In the case of Botten v. Norway (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. Bernhardt, President,
Mr R. Ryssdal,
Mr F. Gölcüklü,
Mr A. Spielmann,
Mr A.N. Loizou,
Mr J.M. Morenilla,
Mr F. Bigi,
Mr L. Wildhaber,
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 September 1995 and 25 January 1996,

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

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Notes by the Registrar

1. The case is numbered 50/1994/497/579. 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).
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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Kingdom of Norway ("the Government") on 8 December 1994 and 16 January 1995 respectively, 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. 16206/90) against Norway lodged with the Commission under Article 25 (art. 25) by a Norwegian citizen, Mr Harald Ståle Botten, on 22 December 1989.

The Commission's request and the Government's application referred to Articles 44 and 48 (art. 44, art. 48) and, as regards the request, to the declaration whereby Norway recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated

that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31).

3. The Chamber to be constituted included ex officio Mr R. Ryssdal, the elected judge of Norwegian nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 3 (b)). On 27 January 1995, in the presence of the Registrar, the Vice-President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr A. Spielmann, Mr A.N. Loizou, Mr J.M. Morenilla, Mr F. Bigi, Mr L. Wildhaber and Mr U. Lohmus (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 Bernhardt, 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 orders made in consequence on 23 February and 15 June 1995, the Registrar received the applicant's and the Government's memorials on 7 July 1995. On 16 August 1995 the Registrar received from the applicant details on his Article 50 (art. 50) claims. On 8 September 1995 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

5. On 21 September 1995 the Commission produced certain material from the file on the proceedings before it, as requested by the Registrar on the President's instructions. On 18 and 25 September and 20 November 1995 and on 15 January 1996, the Registrar received various documents from the Government and the applicant and also further particulars on the latter's Article 50 (art. 50) claims.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 September 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr T. Stabell, Assistant Attorney-General (Civil Matters), Agent,
Mr J.E. Helgesen, Legal Adviser, The Royal Ministry of Foreign Affairs,
Mr K. Kallerud, Assistant Attorney-General, (Civil Matters),
Mr F. Elgesem, Attorney, Attorney-General's Office (Civil Matters), Advisers;

(b) for the Commission

Mrs G.H. Thune, Delegate;

(c) for the applicant

Mr F.E. Engzelius, advokat, Counsel,
Mr J. Hjort, advokat, Adviser.

The Court heard addresses by Mrs Thune, Mr Engzelius and Mr Stabell.

AS TO THE FACTS

I. Particular circumstances of the case

7. The applicant, a Norwegian citizen, is a Lieutenant-Colonel in the Norwegian Air Force. He is Commanding Officer of Flesland Air Station and is currently serving as full Colonel in the United Nations Forces in Tuzla, Bosnia-Herzegovina.

A. Events giving rise to criminal charges against the applicant

8. In 1987 the applicant served as Commander of the Norwegian Defence Telecommunications Station ("the Station") on Jan Mayen island in the Arctic Ocean, which is part of the Kingdom of Norway.

On 17 April 1987 the captain of a shrimp trawler, M/S Polarbas, radioed the Station, asking it to receive for treatment a fisherman, who had injured his arm. On 18 April the applicant agreed to this request and, on the same date, he and a colleague rowed out in a rubber dinghy to meet the trawler's lifeboat bringing the fisherman closer to shore. Shortly after the injured fisherman had been taken aboard, a breaker capsized the dinghy, leaving all three passengers in the sea, which on that date had a temperature of -0.3 °C. The applicant was the only one of the three who managed to reach the shore and who survived.

9. A military board of inquiry, set up inter alia to establish the facts of the incident and to express an opinion on whether any regulations had been violated, concluded in a report of 1 May 1987 that relevant instructions had been violated and that the applicant, as Head of Station, was responsible.

10. On 11 July 1988 the public prosecutor of Nordland, under an expedited non-judicial procedure (forelegg), proposed to the applicant a suspended sentence of twenty-seven days' military custody (vaktarrest) and a fine of 5,000 Norwegian kroner (NOK) for the offence of neglect or carelessness in the performance of official duties (Article 78 para. 1 of the 1902 Military Penal Code - Militær Straffelov, Law no. 13 of 22 May 1902). As the applicant refused to accept the proposal, the public prosecutor instituted proceedings against him in Bodø City Court (byrett - "the City Court"), charging him with the aforementioned offence.

B. Proceedings in the City Court

11. The trial before the City Court took place from 9 to 13 March 1989. The applicant was heard and thirteen witnesses and three expert witnesses gave evidence. Documentary evidence, including the military board of inquiry's report of 1 May 1987 (see paragraph 9 above), was submitted. Furthermore, on 11 March the City Court held an inquiry on Jan Mayen island at the site of the accident, where a number of witnesses testified.

12. In its judgment of 30 March 1989, the City Court described the relevant facts as follows:

> "In the morning of 18 April 1987 [the applicant] was informed by Ms Karin Ree, nurse [at the Station], that the captain of M/S Polarbas had been in contact with

Jan Mayen radio and requested that Mr Asbjørn Olufsen [the injured fisherman] be taken ashore at Jan Mayen so that the nurse could have a look at his wrist injury. The [applicant] responded in a positive manner to the request, but said that they would have to ascertain conditions in [the bay of] Båtvika before receiving Mr Olufsen. The nurse and the Chief Engineer, Arne Svendsen, were willing to participate in the operation. Mr Svendsen went down to Båtvika to check the conditions and reported back to [the applicant] that they were satisfactory. [The applicant] then contacted the Polarbas and agreed that the patient should be brought by a launch close to the beach in Båtvika and that a rubber dinghy ... would meet them there. It was further agreed that the transfer of the patient would take place approximately twenty minutes after the conversation between the Polarbas and the Station. They also agreed on a radio frequency on which the parties would communicate.

...

While driving to Båtvika, the [applicant] discovered that he had forgotten his camera. He wondered whether he should return to pick it up, but the nurse insisted that they had no time to lose and that they should therefore drive on. She then offered to collect the camera later, but the [applicant] told her that she should not do so.

