 15.

5. In 1991 we similarly held, in the Oberschlick case, that the principle of impartiality had been infringed - as had, moreover, Article 489 para. 3 of the Austrian Code of Criminal Procedure - in that the three members of the Vienna Court of Appeal who had quashed the order made by the Review Chamber of the Regional Court that proceedings should be discontinued and had referred the case back to the Regional Court had also heard the applicant's appeal against the Regional Court's judgment following the reference back (8).

8. Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 13, para. 16, pp. 15 and 16, paras. 22 and 23, and pp. 23 and 24, paras. 50 and 51.

A little later, in the Pfeifer and Plankl case, which was very similar to the instant one in that it likewise concerned the application of Article 68 para. 2 of the Austrian Code of Criminal Procedure, the facts were that two judges of the Klagenfurt Regional Court had sat to try Mr Pfeifer when one of them had, as investigating judge, issued the warrant for his arrest and ordered his transfer to Vienna and the other, as duty judge, had questioned him and remanded him in custody (9). In that case we found, as in the Oberschlick case, that "Mr Pfeifer was tried by a court whose impartiality was recognised by national law itself to be open to doubt" and we added that "in this respect, it [was] unnecessary to define the precise role played by the judges in question during the investigative stage" (10).

9. Pfeifer and Plankl v. Austria judgment of 25 February 1992, Series A no. 227, pp. 8 and 9, paras. 7-9.

10. Ibid., p. 16, para. 36. Oberschlick judgment previously cited, p. 23, para. 50.

6. There thus emerged a line of authority that was perhaps rather rigorous but at all events unambiguous and clear.

I initially thought that, following that logic, we should also find a breach of the principle of impartiality in the present case.

7. But in 1989 we began to deviate from the path laid down in the De Cubber judgment by suggesting, in the Hauschildt judgment, that "the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, [could not] be held as in itself justifying fears as to his impartiality" and that "special circumstances [might] in a given case be such as to warrant a different conclusion" (11).

11. Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 22, paras. 50 and 51.

What in the De Cubber judgment had appeared to be the rule thus became the exception.

This method of reasoning may be explained to some extent by the fact that in Denmark there are no investigating judges as there are in Belgium or Austria. It did not prevent the Court from finding a breach of the impartiality principle in the Hauschildt case in that nine of the many orders whereby a member of the trial court had extended the applicant's detention on remand were based on a "particularly confirmed suspicion" - it was only because of these "circumstances of the case" that "the impartiality of the ... tribunals was capable of appearing to be open to doubt" (12).

12. Ibid., pp. 22 and 23, para. 52.

In several judgments since then the Court has taken a similar approach.

8. The Nortier case I am putting aside. In that case a juvenile judge had sat successively as investigating judge, review-chamber judge and trial judge in respect of a 15-year-old prosecuted for attempted rape. In the first capacity the judge had ordered the applicant to be placed in initial detention on remand and also directed that a preliminary investigation should be carried out with a view to having a psychiatric report drawn up. As judge of the Review Chamber he had made an order for the applicant's extended detention on remand and had twice renewed that order.

In that case, adopting a reasoning similar to the one in the Hauschildt case, we reached the conclusion that the principle of impartiality had not been breached (13).

13. Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, pp. 7 and 8, paras. 9-12 and 15, and pp. 15 and 16, paras. 34 and 35.

It is, however, permissible to think that we could also have based that finding, as our colleague Morenilla indicated, on the special nature of proceedings in respect of juvenile offenders and, in particular, on the "educational and psychiatric aspects of the treatment" that should be provided for them (14).

14. Ibid., pp. 18 and 19.

9. The cases of Sainte-Marie, Fey, Padovani and Saraiva de Carvalho were cases of ordinary criminal law.

In the Sainte-Marie case two of the three members of the Criminal Division of the Pau Court of Appeal had earlier sat in the Indictment Division when it had decided to uphold an order refusing the applicant's release. They had thus, as the Court found, made "a brief assessment of the available facts in order to establish whether prima facie the police suspicions had some substance and gave grounds for fearing that there was a risk of

the accused's absconding" (15).

15. Sainte-Marie v. France judgment of 16 December 1992, Series A no. 253-A, pp. 9-11, paras. 15-18, pp. 12 and 13, paras. 21 and 22, and p. 16, para. 33.

In the Fey case the judge sitting as a single judge in the Zell am Ziller District Court had, before the trial, questioned the complainant, sent a rogatory letter to another District Court and obtained information from a German court, a bank and two insurance companies (16).

16. Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, pp. 7-9, paras. 9-14.

In the Padovani case the Bergamo magistrate had, in immediate proceedings (giudizio direttissimo), tried an accused whom the police had arrested nine days earlier and brought before him. Before the trial he had questioned him and two other accused and twice confirmed his arrest, noting on the second occasion that there was "sufficient evidence pointing to Mr Padovani's guilt" (17).

17. Padovani v. Italy judgment of 26 February 1993, Series A no. 257-B, pp. 16 and 17, paras. 10-12.

In the case of Saraiva de Carvalho, the President of the division of the Lisbon Criminal Court before which the applicant had appeared had earlier, as the judge responsible for the case, issued the despacho de pronúncia, which meant that there was, in his view, sufficient evidence to "enable a reliable assessment to be made of the probability of guilt". In so doing he also decided that the applicant should be kept in pre-trial detention (18).

18. Saraiva de Carvalho v. Portugal judgment of 22 April 1994, Series A no. 286-B, p. 32, paras. 11 and 12.

In each of these four cases the Court held that the principle of impartiality had not been infringed.

10. The Court held likewise more recently in the Diennet case. This case, however, was slightly different from the ones discussed above, firstly in that it was not ordinary criminal law that was at issue but professional discipline, and secondly in that it posed the problem, already raised in the Ringeisen case, of the membership of a judicial body rehearing a case after an earlier decision has been quashed.

It had already been held in the Ringeisen judgment that "it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority" (19). The Court similarly found in the Diennet case that "no ground for legitimate suspicion [could] be discerned in the fact that three of the seven members of the disciplinary section" of the National Council of the Ordre des médecins had "taken part in the first decision" that had been taken by that section in respect of

misconduct of which he was accused and had subsequently been set aside by the Conseil d'Etat (20).

19. Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 40, para. 97.

20. Diennet v. France judgment of 26 September 1995, Series A no. 325-A, p. 8, paras. 7-12, and p. 16, para. 38.

In actual fact the Ringeisen and Diennet cases did not, properly speaking, raise the issue of the discharge of different judicial functions in succession, since in both cases the bodies in question had to discharge the same function as on the occasion of their "first decision". And where that function in fact consists in finding someone's guilt or imposing a penalty on him, the situation is even more problematic from the point of view of impartiality than the one which arises where judges sitting in a trial court have earlier discharged judicial-investigation functions in the same case or taken decisions on the pre-trial detention of the accused.

11. Taking all the foregoing into consideration, it may be thought that our case-law on the concept of an "impartial tribunal" has become very "uncertain" (21).

21. See the dissenting opinion of Mr Morenilla in the Diennet case, *ibid.*, pp. 19-20.

In these various cases were there differences between the functions discharged by the judges in question which justified the different conclusions reached by the Court? And what was the relevance of them?

According to several of the judgments, there were differences in the "extent", "scope" or "nature" of the "measures taken by the judge before the trial" (22). But we have never said clearly what that might mean.

22. Hauschildt judgment previously cited, p. 22, para. 50 ("the nature", "la nature"). Fey judgment previously cited, p. 12, para. 30 ("the extent and nature", "l'étendue et la nature"). Nortier judgment previously cited, p. 15, para. 33 ("the scope and nature", "la portée et la nature"). Saraiva de Carvalho judgment previously cited, p. 38, para. 35 ("the scope and nature", "l'étendue et la nature").

12. The "nature of the functions which the judges involved in [the] case exercised before taking part in its determination" (23) was fairly varied. Except in the Diennet case, what was involved was various kinds of investigative measures or steps in the preparation of the trial or decisions relating to pre-trial detention. But these differences in kind or "nature" do not seem to have weighed decisively with the Court in one direction or the other.

23. Hauschildt judgment previously cited, *loc. cit.*

Was the difference due to the fact that, as we said in the Hauschildt judgment, "suspicion and a formal finding of guilt are not to be treated as being the same" (24)? No doubt there

is a difference in kind or "nature" there, and perhaps also in "extent" or "scope", but it cannot have been of much use as a criterion for assessing the impartiality of the judges concerned, since there had been no "formal finding of guilt" in any of the cases cited above, except of course in the Diennet case.