On arriving at Båtvika they found the [rubber dinghy] already there, the Maintenance Chief Officer having fetched it and driven it down to the beach. The Maintenance Chief Officer said that the dinghy ought to be pumped up. The Chief Engineer, however, thought that it was better to leave the dinghy as it was and so do nothing to it. The [applicant] and Mr Svendsen sat down in the dinghy after having put on survival suits. However, neither of them put on their hoods. They took no radio equipment with them in the dinghy, but Ms Ree had a radio for the purpose of communicating with the Polarbas and its launch.

As they left the beach, the Polarbas launch with the injured fisherman on board was far out in the approaches to Båtvika. Some time after the dinghy had left, the nurse ... returned to the beach with the [applicant's] camera which she had gone back to collect at the administration building ...

Mr Svendsen rowed the dinghy out from the beach. After having rowed some forty to sixty metres from the shore they waited a while, trying to get the launch to approach them. However, they did not obtain any response from the persons in the launch.

[Mr Svendsen] was tired and he and [the applicant] changed places, the [applicant] taking over the rowing. They tried several times to contact the launch, but to no avail. They realised that something had gone wrong. They therefore rowed further towards the launch which was still lying far out in the approaches to Båtvika. As they came up to the launch they were told that the engine had broken down and that a sea anchor had been deployed. The men in the launch were anxious since, despite the sea

> anchor, the launch was drifting towards the rocks. None of the persons in the launch were wearing life-jackets or survival suits. Nor was such equipment available in the launch.
>
> The injured fisherman ... was taken on board the [rubber dinghy]. The dinghy was then rowed away from the launch. A breaker capsized the dinghy and the three people on board were thrown into the sea. They were not attached to the dinghy with lines nor did they have any lines with them. They did not have life-jackets.
>
> Ms Ree, who was standing on the beach, had a portable radio set, but did not have first-aid equipment, such as a stretcher, blankets or the like."

13. The City Court acquitted the applicant. Its judgment includes the following observations. Although the applicant was in principle under no duty to receive the injured fisherman, such a duty arose from the fact that he agreed to do so. In determining whether the applicant had been guilty of neglect or carelessness in the landing operation or in its preparations, it had to be ascertained whether he had breached any applicable instructions. Gross breaches or several recurring breaches of instructions could amount to neglect or carelessness within the meaning of Article 78 para. 1 of the Military Penal Code. The public prosecutor had argued that the applicant had acted in breach of his duties in seven instances, of which those indicated below were the subject of argument in the present case:

> "1. It was the duty of the defendant to use the dory once he had decided to receive a patient.
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> ...
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> 4. It was his duty to ensure that the nurse brought along medical equipment and was present throughout the operation.
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> ...
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> 7. It was his duty, once he had chosen to use the rubber dinghy, to ensure that the chief engineer was attached to it by a line. Moreover he ought to have returned to the beach earlier, once he realised that the launch did not intend to approach them."

The City Court was of the view that the instructions imposing duties on military and civilian personnel on Jan Mayen, in particular Instruction C 14 containing General Rules on Traffic on and around Jan Mayen, were for various reasons unclear. Moreover, many of the provisions in question were designed for the loading and discharging of supply vessels. The relevant instructions could therefore apply to rescue operations only in so far as was appropriate.

As to the above-mentioned item 4 of the prosecutor's allegations, the City Court held:

> "... the [applicant] cannot be blamed for the fact that the nurse did not remain on the shore throughout the operation. The Court is satisfied that Botten did not know that she had returned to the Station to fetch his

camera. Moreover, the Court is satisfied that he did not order her to fetch the camera. Anyway, her absence was quite short, lasting only a few minutes. The [applicant] knew, however, that [the] nurse ... did not bring along first-aid equipment to the shore. In that respect therefore, there is a breach of Instruction B 13, section 3.6. The Court points out, however, that there are no serious violations of the instructions. The object of the operation was merely to fetch a fisherman who was only suffering from a wrist injury and it would moreover take only a short time to go up to the Station buildings to collect the necessary equipment."

With regard to item 7, the City Court made, inter alia, the following observations:

"... the City Court agrees in principle with the prosecutor that it was unsafe to row the rubber dinghy right out to the launch. However, the [City] Court takes into account the fact that the [applicant] and [Mr Svendsen], while on their way, admittedly after they had passed the point where they had intended to meet the launch, but while they were still in fairly calm waters, discovered that there were problems on board the launch. Accordingly, the [City] Court cannot see here either that the [applicant] committed any breach of the instructions since it was highly probable, and gradually became quite obvious, that the launch was in a critical situation."

Finally, with regard to item 1, the members of the City Court were divided:

"Assessor Terje Henriksen considers that section 2 of Instruction C 14 lays down an obligation for the defendant to use the dory, since the penultimate paragraph of section 2 ... provides that this rule applies to all personnel on Jan Mayen. The President of the Court considers that ... section 2, which applies to sea traffic, must be applied wherever appropriate. Regarding this special case, where the [applicant] was to take ashore a fisherman with an injured wrist, the President cannot find any circumstances which could justify setting aside the general obligation to use the dory. The operation was not conducted under such heavy pressure that this provision could be disregarded. Assessor Tordis Kvarv is of the opinion that the provision does not apply in a rescue operation of the kind in issue and that the matter must therefore be assessed in terms of general requirements of care.

Assessor Terje Henriksen considers that the breach of this provision under the very special weather conditions which exist in the ocean area off Jan Mayen is so serious that it qualifies as `neglect or carelessness' within the meaning of Article 78 para. 1 of the Military Penal Code. He has therefore arrived at the conclusion that the defendant should be convicted for violation of Article 78 para. 1 ...