24. Ibid., loc. cit.

There is probably also some difference between the brief assessment of the substance of police suspicions (25) and that of whether there is a "particularly confirmed suspicion" (26). But in what way must such suspicions be stronger than those which may be based on "sufficient evidence pointing to ... guilt" (27) or on "evidence ... sufficient to enable a reliable assessment to be made of the probability of guilt" (28)?

25. Sainte-Marie judgment previously cited, p. 16, para. 33.

26. Hauschildt judgment previously cited, p. 22, para. 52.

27. Padovani judgment previously cited, p. 17, para. 11.

28. Saraiva de Carvalho judgment previously cited, p. 32, para. 12.

The "detailed knowledge of the case" acquired by the judge who issued the despacho de pronúncia in the Saraiva de Carvalho case did not prevent the Court from considering him as "being impartial when the case came to trial" (29), whereas, according to the De Cubber judgment, the "particularly detailed" knowledge of the file that has been acquired by an investigating judge in the course of his inquiries was one of the reasons why he should have been excluded from the trial court (30). What is the difference between these two kinds of detailed knowledge? Or must it be recognised, rather, that, as Mr Spielmann pointed out in the Fey case, "no distinction should be drawn between extensive investigations and less extensive investigations" - it was a matter of principle (31)?

29. Ibid., p. 39, para. 38.

30. De Cubber judgment previously cited, p. 16, para. 29.

31. Fey judgment previously cited, p. 15.

13. These over-subtle distinctions, which give rise to uncertainty and confusion, are scarcely compatible with legal certainty.

As regards a tribunal's impartiality, we must firstly, it seems to me, not be obsessed with "appearances", as we too often are in the reasoning of our judgments, but simply take into account the reality of the proceedings, in the light of what common sense tells us.

That being so, we must above all endeavour to formulate rules that are as precise as possible and will enable litigants to see things more clearly.

Leaving aside the special problem of the criminal law in respect of juveniles, which the Nortier case was concerned with,

and of judicial bodies which have to rehear a case after their original decision has been set aside, as in the Diennet case, I am prompted to distinguish several types of case.

14. It is obviously not appropriate that someone who has already dealt with the case as a party or representative of a party, whether on the prosecution side or for the defence and even if only minimally or purely formally, should subsequently deal with it as a member of a trial court. That is wholly unhealthy and the Court so held in the Piersack case.

15. What of the situation where a judge has taken decisions in respect of the accused's pre-trial detention? It may be said that such decisions, whether favourable or unfavourable to the accused, mean that the judge who takes them must, as the terms of Article 5 (art. 5) of the Convention indicate, have determined whether there is "reasonable suspicion" of his having committed an offence or whether it is "reasonably considered necessary to prevent his committing an offence or fleeing after having done so". But is that sufficient to put the judge's impartiality in doubt and consequently rule out his taking part later in the trial of the case?

It may be considered that it is, but it may equally be considered that it is not.

Have we not, in some of our judgments, given undue weight to the necessarily biased and subjective point of view of the accused? Have we sufficiently considered the objective and reasonable justification for his fears?

I will go no further here than to raise questions. They do not have to be settled in the instant case, but further serious thought will have to be given to them.

16. The position of a judge who has taken a decision to charge, to commit for trial or not to bring charges is very similar to that of a judge who has taken a decision concerning pre-trial detention.

It raises the same questions and these must probably be answered in the same way.

17. The questions raised under 15 and 16 above cannot be answered differently according as the decisions in question were taken by a judge specifically responsible for the preliminary investigation, as in the De Cubber case, or by the trial judge himself as such, as in the Padovani and Saraiva de Carvalho cases.

18. There remains the case of a judge who has carried out what I would call purely preparatory or preliminary steps, such as questioning an accused or witnesses, gathering information, seizing objects connected with the offence or ordering an expert opinion. Such steps (32) are neutral in themselves and, as such, certainly do not suffice for it to be assumed a priori that the judge who carries them out will consequently be prejudiced, one way or the other, when the case comes to trial. The more detailed knowledge thus acquired by the judge concerned is more an advantage than a drawback; it is no bad thing if justice is done in full knowledge of the facts.