The President ... is of the opinion that even if this instruction has been disregarded, it must nevertheless be considered in applying Article 78 para. 1 ... whether the choice made by [the applicant] made the situation worse than would have been the case had he chosen the dory. If

it did not, a violation of this instruction cannot be described as neglect or carelessness. The majority of the Court (Assessor Tordis Kvarv and the President) have found that the use of the dinghy instead of the dory did not lead to reduced safety, having regard to the purpose which the boat was originally supposed to serve. Particular weight is attached to the fact that the parties had agreed to meet close to the beach. Although the precise meeting point had not been agreed, it must at least be accepted that they did not intend to go much further out than about 100 metres from the beach. In this area the waters are calm. Moreover, reference is made to the testimony of the prosecution expert witness, Mr Alv Håkon Klepsvik, Commander. He testified in court that he saw no safety problems in using the rubber dinghy in, or just outside, Båtvika provided it was kept away from breakers or wave peaks. He considered that, if one stayed in the middle of Båtvika or on the lee side, using the dinghy did not give rise to any problems. Nor would he have had any hesitation in using the dinghy to receive a person from another boat. He further testified that there was less risk of injury in transferring a person from a boat to another when the second was a rubber dinghy, and he thought that it would be preferable to use a rubber dinghy rather than a dory for that purpose. As regards the fact that the dinghy was not fully pumped up, he stated that it was better to use a dinghy that was not fully inflated. Nor did this reduce the dinghy's seaworthiness.

The majority of the Court agrees with the minority that the essential point in this case is whether there was a duty to use the dory and whether any breach of this duty led to reduced safety. The ... majority has accordingly come to the conclusion that such is not the case and that the defendant should therefore be acquitted, ... finding him not guilty of neglect or carelessness as described in the charge."

C. Proceedings in the Supreme Court

14. On 12 April 1989 the public prosecutor appealed from the judgment of the City Court to the Supreme Court (Høyesterett). In the first place he maintained that the City Court's decision was flawed in that it had applied too narrow an interpretation of the statutory offence of neglect in the performance of official duties. In the view of the prosecution, the breach of the duty to use a dory was so serious that it amounted to neglect. The City Court's view that using a rubber dinghy instead of a dory did not lead to reduced safety was not a sufficient reason for holding otherwise. The instructions had been laid down on the basis of several years' experience and with a view to the particular conditions at Jan Mayen and the fact that the Station officers are not necessarily accustomed to the sea and are only stationed there for a limited period. These considerations suggested that, save in exceptional circumstances, the Station officer was strictly required to exercise care and to follow the instructions. In the prosecution's opinion, the instruction could be departed from only if there was an emergency or if the service might thereby be carried out in a better or safer manner; that, however, was not the situation in the applicant's case.

The prosecutor further submitted that the facts as

established by the City Court were sufficiently clear to allow the Supreme Court to give a new judgment under Article 362 para. 2 of the 1981 Code of Criminal Procedure (see paragraph 28 below) convicting and sentencing the applicant, as opposed to quashing the City Court's judgment and referring the case back for fresh examination.

In his alternative submission, he argued that the City Court's judgment should be quashed on the ground of a procedural defect, its reasoning being incomplete. The judgment failed to describe the sea conditions prevailing at the time when the applicant set out in the dinghy and also when he realised that the lifeboat would not arrive at the agreed meeting point, and the distance between the lifeboat and the shore at those times. Nor did the judgment mention what the applicant thought had gone wrong with the lifeboat, which alternatives he had to taking the dinghy further out or how much time it would have taken to prepare the dory for the operation.

15. On 20 April 1989 the Appeals Selection Committee of the Supreme Court (Høyesteretts Kjæremålsutvalg) granted leave to appeal. By letter of 27 April 1989 the Supreme Court informed the applicant of its decision and that it had appointed as his counsel the lawyer who had represented him in the City Court. Moreover, the Supreme Court invited the applicant to contact his counsel as soon as possible if he possessed any information of relevance to the case which was not apparent from the case file. In addition, the Supreme Court stated that it intended to deal with his case in the near future without giving him further notice (Article 353 of the Code of Criminal Procedure - straffeprosessloven - as applicable at the relevant time).

16. After the prosecutor and counsel for the applicant had been consulted, the Supreme Court, by letter of 11 May 1989, advised counsel that it had set the oral hearing for 20 June 1989, at 9.15 a.m.

Subsequently, counsel informed the applicant of the date of the hearing and told him that, if he wished, he could ask the Supreme Court for leave to make an oral statement at the hearing but that he would not be heard either as a party or as a witness. Moreover, counsel advised the applicant that it was unusual for a defendant in an appeal personally to address the Supreme Court. Accordingly, the applicant did not ask for such leave.

17. An extract of the proceedings in the City Court, prepared by the prosecutor (for further details, see paragraph 18 below), was sent to counsel well in advance of the hearing in the Supreme Court. Counsel made no objections to the extract, nor did he make any further submissions to the Supreme Court.

18. At the hearing on 20 June 1989 the applicant's counsel was present, but he himself was not. As he was entitled to do, counsel addressed the Supreme Court and replied to the prosecutor's oral submissions in so far as they concerned the latter's appeal on points of law and procedure (see paragraph 14 above). However, in determining liability, the Supreme Court was bound by the establishment of the facts concerning the question of guilt in the City Court's judgment (Article 335 of the Code of Criminal Procedure as applicable at the relevant time).

After the main pleadings, the prosecution requested the Supreme Court to convict the applicant of an offence under Article 78 para. 1 of the Military Penal Code and to sentence him

to a suspended term of twenty-seven days' military custody and to a fine of NOK 5,000, failing payment of which he should be imprisoned for fifteen days. In the alternative, the prosecutor asked the Supreme Court to quash the City Court's judgment.

Counsel for the applicant requested the Supreme Court to dismiss the appeal.

The Supreme Court's case file included a 112-page extract from the proceedings in the City Court, containing the City Court's judgment of 30 March 1989, the written evidence used by it, including details of the applicant's professional and private status and income, his military service card, a statement to the effect that he had no criminal record, the military inquiry report and certain court transcripts. However, it did not include any records of the hearings in the City Court, such records not being available. The Supreme Court heard no witnesses or experts.