32. It is of little importance whether the judge who carries them out is described as an "investigating judge" or not.

Purely preparatory or preliminary steps of this kind were what was carried out in the Fey case by Mrs Kohlegger and also in the instant case by Mr Schaumburger, who had merely questioned two witnesses (33).

33. Paragraphs 9, 33 and 34 of this judgment.

That is why I ultimately think that the principle of impartiality was not infringed in the present case.

II. No adversarial hearing before the Supreme Court

19. The applicant's appeal on grounds of nullity raised not only issues of law but also issues of fact - whether he had really waived his right to rely on Article 68 para. 2 of the Code of Criminal Procedure and the questions he had raised as to the credibility of the witnesses and the alleged incompleteness and contradictoriness of the examination and determination of the facts by the court of first instance (34).

34. Paragraphs 13 and 19 of this judgment.

In my view, that made an adversarial hearing necessary (35).

35. See the Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, p. 14, para. 32, and the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 17, para. 35, and also the dissenting opinions annexed to the Jan-Åke Andersson v. Sweden and Fejde v. Sweden judgments of the same date, Series A no. 212-B, pp. 48 and 49, and Series A no. 212-C, pp. 71 and 72.

20. I also consider that Austria's reservation in respect of Article 6 (art. 6) of the Convention cannot be relied on in this case; as I have already pointed out in another case, Article 64 (art. 64) of the Convention does not allow situations that are incompatible with the fundamental rights guaranteed in the Convention to continue indefinitely (36).

36. Belilos v. Switzerland judgment of 29 April 1988, Series A no. 132, p. 36.

III. The observations of the Attorney-General at the Supreme Court

21. On this point I have no difficulty in agreeing with the Court's conclusion. A single sentence would have been enough to justify it.

It is manifestly unacceptable that observations may be filed with a court by the prosecution without the knowledge of the defence.

This is certainly not a matter of "appearances" but of real and rather shocking fact.

PARTLY DISSENTING OPINION OF JUDGE MORENILLA

(Translation)

1. My disagreement with the majority relates solely to their finding that there has been no breach of Article 6 para. 1 (art. 6-1) of the Convention in respect of Judge Schaumburger's participation in the trial proceedings although he had "acted as investigating judge for part of the preliminary proceedings" (paragraph 10 of the judgment) including "the questioning of two witnesses during the preliminary investigation" (paragraph 9 of the judgment).

2. In my opinion, that fact amounted to a breach of Mr Bulut's right to have the criminal charge against him heard by an impartial tribunal in accordance with Article 6 para. 1 (art. 6-1). In the *De Cubber v. Belgium* judgment of 26 October 1984 (Series A no. 86, pp. 15-16) the Court explained at length the reasons why investigation functions are incompatible with those of trying a case where, "through the various means of inquiry which he will have utilised at the investigation stage," a judge, "unlike his colleagues, [has] already ... acquired well before the hearing a particularly detailed knowledge of the - sometimes voluminous - file or files which he has assembled. Consequently, it is quite conceivable that he might, in the eyes of the accused, appear, firstly, to be in a position enabling him to play a crucial role in the trial court and, secondly, even to have a pre-formed opinion which is liable to weigh heavily in the balance at the moment of the decision" (loc. cit., p. 16, para. 29). In the same judgment (p. 16, para. 30) the Court held: "... a restrictive interpretation of Article 6 para. 1 (art. 6-1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision (art. 6-1), bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention (see the *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11, pp. 14-15, para. 25 in fine)."

3. The clarity and the very tone of this doctrine - which has led to changes in legislation and in the judicial system in States parties to the Convention, such as Spain - have been attenuated, however, by later judgments of the Court, beginning with the *Hauschildt v. Denmark* judgment of 24 May 1989 (Series A no. 154). Under this new case-law, each case is to be examined to ascertain whether there were guarantees "sufficient" to exclude any legitimate doubt in this respect on the part of the accused. In my dissenting opinion in the *Diennet v. France* case (judgment of 26 September 1995, Series A no. 325-A) I criticised this approach of the Court's to the problem of a tribunal's impartiality on account of the uncertainty it entailed.