19. In a judgment of 27 June 1989, which was final, the Supreme Court upheld the prosecution appeal. Mr Justice Dolva, on behalf of a unanimous court, gave the following reasons:

> "I find that the appeal on the application of the law must be upheld and that the conditions for pronouncing a new judgment convicting the accused pursuant to Article 362 para. 2 of the Code of Criminal Procedure have been fulfilled.
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> ...
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> The decisive issue in the case is ... whether the applicant's conduct in connection with the landing operation and the preparations for it constitutes neglect or carelessness under Article 78 para. 1 of the Military Penal Code. The grounds cited for this are that he disregarded applicable instructions on several points as specified in the indictment. The City Court's judgment lists seven matters which, taken together, are claimed to constitute neglect. Several of these points have not been pursued before the Supreme Court.
>
> The instructions applying to Jan Mayen are comprehensive. This must be viewed in the light of the demanding conditions for those serving there. I would note that the preamble to the instructions for Jan Mayen, which were issued in August 1986 by the Norwegian Defence Communications and Data Services Administration and which are relevant to the present case, states: 'Written instructions are more necessary on Jan Mayen, where there is a constant turnover of personnel, than elsewhere.'
>
> The 'General Provisions concerning Traffic on and around Jan Mayen', which form part of the said instructions, figure centrally in the case. Section 1 ..., entitled 'Purpose', reads: 'These are general provisions which are intended as guidelines for both official and leisure traffic on and around Jan Mayen.' Even though the provisions initially give the impression of setting out 'guidelines', it is clear that they include binding rules, as shown by section 2 on sea traffic, the first paragraph of which reads: 'Excursions by boat in the sea around Jan Mayen without seagoing support vessel are generally prohibited.' However, the rule goes on to list

various exceptions. I would point out that the provisions on sea traffic clearly must cover the operation launched to receive the injured fisherman on that occasion, even though it was presumed that the transfer would be conducted relatively close to the shore. I also find it clear that the provisions must apply to the landing operation, even though there is no mention of assistance to the fishing fleet here or elsewhere in the instructions for Jan Mayen.

Section 2 ... includes, inter alia, the following two clauses:

` - Ensure that both dories are used on trips if no other boat is close to the island, or no other boat has been made ready to assist if necessary.

- When the weather conditions are deemed to be satisfactory, the other dory may be replaced by the dinghy, which may be taken aboard the dory or drawn behind it.'

In my view, it follows from the rules that there is a requirement to use a dory on occasions such as the one in question here, and that a dinghy could not replace a dory in this situation. It is true that a dinghy could be used in certain circumstances, but only as a backup. I therefore agree with the President of the City Court and the one lay judge who, admittedly on somewhat different grounds, found that the provisions imposed an official duty on the [applicant] to use a dory instead of a dinghy.

The President of the [City] Court was however of '... the opinion that even if this instruction has been disregarded, it must nevertheless be considered in applying Article 78 para. 1 ... whether the choice made by the [applicant] made the situation worse than would have been the case had he used a dory. If it did not, a violation of this instruction cannot be described as neglect or carelessness'.

I do not agree with this interpretation of the law.

In my opinion, the duty to use a dory is of such key significance in the provisions relating to traffic that an assessment such as that mentioned by the President is insufficient. I refer to the fact that the duty was imposed in the light of experience and is intended to protect life and health in an area characterised by quite extraordinary weather conditions and in difficult waters, and that it is thus particularly important that the instruction is complied with on this point. The assessment referred to by the President of the City Court cannot therefore be decisive for whether there was neglect.

The second lay judge, who together with the President of the City Court constituted the majority voting in favour of acquittal, likewise based her decision on an erroneous application of the law. In her opinion, the duty to use a dory did not apply 'to a rescue operation of this kind, and the matter must therefore be considered on the basis of a general assessment of the duty of care'. I find

that she was of the opinion that there was no duty to use a dory, and therefore no neglect within the meaning of Article 78 para. 1.

The majority of the City Court ... found that using a rubber dinghy instead of a dory on the occasion did not have the effect of reducing safety given the use for which the dinghy was initially intended, namely reception of the injured fisherman from the shrimp trawler's lifeboat not 'much further than about 100 metres from shore'. However, according to the regulations, this is not decisive.

Thus the [applicant's] acquittal is based on an erroneous application of the law. In the present case, however, this does not warrant quashing the City Court's judgment, since I agree with the prosecution's submission in the notice of appeal that the conditions are satisfied for pronouncing a new judgment convicting [the applicant] pursuant to Article 362 para. 2 of the Code of Criminal Procedure. In this connection, I refer to the City Court's account of the facts.

I also refer to what I previously said about the background to and the specific contents of the provisions concerning traffic on and around Jan Mayen, in particular the duty to use a dory. Given the difficult conditions on the island, it is particularly important that rules of this kind are complied with. The [applicant] is at fault for having decided, despite the requirement set out in the instruction, to use the rubber dinghy on that occasion and for having done so. I would point out, however, that the situation had changed at the subsequent stages of the operation, when it was clear that the persons in the approaching lifeboat were in danger. In my opinion, however, what had already happened in the earlier stages constitutes such a serious matter that it must be deemed to constitute neglect under Article 78 para. 1. I would note that counsel for the defence has contended before the Supreme Court that the duty to use a dory could not apply when a lifeboat was launched from the shrimp trawler. I do not find that this [argument] can be accorded decisive weight in the present case, as it is clear from the City Court's judgment that the dinghy was not simply used as a backup on this occasion. Nor could the defendant know whether or not the lifeboat was properly equipped, as subsequently turned out not to be the case.

As previously indicated, the prosecution has also brought up other matters which, in its opinion, constitute breaches of the applicable instructions. Some of these matters which were submitted to the City Court have not been pursued before the Supreme Court.

...

The City Court unanimously concluded that there was a breach of the instruction on account of the fact that the nurse had not brought first-aid equipment down to the shore and that the [applicant] was aware of this fact. I find this to be the case. However, the failure to use a dory in the landing operation is the predominant factor in relation to Article 78 para. 1.

As regards sentencing, I find it appropriate to sentence [the applicant] to twenty days' military custody suspended for a probation period of two years, in addition to an unconditional fine of NOK 5,000 or, in default of payment, military custody for fifteen days. In this connection, I have attached importance to the fact that the defendant is only at fault in respect of his conduct during the preliminary stages of the landing operation."

II. Relevant domestic law

20. Article 78 para. 1 of the Military Penal Code reads:

"A person exercising command who is guilty of neglect or carelessness in the performance of his official duties shall be punished with arrest or with the loss of commission or with detention for a term not exceeding six months."

21. Appeals in all criminal cases, including those covered by the Military Penal Code, are governed by the Code of Criminal Procedure.

A. Proceedings in the City Court

22. Under Article 278 of the Code of Criminal Procedure, proceedings during the main hearing in the District or City Court are oral. Written evidence is read out by the person producing the evidence unless the court decides otherwise (Article 302). After the examination of each individual witness and after the reading out of each piece of written evidence, the accused has to be given an opportunity to speak (Article 303). The court must see to it that the facts of the case are fully established (Article 294).

When the production of evidence (bevisførselen) is completed, the prosecutor and then defence counsel may make a speech. Each of them is entitled to speak twice. When defence counsel has finished, the person indicted is asked whether he has any further comment to make (Article 304). In deciding what is deemed to be proved, only the evidence produced at the main hearing shall be taken into consideration by the court (Article 305).

23. Under Article 40 of the Code of Criminal Procedure, if the City Court decides to convict the accused its judgment must, in giving its verdict, state in a specific and exhaustive manner the facts of the case which the court has found to be proved and on which its verdict is based. It must also refer to the penal provision under which the accused has been convicted. In addition the judgment must state the reasons to which the court has attached importance in determining the sanctions.

If the person charged is acquitted, the grounds of the judgment must, in accordance with Article 40, state which conditions for a finding of guilt are deemed not to be satisfied, or the circumstances which exclude a sanction called for by the prosecution.

B. Appeal to the Supreme Court

24. Under the Code of Criminal Procedure, as applicable at

the material time, a party in a criminal case seeking to challenge a judgment of the City Court could, depending on the nature of the point disputed, either request a new trial (fornyet behandling) in the High Court (lagmannsretten) or appeal (anke) to the Supreme Court.

If the object was to contest the City Court's assessment of evidence in relation to the question of guilt (bevisbedømmelsen under skyldspørsmålet, Article 369, as applicable at the relevant time), the appellant party could, with leave from the Appeals Selection Committee of the Supreme Court apply for a new trial in the High Court (Article 370, as applicable at the relevant time).

On the other hand, an appeal on grounds of errors of law going to the verdict (rettsanvendelsen under skyldspørsmålet), on procedural defects (saksbehandling) and as to sentence (straffutmåling) could be lodged with the Supreme Court (Article 335, as applicable at the relevant time). The Supreme Court thus had no competence to review questions of facts which go to the question of guilt but had to base itself on the findings of the City Court in this respect. No such limitation applied to the Supreme Court's jurisdiction with regard to sentencing, which comprised both questions of facts and of law.

25. Both parties may in principle lodge an appeal against a judgment of the District or City Court (Article 335, as applicable at the time). However, an acquitted person may not appeal unless the court has found it proved that he committed the unlawful act referred to in the indictment (Article 336, as applicable at the time).

26. The appeal proceedings are prepared and conducted according to the rules applicable to the hearing at first instance in so far as such rules are appropriate and it is not otherwise provided (Article 352, as applicable at the relevant time).

27. The proceedings in the Supreme Court are oral and public and both parties are allowed to speak twice. The appellant party is entitled to address the court first. The accused may be allowed to address the court during the hearing (Article 356, as applicable at the relevant time). Evidence is submitted to the court by reading out from the documents relating to the case (Article 357, as applicable at the time).

28. Article 362 (as applicable at the time) read:

> "If the court finds no reason to vary or set aside the judgment appealed against, the appeal shall be dismissed by court order.
>
> In the alternative the court shall pronounce a new judgment if the necessary conditions are fulfilled; otherwise the judgment appealed against shall be set aside by court order."

In determining whether the "necessary conditions are fulfilled", the Supreme Court will concentrate on the question whether the facts as ascertained in the judgment appealed against are sufficient to render a new decision on the merits. Case-law under Article 362 confirms that the Supreme Court is reluctant to pronounce a new judgment.

Prior to the entry into force of the 1981 Code of Criminal Procedure on 1 January 1986, the Supreme Court had, under Article 396 of the 1887 Code of Criminal Procedure, power to give a new judgment convicting the accused only "when the question of guilt had been decided against the defendant" in the lower court. The 1981 Code removed this limitation on the Supreme Court's competence.

C. Reform of the Norwegian appeal system

29. Since 1 August 1995, when the 1993 Act Amending the Code of Criminal Procedure (Lov av 11 juni 1993 nr. 80 om endringer i straffeprosessloven m.v. (toinstansbehandling, anke og juryordning)) entered into force, an appeal against the City Court lies ordinarily with the High Court, which has power to review points of fact, law and procedure (Articles 5, 306 and 345 as amended). As a consequence, to a greater extent than before, the High Court will act as a second instance, and the Supreme Court as a third instance, in criminal cases.

On the other hand, the above-mentioned provisions in Articles 336, 356, 357 and 362, which have been replaced respectively by Articles 307, 339, 340 and 345, remain essentially unchanged.

30. In an opinion appended to the bill proposing to amend the Code (Ot prp nr. 78 (1992-93), p. 25), the Supreme Court stated:

> "The present system, where the Supreme Court acts as the ordinary second instance in criminal cases, is internationally unique. This arrangement has enabled a speedy hearing of appeal cases and has given the Supreme Court a considerable influence on the practice of criminal law. However, in recent years - given current developments - the present system has demonstrated that it is no longer satisfactory. It does not fulfil the standards of legal safeguards which ought to be met and, at the same time, with the increased number of criminal cases in present-day society, the arrangement creates working conditions in the Supreme Court which prevent it from performing its functions in a fully satisfactory manner. The proposal that one should have two ordinary instances below the Supreme Court would bring the appeal system in criminal cases in line with that in civil cases and with the appeal systems in most countries. It would give the Supreme Court the opportunity to concentrate its work to a greater extent on cases where its decision will concern matters of principle, or where there are other particular reasons for obtaining a decision from the Supreme Court."

PROCEEDINGS BEFORE THE COMMISSION

31. In his application (no. 16206/90) to the Commission of 22 December 1989, Mr Botten complained that, in breach of Article 2 of Protocol No. 7 (P7-2) to the Convention, he was not afforded a right to have his conviction and sentence reviewed by a higher tribunal, the Supreme Court being barred from assessing the facts in relation to the question of guilt. He further alleged that there had been a violation of his right to a fair trial under Article 6 (art. 6) of the Convention, on account of the fact that his conviction by the Supreme Court was based on the facts grounding his acquittal by the City Court and that he was neither summoned to appear nor present at the hearing of the

Supreme Court.

32. On 17 January 1994, the Commission declared the applicant's complaint under Article 6 (art. 6) admissible and declared the remainder of the application inadmissible. In its report of 11 October 1994 (Article 31) (art. 31), the Commission expressed the opinion that the proceedings in the Supreme Court gave rise to a violation of the applicant's right to a fair hearing as guaranteed by Article 6 para. 1 (art. 6-1) of the Convention (by sixteen 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).

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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-I), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS MADE TO THE COURT

33. At the hearing on 26 September 1995 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of Article 6 (art. 6) of the Convention.

34. On the same occasion the applicant reiterated his request to the Court stated in his memorial to find that there had been a breach of Article 6 (art. 6) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

35. The Government maintained, as they had done unsuccessfully before the Commission, that the applicant had failed to exhaust domestic remedies (Article 26 of the Convention) (art. 26). He had not raised before the Supreme Court the substance of his complaint under Article 6 (art. 6) of the Convention, namely that the Supreme Court, without having summoned him and without having heard him in person, gave a new judgment overturning his acquittal by the City Court (see paragraphs 15, 16, 18, 19 and 28 above).

36. However, the Court observes that the subject-matter of the applicant's complaint to Strasbourg was addressed and dealt with in the domestic proceedings.

In his appeal to the Supreme Court the public prosecutor invited that court to convict and sentence the applicant for the offence of neglect or carelessness in the performance of official duties under Article 78 para. 1 of the Military Penal Code. The prosecutor pleaded that the facts as established by the City Court were sufficiently clear to allow the Supreme Court to give a new judgment under Article 362 para. 2 (as applicable at the material time) of the Code of Criminal Procedure, as opposed to quashing the City Court's judgment and referring the case back for a retrial (see paragraph 14 above). Counsel for the applicant asked the Supreme Court to dismiss the appeal but did not, by way of alternative submission, object to the Supreme Court giving a new judgment under Article 362 para. 2.

On 27 June 1989, the Supreme Court found that the description of facts in the City Court's judgment were sufficient to fulfil the condition in Article 362 para. 2 and convicted and sentenced the applicant for an offence under Article 78 para. 1, without summoning him or hearing him in person. It is implicit in the Supreme Court's judgment that it did not consider this to give rise to any unfairness in the proceedings against the applicant (see paragraph 19 above).

In these circumstances, notwithstanding the fact that the applicant or his counsel did not raise the matter themselves, the Norwegian court cannot be said to have been denied the opportunity which the rule of exhaustion of domestic remedies is designed to afford to States, namely to put right the violations alleged against them (see, amongst other authorities, the Van Oosterwijck v. Belgium judgment of 6 November 1980, Series A no. 40, p. 17, para. 34). Accordingly, the Government's preliminary objection must be dismissed.

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

37. The applicant complained mainly of the fact that the Supreme Court, without having summoned him and without having heard him in person, gave a new judgment overturning his acquittal by the City Court. He alleged a violation of Article 6 para. 1 (art. 6-1) of the Convention which, in so far as relevant, reads:

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

38. The Government disputed this contention, whereas the Commission agreed with the applicant.

A. Principles in the Court's case-law

39. The Court reiterates that the manner of application of Article 6 (art. 6) to proceedings before courts of appeal 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. Where a public hearing has been held at first instance, the absence of such a hearing may be justified at the appeal stage by the special features of the proceedings at issue, having regard to the nature of the domestic appeal system, the scope of the appellate court's powers and to the manner in which the applicant's interests were actually presented and protected before the court of appeal, particularly in the light of the nature of the issues to be decided by it (see, inter alia, the Fejde v. Sweden judgment of 29 October 1991, Series A no. 212-C, pp. 67-69, paras. 27 and 31; and the Kremzow v. Austria judgment of 21 September 1993, Series A no. 268-B, p. 43, paras. 58-59).

According to the Court's case-law, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 (art. 6), although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see the Axen v. Germany judgment of 8 December 1983, Series A no. 72, pp. 12-13, paras. 27-28; and the Kremzow judgment cited above, pp. 43-44, paras. 60-61). Moreover, even

if the court of appeal has full jurisdiction to examine both points of law and of fact, Article 6 (art. 6) does not always require a right to a public hearing or, if a hearing takes place, a right to be present in person (see, for instance, the Fejde judgment cited above, p. 69, para. 33).

B. Application of those principles to the present case

40. In the proceedings at first instance in the present case, the City Court held a public hearing during which it took evidence not only from the applicant but also from a large number of witnesses and expert witnesses. In addition it conducted an inquiry at the site of the accident (see paragraph 11 above). The fairness of the proceedings in the City Court is undisputed.

Furthermore, the appeal proceedings in the Supreme Court included a public and oral hearing at which the applicant was represented by counsel (see paragraph 18 above). The issue to be determined by the Court is whether, in the particular circumstances of the case, the applicant's right to a fair hearing as guaranteed by Article 6 (art. 6) of the Convention was breached in as much as the Supreme Court gave a new judgment under Article 362 para. 2 (as applicable at the relevant time) of the Code of Criminal Procedure, convicting and sentencing the applicant, without having summoned and heard him in person.

1. Arguments of those who appeared before the Court

41. In the Government's submission, the procedure applied in the case under review not only complied with the "fair hearing" guarantee in Article 6 (art. 6) of the Convention but in addition enabled the national courts to complete criminal proceedings "within a reasonable time" as also required by that Article (art. 6). In the instant case, the applicant, through his counsel, was afforded equal opportunities to those of the prosecution to take part in the proceedings and to be heard. His presence in person at the hearing before the Supreme Court would not have provided any further guarantee of the fundamental principles underlying Article 6 (art. 6).

42. As regards liability, the Government stated that under Norwegian law the Supreme Court was bound by the City Court's findings of fact in relation to the question of guilt (see paragraphs 12, 19 and 24 above), which were in any event undisputed. It would not have been able to review those facts even if the applicant had been present. Nor did it follow from the requirements in Article 40 of the Code of Criminal Procedure (see paragraph 23 above) that facts set out in a judgment of acquittal, like that of the City Court, were incapable of grounding a conviction by the Supreme Court. On the contrary, in the case under consideration, the majority of the City Court voting for acquittal, and the minority voting for conviction, had based their conclusions on the same facts and had disagreed solely on a point of law (see paragraph 13 above). The prosecution appeal on the applicant's liability clearly raised only questions of law.

In this connection, it was stressed that the Supreme Court, on a different construction of the law from that of the majority of the City Court, had concluded that it had been mandatory for the applicant to use a dory in the rescue operation. It had convicted him under Article 78 para. 1 of the Military Penal Code principally for having chosen to use a rubber dinghy rather than a dory and also, on a minor point, for having

failed to ensure that the nurse brought first-aid equipment down to the beach (see paragraph 19 above). The applicant's conduct after he left the beach was thus irrelevant to his conviction, as was the prosecution's alternative plea that the grounds of the City Court's judgment were incomplete (see paragraph 14 above).

Consequently, in view of the Supreme Court's findings on the law, the description of facts in the City Court's judgment had clearly been sufficient to ground the Supreme Court's conclusion on liability.

43. In the matter of sentencing, the facts presented to the Supreme Court were in the Government's view sufficient and complete. The case file had contained details of the applicant's professional and private status, his income and his military service card, and had indications that he had no criminal record (see paragraph 18 above). It was hard to see what other evidence could have been of relevance, since, in a case like the present one, importance was attached to the nature of the offence, not to the defendant's personality, character, state of mind or motives. As appeared from the applicant's own submissions before the Norwegian courts and the Convention institutions, he attached importance to the question of guilt but not to that of sentencing. The penalty imposed on the applicant had been lenient (see paragraph 19 above) and could not have been of great importance to him.

44. In their alternative submission, the Government argued that the applicant had, in an unequivocal manner, waived his rights under Article 6 (art. 6) of the Convention. In this connection, they pointed to the fact that the applicant had failed to exercise his right to be present at the appeal hearing and to seek leave to address the Supreme Court. His counsel had in addition neglected to object to the Supreme Court's giving a new judgment under Article 362 para. 2 of the Code of Criminal Procedure (see paragraphs 16-18 and 28 above).

45. The applicant and the Commission disagreed. As to the appeal on liability, they maintained that, although the facts established by the City Court were undisputed, this did not necessarily mean that they were complete. Even the public prosecutor had argued, as an alternative appeal submission, that the grounds for the City Court's judgment were incomplete (see paragraph 14 above). Moreover, the Supreme Court lacked powers to review the facts as to the question of guilt. Since the Supreme Court reversed the acquittal by the City Court and thus convicted him for the first time in the proceedings against him, the applicant ought to have been present and to have been heard in person.

The applicant submitted, furthermore, that, since there were no records of the hearing in the City Court, the Supreme Court could not acquaint itself with all the evidence adduced at first instance (see paragraph 18 above). Nor could it be assumed that the description of facts in the City Court's judgment was sufficient for the purposes of the Supreme Court's decision to convict the applicant, since, under Article 40 of the Code of Criminal Procedure, the City Court was only required to state the facts in so far as was necessary to ground its own judgment acquitting the applicant (see paragraph 23 above).

46. On the question of sentencing, the applicant and the Commission considered it essential to the fairness of the proceedings that the applicant should have been present and

afforded an opportunity to address the Supreme Court. In this connection, they pointed to the fact that sentencing was examined for the very first time by the Supreme Court and did not involve a fixed or mandatory sentence and they also stressed the importance of the outcome of the proceedings for the applicant (see paragraphs 13, 19 and 20 above). In his view the Supreme Court's decision had adversely affected his career.

47. In addition, as a further aspect of his complaint that he had been denied a fair trial, the applicant argued that the Norwegian procedure did not afford equality of arms between the parties. The public prosecutor could, unlike the applicant, chose either to appeal on points of law to the Supreme Court or request a new trial in the High Court (see paragraph 25 above). As a result of the prosecutor's choice of the former remedy, the applicant could not have the facts relating to the question of guilt reviewed.

2. The Court's assessment

48. In the Court's view, the fact that the Supreme Court was empowered to overturn an acquittal by the City Court without summoning the defendant and without hearing the latter in person (see paragraphs 15, 27 and 28 above) did not on its own infringe the fair hearing guarantee in Article 6 (art. 6) of the Convention.

However, it is necessary to examine whether, in the light of the Supreme Court's role and the nature of the issues to be decided by that court, there has been a violation in the particular circumstances of the case. In carrying out this examination, the Court will confine itself to consider whether the proceedings in the present case were fair; it is not its task to express any view on whether the Supreme Court's interpretation of Norwegian law was correct or to substitute its own assessment for that of the Supreme Court as to whether the facts described in the City Court's judgment were sufficient to ground a conviction under Article 78 para. 1 of the Military Penal Code (see, for instance, the Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 18, para. 31; and the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34).

49. On the question of liability, the Court notes that the public prosecutor invited the Supreme Court to place a different construction on the terms "neglect" and "carelessness" within the meaning of Article 78 para. 1 of the Military Penal Code from that adopted by the City Court and to give a new judgment convicting the applicant on the basis of the facts as found in the City Court's judgment (see paragraph 14 above). The Supreme Court, referring to those facts, convicted the applicant under Article 78 para. 1 for his conduct at the "earlier stages" of the rescue operation, principally for having chosen to use the rubber dinghy instead of the dory (see paragraphs 12 and 19 above).

Even if, as suggested by the Government, only the main point in respect of which the applicant was convicted is taken into account, the Court is not persuaded by their submission to the effect that the prosecution appeal raised exclusively questions of law. Although the facts relating to the question of guilt established by the City Court were undisputed and the Supreme Court was bound by them, it had to some extent to make its own assessment for the purposes of determining whether they provided a sufficient basis for convicting the applicant; if they

did not it had to quash the City Court's judgment and order a retrial (see paragraphs 19 and 28 above). This was compounded by the fact that, as appears from the latter judgment and the prosecution appeal to the Supreme Court, the allegation that the applicant had a duty under the relevant rules to use a dory in the rescue operation and that his failure to do so constituted an offence under Article 78 para. 1 raised serious questions (see the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 17, para. 38). These concerned not only the interpretation of the terms of the applicable instructions but also whether there had been neglect or carelessness in view of the particular conditions obtaining at the site of the rescue operation at the material time (see paragraphs 13, 14 and 19 above).

50. Furthermore, as to sentencing, the Supreme Court had full jurisdiction to examine questions of fact and of law and had, in the event of liability under Article 78 para. 1, discretion to impose a penalty of up to six months' military custody (see paragraphs 20 and 24 above). In view of the nature of the offence, sentencing was, whatever the considerations relied on by the Supreme Court, capable of raising issues going to such matters as the applicant's personality and character (see, mutatis mutandis, the Kremzow judgment cited above, p. 45, para. 67). However, in deciding on sentence, the Supreme Court did not even have the benefit of having a prior assessment of the question by the lower court which had heard the applicant directly.

51. In addition, bearing in mind the character of the offence in question, the Court sees no reason to doubt that the outcome of the proceedings could have adversely affected the applicant's professional career (see, mutatis mutandis, the Helmers judgment cited above, p. 17, para. 38). Indeed, criminal conviction and sentence for neglect in the performance of official duties may be a serious matter for any public official.

52. Taking into account what was at stake for the applicant, the Court does not consider that the issues to be determined by the Supreme Court when convicting and sentencing the applicant - and in doing so overturning his acquittal by the City Court - could, as a matter of fair trial, properly have been examined without a direct assessment of the evidence given by the applicant in person.

53. Having regard to the entirety of the proceedings before the Norwegian courts, to the role of the Supreme Court and to the nature of the issues adjudicated on, the Court reaches the conclusion that there were no special features to justify the fact that the Supreme Court did not summon the applicant and hear evidence from him directly before passing judgment under Article 362 para. 2 (as applicable at the time) of the Code of Criminal Procedure. The Supreme Court was under a duty to take positive measures to this effect, notwithstanding the fact that the applicant neither attended the hearing, nor asked for leave to address the court nor objected through his counsel to a new judgment under Article 362 para. 2 being given by the Supreme Court.

In short, the Court finds that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention.

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

54. Mr Botten sought just satisfaction under Article 50 (art. 50) of the Convention, which reads:

> "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."

55. The applicant did not seek compensation for damage. He claimed reimbursement of costs and expenses in respect of several items, from which should be deducted the NOK 81,815 and 12,611 French francs which he had received in this respect in legal aid from the Norwegian authorities and the Council of Europe. By letter of 15 January 1996, the applicant stated that he had been granted a further NOK 131,253 in domestic legal aid and that, bearing this in mind, he had no further claim under Article 50 (art. 50) of the Convention.

56. In these circumstances the Court does not find it necessary to make an award for costs and expenses.

FOR THESE REASONS THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by seven votes to two that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention;

3. Holds unanimously that it is not necessary to make an award for costs and expenses.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 1996.

Signed: Rudolf BERNHARDT
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 dissenting opinion of Mr Ryssdal and Mr Gölcüklü is annexed to this judgment.

Initialled: R. B.

Initialled: H. P.

DISSENTING OPINION OF JUDGES RYSSDAL AND GÖLCÜKLÜ

In our opinion there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention in the present case.

As to whether the applicant was guilty of neglect in the performance of official duties (Article 78 para. 1 of the 1902

Military Penal Code) the Supreme Court in its judgment of 27 June 1989 exclusively discussed and decided a question of law based on the facts as set out in the City Court's judgment of 30 March 1989. As stated by the City Court, and as was undisputed, the applicant used a rubber dinghy during the rescue operation instead of a dory. The majority of the City Court had acquitted the applicant because, in their opinion, the use of a rubber dinghy did not lead to reduced safety. The Supreme Court decided that the acquittal was based on an erroneous application of the law because the relevant provision made it obligatory for the applicant to use a dory.

The decision on this question of law would necessarily have been the same even if not only the applicant's counsel but he himself had been present at the hearing on 20 June 1989 and he had been afforded an opportunity to address the Supreme Court. Moreover, if the judgment of the City Court had been quashed and the case had been referred back to the court of first instance for retrial, the City Court would have been bound to follow the Supreme Court's interpretation of the law, namely that the relevant provision made it obligatory to use a dory in the rescue operation.

As to the sentence, it must be observed that, according to the applicant's own submissions both before the Norwegian courts and before the Convention institutions, he attached importance to the question of whether he was guilty of an offence but not to that of sentencing. If it were otherwise he could have availed himself of the opportunity to be present at the appeal proceedings and to have asked for leave to address the Supreme Court. Moreover, in its judgment the Supreme Court emphasised the fact that the applicant was only at fault in respect of his conduct during the preliminary stages of the rescue operation. In addition the penalty imposed was lenient. Indeed, one can hardly imagine a less severe penalty.

Finally, in our view, the reference in the decision of the Court to the Kremzow v. Austria judgment of 21 September 1993 (Series A no. 268-B) is certainly not appropriate for this case. The special circumstances mentioned in paragraphs 67-68 of that judgment - relating to a murder trial resulting in a sentence of life imprisonment - are in no way comparable to the facts in the present case, where there was no particular need to assess the applicant's personality and character.