4. The present judgment, to my regret, continues this trend and departs even further from the earlier case-law, not only in finding no breach of Article 6 (art. 6) but also in the reasoning adopted by the majority in order to reach that finding. The majority hold that in the "limited" context of the case, the applicant's fear as to the impartiality of the court which tried and convicted him cannot be regarded as objectively justified. The reasons set out by the majority in paragraph 34 to support their finding do not seem to me to be persuasive, however. On the contrary, their analysis strengthens my opinion that the circumstances of the case should not be seen as justifying an exception to the principle laid down in the *De Cubber* judgment.

5. To begin with, the right to an impartial tribunal is a "fundamental" right relating to jurisdiction, that is to say the power to judge. The right is an absolute one, which cannot lawfully be waived; the constitution of a criminal court is a matter of public policy and cannot be left to the wishes of the accused. Certainly, there are procedural rights which can be waived where the waiver has been established in an unequivocal manner (see, among other authorities, the *Colozza v. Italy* judgment of 12 February 1985, Series A no. 89, p. 14, para. 28, and the *Barberà, Messegué and Jabardo v. Spain* judgment of 6 December 1988, Series A no. 146, p. 35, para. 82), but where the right at issue is a fundamental one, like the right to an impartial tribunal, such a waiver is not permissible.

In the *Pfeifer and Plankl v. Austria* case (judgment of 25 February 1992, Series A no. 227, pp. 16-17, paras. 35-39) the Court, without explanation, left this question open, however. The instant case gave the Court an opportunity to decide the issue. Yet it has not considered it appropriate to do so, despite both parties' allegations. The Government alleged that Mr Bulut had not exercised his right to challenge Judge Schaumburger (paragraph 27) and the applicant expressly stated that such a waiver would be impossible in law (paragraph 26); the national courts had interpreted Austrian law (paragraphs 18-20) as meaning that a waiver could lawfully be made. The majority have confined themselves to stating that they see "no reason to call into question the resolution of this issue by the Austrian courts" and similarly they regard the applicant's failure to challenge the composition of the court as showing that he did not have legitimate reasons to doubt the impartiality of the court which tried him.

6. To reach their conclusion, the majority firstly take into consideration that in the instant case "it has not been suggested that Judge Schaumburger was responsible for preparing the case for trial" and that "in fact, it has not been established that he had to take any procedural decisions at all". I cannot concur in this reasoning. Mr Bulut, a 21-year-old waiter of Turkish nationality, was not under an onus to prove what role had been played by Judge Schaumburger in the investigation of the case. The onus lay exclusively on the Austrian Government to show that the steps carried out by Judge Schaumburger were of no significance in the proceedings, and the failure to discharge it should not in any way benefit the Government; on the contrary, they should suffer the consequences of that failure.

7. The majority go on to say that Judge Schaumburger's role "consisted of questioning two witnesses. It did not entail any assessment of the evidence by him nor did it require him to reach any kind of conclusion as to the applicant's involvement". Since the extent of Judge Schaumburger's intervention in the preliminary investigation is not known, I cannot concur in the majority's reasoning here either. But it is clear that for the investigating judge to be able to question witnesses, he must have a knowledge of the case and take an active role which inevitably entails an assessment of the evidence and of the witnesses that could lead him to prejudge the accused's guilt or innocence. It is precisely for this reason that a judge who has taken part in the investigation by carrying out such steps must never try the case. The trial judge's view must be formed exclusively by evidence produced "in the presence of the accused at a public hearing with a view to adversarial argument" (*Barberà, Messegué and Jabardo* judgment previously cited, p. 34,

para. 78).

8. As indicated above, I am likewise unable to accept the final argument - "in any event" - that it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court. In my opinion, the fact that an accused has not challenged a judge or court cannot found an argument to show that the accused could not have any legitimate doubt as to their impartiality. In the instant case, for example, having regard to Mr Bulut's personal circumstances and the offence with which he was charged (paragraph 8), this omission could also have been explained by a fear that making such a challenge might be prejudicial to him. At all events, the objectiveness of his doubts and Article 68 para. 2 of the Austrian Code of Criminal Procedure (paragraph 18) required that Judge Schaumburger withdraw of his own motion in accordance with our Court's case-law (see the following judgments: *Piersack v. Belgium*, 1 October 1982, Series A no. 53, pp. 14-15, para. 30; *De Cubber*, previously cited, p. 14, para. 26; and *Hauschildt*, previously cited, p. 21, para. 48): "... any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused."