



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

COURT (CHAMBER)

CASE OF PAUWELS v. BELGIUM

(Application no. 10208/82)

JUDGMENT

STRASBOURG

26 May 1988

In the Pauwels case*,

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

Mr. R. RYSSDAL, *President*,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. L.-E. PETTITI,
Mr. C. RUSSO,
Mr. J. DE MEYER,
Mr. N. VALTICOS,

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

Having deliberated in private on 28 January and 27 April 1988,

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

PROCEDURE

1. The case was brought before the Court by the European Commission of Human Rights ("the Commission") on 13 March 1987 within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10208/82) against the Kingdom of Belgium lodged with the Commission under Article 25 (art. 25) by Mr. Willy Pauwels, who is a Belgian national, on 19 November 1982.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision from the Court as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 § 3 (art. 5-3).

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

* Note by the Registrar: The case is numbered 1/1987/124/175. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

3. The Chamber to be constituted included ex officio Mr. J. De Meyer, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 23 April 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mrs. D. Bindschedler-Robert, Mr. L.-E. Pettiti, Mr. C. Russo, Mr. A.M. Donner and Mr. N. Valticos (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr. Thór Vilhjálmsson, substitute judge, replaced Mr. Donner, who was unable to attend (Rules 22 § 1 and 24 § 1).

4. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, having on each occasion consulted - through the Registrar - the Agent of the Belgian Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant :

(a) decided on 1 October 1987 that there was no need at that stage for memorials to be filed; and

(b) directed on 22 October 1987 that the hearing should be held on 26 January 1988 (Rule 38).

5. However, the Registrar did receive:

(a) the applicant's claims under Article 50 (art. 50) of the Convention, on 13 November 1987, and observations on those claims by the Delegate of the Commission and by the Government, on 21 December 1987 and 8 January 1988 respectively; and

(b) various documents which the President had instructed him to request the Commission to produce, on 21 December 1987.

6. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. C. DEBRULLE, Deputy Secretary,

Ministry of Justice,

Agent,

Mr. G. KIRSCHEN, former leader

of the Brussels Bar, former Chairman of the National

Council of the Ordre des avocats,

Mr. A. ANDRIES, Advocate-General

at the Courts-Martial Appeal Court,

Counsel;

- for the Commission

Mr. J.-C. SOYER,

Delegate;

- for the applicant

Mr. L. PEETERS, avocat,

Mr. R. PERRIENS, avocat,

Ms. E. DE RYCK, avocate,

Counsel.

7. The Court heard addresses by Mr. Kirschen for the Government, by Mr. Soyer for the Commission and by Mr. Peeters and Mr. Perriens for the applicant, as well as their replies to its questions.

The Government and the applicant produced several documents at the hearing.

The Court adjourned briefly to consider an application from one of Mr. Pauwels' lawyers for a stay of the proceedings until such time as the Commission referred to it a second application lodged by Mr. Pauwels. It decided to continue its examination of the merits of the case submitted by the Commission in its report.

8. On 20 February 1988, the applicant supplied particulars of some of his costs and expenses, as the Registrar had requested on the Court's behalf on 28 January. The Government and the Delegate of the Commission filed observations on this matter, which were received by the registry on 24 March and 26 April respectively.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Mr. Pauwels is a Belgian national and was born in 1931. He was formerly a regular army officer and as such last served in the Belgian forces stationed in the Federal Republic of Germany with the rank of senior captain (*capitaine-commandant*). He and his family now live in Cologne and the Belgian authorities have requested his extradition.

A. The applicant's arrest and detention on remand

10. On 2 April 1982, the Board of Inquiry (*commission judiciaire*) of Field Court Martial "A", sitting at Cologne, ordered the applicant's arrest and charged him with embezzlement of State funds. The Board was chaired by Mr. G. Van Even, a senior deputy *auditeur militaire*, who had questioned Mr. Pauwels on 23 and 24 March, and it said that its decision had been taken in view of the seriousness of the charges and the need to take statements from certain witnesses before the applicant could exert influence on them.

On his arrest a few hours later, the applicant lodged an application for his immediate release but on 8 April the Board of Inquiry, again chaired by Mr. Van Even, confirmed the order in question on the same grounds.

11. The same day, Mr. Pauwels submitted to the Court Martial a second application for his release. On 15 April, the Court Martial, after having

heard the views of another deputy auditeur militaire, Mr. Potemans, declared the application admissible but ill-founded. The Court Martial observed that during the preliminary investigation the Board of Inquiry had exclusive jurisdiction to hear such applications and determine whether or not detention should be ordered. It also found that the initial arrest warrant had been lawful.

The applicant immediately appealed to the Courts-Martial Appeal Court sitting in Brussels, which dismissed the appeal on 22 April, upholding the contested judgment on every point.

On 23 April, the Board of Inquiry, again chaired by Mr. Van Even, confirmed the arrest order for the second time.

On 30 April, the applicant appealed to the Court of Cassation against the judgment of the Courts-Martial Appeal Court. He relied *inter alia* on paragraph 3 of Article 7 of the Constitution, which provides that "save for offences discovered while being committed, no one may be arrested except pursuant to an order issued by a judge, which shall state the grounds on which it is based". He argued that neither the Board of Inquiry nor any of its members had the status of judge or possessed the independence and impartiality inherent in such status. In particular, an auditeur militaire carried out his duties under the supervision and direction of the Minister of Justice; he combined the functions of public prosecutor and investigating judge; his interests as prosecutor and those of the remand prisoner or defendant were directly opposed; and he alone was vested with the power of decision, since he was not bound by the dissenting opinion of either or both of the officers designated to sit on the Board (see paragraph 24 below).

On 22 June 1982, the Court of Cassation dismissed the applicant's appeal. As regards the submission based on Article 7 of the Constitution, it held that paragraph 3 had to be read in the light of Article 105 of the Constitution (see paragraph 18 below). In this context the term "judge" therefore meant a body on which judicial powers were conferred by the provisions governing military criminal procedure. Articles 35 and 36 of the Code of Military Criminal Procedure, adopted under an Act of 15 June 1889, empowered Boards of Inquiry to issue arrest warrants. The drafting history showed that the auditeur militaire who chaired the Board of Inquiry performed the function of an investigating judge, in which capacity he was by definition independent.

12. In the meantime, on 3 May 1982, Mr. Pauwels had requested the Court Martial to order his release on the ground that the Board of Inquiry had no power to issue and then confirm the warrant of 2 April. On 11 May, the Court Martial declared this third application inadmissible on the ground that it was incompatible with the principle of *res judicata*, which applied to the decision of 15 April. Before making its ruling, the Court Martial had heard the views of the public prosecutor in the person of Mr. Van Even. The applicant immediately appealed to the Courts-Martial Appeal Court,

which dismissed his appeal on 4 June as inadmissible and in any event ill-founded.

13. A fourth application, on 14 June, likewise failed. On 23 June, the Court Martial dismissed the application on similar grounds, after having heard the views of Mr. Van Even.

14. On 11 June 1982, the applicant's lawyer had written direct to the auditeur général, who, on 16 June, sent him the following reply (translated from the Dutch original):

"With reference to the application of 1 June 1982 for Pauwels to be released on bail ..., I have the honour to inform you that, having studied the application, I consider that there are not sufficient grounds for the question of his continued detention to be determined by my office under Article 123 of the Code of Military Criminal Procedure.

However, I have asked the auditeur militaire of Field Court Martial A to bring the case before the Court Martial as quickly as possible in order to enable that court to determine the merits and, at the same time, decide on any application for release. ..."

B. The trial proceedings

15. On 23 June 1982, the senior deputy auditeur militaire, Mr. Van Even, issued a summons for the applicant to appear before the Court Martial at Cologne on 5 July. On the appointed day, the Court Martial ordered the applicant's release and adjourned the case sine die.

The trial proceedings resumed on 6 December 1982 following a further summons, signed this time by Mr. Potemans (on 17 November). On 2 May 1983, the Court Martial agreed to allow Mr. Van Even to give evidence, under oath. Since the defence objected, the Court Martial decided to join the issue to the merits. However, it elected to hear Mr. Van Even immediately.

The following day, the defendant appealed against this decision, but on 4 July agreed that the proceedings should continue. In its decision of 8 September 1983, the Court Martial based its conclusion *inter alia* on Mr. Van Even's statements, which it ruled were admissible. It sentenced the applicant to six years' imprisonment and a fine of 6,000 Belgian francs (BF) for forgery, uttering forged documents and embezzlement of State funds.

16. On the same day, the applicant appealed to the Courts-Martial Appeal Court, which ruled on his two appeals in a single judgment of 27 February 1985.

In the first place, the Courts-Martial Appeal Court quashed the decision of 2 May 1983 concerning Mr. Van Even's testimony, on the ground that it did not give adequate reasons. It noted in addition that Mr. Van Even, acting not as investigating judge but as representative of the public prosecutor, had taken certain steps in the prosecution, and in particular had issued the summons of 23 June 1982. This meant that he had become a party to the

proceedings and accordingly could not appear as a witness. His testimony should therefore have been disregarded.

On the merits, the Courts-Martial Appeal Court reduced the sentence to four years' imprisonment and a fine of 6,000 BF. It ordered that the applicant be dismissed the service (Article 54 of the Military Criminal Code) but, unlike the court below, did not order his immediate arrest.

17. On 3 March 1987, the Court of Cassation dismissed appeals on points of law which the public prosecutor and Mr. Pauwels had entered against the judgment of the Courts-Martial Appeal Court.

II. THE RELEVANT DOMESTIC LAW

18. By Article 105, first paragraph, of the Constitution, "special laws shall regulate the organisation of military courts, their powers, the rights and obligations of their members and the terms of office of the latter".

Military criminal procedure is governed principally by the Army Code of Procedure (ACP) of 20 July 1814 and the Code of Military Criminal Procedure (CMCP) of 15 June 1899.

A. The *auditeur militaire*

19. The *auditeur militaire* heads the *auditeur militaire's* office of a particular court martial. He is a member of the judiciary, and consequently is not subject to the military chain of command. The same is true of the senior deputies (such as Mr. Van Even) and the deputies (such as Mr. Potemans), who assist the *auditeur militaire*.

Auditeurs militaires and their deputies, however, are not judges within the meaning of Article 100 of the Constitution. The King, who appoints them, may also dismiss them (Article 77 of the CMCP). They are therefore not irremovable.

They are hierarchically subordinate to the *auditeur général* at the Courts-Martial Appeal Court and to the Minister of Justice, but it is not disputed that in practice they are wholly independent in the performance of their duties.

20. The *auditeur militaire* and his deputies discharge the functions of:

(a) senior police officers (*officiers de police judiciaire* - Article 44 of the CMCP);

(b) investigating judges, vested with powers identical to those of civilian investigating judges and which each individual exercises either alone or as chairman of the Board of Inquiry (Article 35 of the CMCP and paragraph 25 below);

(c) members of the public prosecutor's office, acting as prosecuting counsel before the courts martial, subject to the supervision and direction of the *auditeur général* (Article 76 of the CMCP).

The Code of Military Criminal Procedure thus derogates from Article 292 of the Judicial Code, which prohibits such plurality of functions "except in the cases prescribed by law".

21. However, as a consequence of the Schiesser judgment given by the European Court of Human Rights on 4 December 1979 (Series A no. 34), the auditeur général issued the following instructions on 29 March 1983 (Circular no. 2920):

"... The Principal Public Prosecutor at the Court of Cassation has informed me of his view that, in the light of the Schiesser judgment, it is absolutely essential to ensure that, in cases where a preliminary investigation is held, particularly those in which the accused is placed in detention on remand, the judicial officer who acts as prosecuting counsel before the court martial should not be the one who conducted the preliminary investigation.

I have explained to the Principal Public Prosecutor at the Court of Cassation why in many circumstances, in view of the limited number of auditeurs militaires and deputies, it will no doubt be physically impossible to comply with the rule he wishes to have applied, but have told him that the rule generally will be applied in future.

Pending a solution which will inevitably require legislative reform, I would therefore ask you to ensure that to the fullest extent possible, particularly in cases where the accused is held in detention on remand, the rule laid down by the Principal Public Prosecutor at the Court of Cassation is applied."

In subsequent instructions issued on 11 March 1985, the auditeur général confirmed and clarified the distinction to be maintained between investigation and prosecution, "pending the necessary legislative reforms":

"... It has been held by the European Court of Human Rights that a judge who may be required to act in a given case as prosecuting counsel does not afford the guarantees of independence and impartiality necessary for the performance of the judicial acts inherent in the process of investigation.

This case-law prompted my circular (no. 2920) of 29 March 1983. I now consider that the time has come to take a further step towards separating the processes of investigation and prosecution. That is the purpose of the following instructions.

In all cases in which the auditeur militaire has exercised the judicial powers of investigating judge (e.g. arrest warrant, hearing of witnesses under oath, search warrant, seizure, body search, or appointment of an expert by the Board of Inquiry), the investigation and the prosecution must be conducted by different judicial officers.

...

I would ask you:

1. to implement forthwith the instructions in this circular;
2. to send to me by 1 October 1985 a detailed report on the practical application of these instructions, on any problems to which such application has given rise, etc.

..."

22. In the case of *Public Prosecutor v. Faymonville* which came before the Courts-Martial Appeal Court (permanent German division), the Advocate-General made the following submissions (translation):

"The *auditeur militaire* who chairs the Board of Inquiry discharges the judicial functions of an investigating judge (Cass., 22 June 1982, RW [Rechtskundig Weekblad], 1983-1984, col. 1115). Article 35 of the Army Code of Procedure of 20 July 1814, taken together with Article 70 of the Code of Military Criminal Procedure, lays on the chairman of the Board of Inquiry the duty to act as an independent judge, in particular in regard to the parties (Cour mil., 23 April 1980, RDP [Revue de droit pénal et de criminologie], 1983, p. 929).

It has been held by the European Court of Human Rights that the judge or other officer authorised by law to exercise judicial power during preliminary investigations, and more particularly when an arrest warrant is issued, must be independent of the executive and of the parties (*Schiesser* judgment, 4 Dec. 1979, Series A, no. 34, §§ 27-31). As an investigating judge, the *auditeur militaire* is independent of the executive, as under Article 76 of the Code of Military Criminal Procedure (Act of 15 June 1899) he is only subject to the supervision and direction of the *auditeur général* when discharging his duties as a member of the public prosecutor's office.

The European Court of Human Rights held in the cases of *Duinhof and Duijf* (judgment of 22 May 1984, Series A, no. 79, § 38) and *van der Sluis, Zuiderveld and Klappe* (judgment, 22 May 1984, Series A, no. 78, § 44) that the Dutch *auditeur-militair*, although independent of the military authorities, could not be independent of the parties during the preliminary stage of the trial because he was liable, at a subsequent stage, to become a party himself, in that instance as prosecuting authority.

Consequently, the Belgian *auditeur militaire*, in that he intervenes as prosecuting authority, likewise does not afford the guarantees of impartiality and independence necessary for him to be able to perform the duties of investigating judge in the same case.

There is a danger that he might perform his duties as investigating judge from the point of view of the prosecuting authority at a subsequent stage of the proceedings.

This does not apply only to cases in which an arrest warrant is issued. The judicial function of investigating judge is indivisible and embraces all the judicial acts performed during a preliminary investigation.

The preliminary investigation and the prosecution must accordingly be conducted by different judicial officers (Cour mil., 13 Nov. 1983, RDP, 1985, p. 904); having a single judicial officer combine the functions of investigation and prosecution is incompatible with the impartiality and independence required of an investigating judge and accordingly violates Articles 5 and 6 (art. 5, art. 6) of the European Convention on Human Rights as construed by the European Court of Human Rights in the above-mentioned cases.

The explicit provisions of the European Convention on Human Rights regarding judicial safeguards lay down rights which are distinct but stem from the same basic idea, namely a citizen's right to a fair trial (*Golder* judgment, 21 Feb. 1975, Series A,

no. 18, §§ 28 and 36). This basic right in a democratic society, as laid down in the Convention, has such a prominent place that a narrow interpretation of the Convention's explicit provisions in this field would not be in accordance with the Convention's object and purpose (De Cubber judgment, 26 Oct. 1984, Series A, no. 86, §§ 30 and 32). One of the vital prerequisites of the right to a fair trial is precisely that the preliminary investigation and the prosecution should be separate, and Article 5.3 (art. 5-3) of the Convention is but an application of this principle.

In the present case the same judicial officer combined the functions of investigating judge with those of public prosecutor, firstly - as chairman of the Board of Inquiry and with the military members of the Board - by ordering a report to be made by an expert and hearing the accused during the final questioning, and subsequently by participating in the trial as prosecutor.

This amounts to a violation of Articles 5 and 6 (art. 5, art. 6) of the European Convention on Human Rights and is consequently unlawful in Belgian domestic law (Cass., 27 May 1971, Pas. [Pasicrisie], 1971, 919).

The investigative measures taken in the Faymonville case - the appointment of an expert and the final hearing of the accused by the Board of Inquiry - should therefore be declared null and void and the documents relating to those measures (including the expert's report) should be declared inadmissible in evidence.

Ruling that these documents are inadmissible, however, does not in any way prevent the court from reaching a decision on the basis of the other evidence, namely the police reports and the accused's statements to the auditeur militaire acting as senior police officer (officier de police judiciaire).

For these reasons,

Having regard to Article 35 of the Army Code of Procedure, Articles 70 and 76 of the Code of Military Criminal Procedure and Articles 5 and 6 (art. 5, art. 6) of the European Convention on Human Rights (Act of 13 March 1955),

I ask the court,

firstly, to declare that the appointment of an expert by the Board of Inquiry and the Board's final hearing of the accused (item 2 in the file on the expert's report and items 84 and 85 in the file on the preliminary investigation) together with the expert's report are null and void and to rule these items inadmissible in evidence;

secondly, to order the costs of the expert's report to be paid by the State; and

thirdly, taking its decision on the basis of the other evidence, to convict the accused in accordance with my oral submissions." (Journal des tribunaux, no. 5382, 31 May 1986, pp. 370-371)

On 18 December 1985, the Courts-Martial Appeal Court gave its judgment, which included the following reasons (translated from the German original):

"The auditeur général's office took the view that, as the same senior deputy auditeur militaire acted both as investigating judge and as prosecutor, several items relating to

the investigative measures must be declared null and void and inadmissible in evidence, because the investigation and the prosecution must be conducted by different judicial officers.

Every citizen has a right to a fair trial, and one of the vital prerequisites of the right to a fair trial is that the preliminary investigation and the prosecution shall be separate.

The European Court of Human Rights has so held (*De Cubber* case, judgment of 26 Oct. 1984, Series A, no. 86, §§ 30 and 32), and the Court of Cassation has likewise so decided on several occasions (judgments of 29 May 1985, *Pub. v. D...* and *Pub. Pros. v. R...* and others, *Jur. Liège* [*Jurisprudence de la cour d'appel de Liège*], 11 Oct. 1985, pp. 541-544).

...

For these reasons:

THE COURT,

...

Declares the appeals admissible;

Holds that the Board of Inquiry's appointment of an expert, the final hearing of the defendant by the Board and the expert's report are null and void and must be excluded as inadmissible evidence;

Sets aside the decision appealed against in so far as it ordered the defendant to pay the costs of the expert opinion (41,882 F);

Orders the State to pay the costs of the expert opinion;

..." (*ibid.*, p. 371).

23. On 10 April 1987, the *auditeur général* submitted to the Minister of Justice a new preliminary draft Code of Military Criminal Procedure which had been drawn up by an inter-departmental committee. One of its purposes was to prevent any plurality of functions in the person of the *auditeur militaire* in peace time by creating two categories of military judicial officer, namely *auditeurs militaires*, who would retain only the powers of public prosecutors, and judges, who would deal with preliminary investigations as chairmen of Boards of Inquiry.

According to the report submitted by Mr. Van Rompaey on behalf of the Senate Legal Affairs Committee, the existing Code "has now been overtaken, in a number of fundamental respects, both by changes in human-rights case-law and by the new patterns of organisation entailed by the separation of preliminary investigation and prosecution" (*Sénat* 5-VI (1986-1987) no. 2 of 6 October 1987, p. 44).

B. The Board of Inquiry

24. When constituted at the seat of the Court Martial, the Board of Inquiry comprises - in addition to the *auditeur militaire* (or deputy *auditeur militaire*), who chairs it - two officers (*officiers commissaires*) appointed by the area commanding officer from among the officers of the garrison, normally for a period of one month. They are appointed in turn and in order of seniority (Articles 35-37 of the CMCP).

The *auditeur militaire* is the sole permanent member of the Board. The military members of the Board are changed frequently, on the expiry of their term of office or as operational needs require.

25. The Board conducts the written part of the investigation of the case (Article 35 CMCP). In carrying out its task, it may issue a warrant for the arrest of a person who has been brought before the *auditeur militaire*. In such cases it must, at least once a month, review the detention in question (*auditeur général's* Circular no. 2322 of 28 July 1955, paragraph III (e)(1)). In addition, it may at any time order the accused's release on condition that he appear in person at any stage in the proceedings as soon as he is asked to do so (Article 60 of the ACP).

By Article 35 of the Code of Military Criminal Procedure, the *auditeur militaire* "shall direct the investigation". He must endeavour as much to establish the accused's innocence as to obtain evidence of his guilt and secure a confession (Article 70 of the ACP). The decisions of the Board of Inquiry are his sole responsibility, and any dissenting opinions of the two officer members of the Board are not binding on him. The function of these two members is merely to assist him, not as investigating judges but as technical advisers and as witnesses to the lawfulness of the investigation, which they guarantee by their presence and by their signature.

26. Responsibility for conducting the prosecution lies with the public prosecutor, in other words the *auditeur militaire* (see paragraph 20 above), and not with the Board of Inquiry. It falls to the Board to determine at the end of the investigation whether there is sufficient evidence to justify committal for trial, but the summons requiring the accused to appear before the Court Martial is issued by the *auditeur militaire* or one of his deputies. On issue of the summons the Board of Inquiry ceases to have jurisdiction.

PROCEEDINGS BEFORE THE COMMISSION

27. In his application of 19 November 1982 to the Commission (no. 10208/82), Mr. Pauwels contested the lawfulness of his detention on remand both under Belgian law and under the Convention (Article 5 § 1 (c) and Article 60 of the Convention) (art. 5-1-c, art. 60). He claimed in addition to have been the victim of discrimination contrary to Article 14

(art. 14), inasmuch as he had not enjoyed the judicial safeguards afforded by the ordinary law. Finally, he alleged that neither the Board of Inquiry nor the auditeur militaire or deputy auditeur militaire who chaired it could be regarded as "a judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5 § 3 (art. 5-3).

28. On 8 July 1985, the Commission found the last complaint admissible. It declared the remainder of the application inadmissible as manifestly ill-founded.

In its report of 4 December 1986 (made under Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a breach of Article 5 § 3 (art. 5-3). The full text of its opinion is reproduced as an annex to this judgment.

29. On 20 August 1987, Mr. Pauwels lodged a further application with the Commission (no. 13178/87), but it is not under consideration in the instant case (see paragraph 7 above).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 (art. 5-3)

30. The applicant alleged a violation of Article 5 § 3 (art. 5-3) inasmuch as that provision guarantees to "everyone arrested or detained in accordance with the provisions of paragraph 1 (c)" of Article 5 (art. 5-1-c) the right to be "brought ... before a judge or other officer authorised by law to exercise judicial power". He claimed that the auditeur militaire and the Board of Inquiry he chaired did not afford the required independence of either the parties or the executive.

31. On the first point - independence of the parties - Mr. Pauwels referred to the Court's case-law (de Jong, Baljet and van den Brink judgment and van der Sluijs, Zuiderveld and Klappe judgment, both of 22 May 1984, Series A no. 77, p. 24, § 49, and no. 78, p. 19, § 44, respectively) and put forward two arguments. To begin with, the mere fact that the auditeur militaire could discharge the function of public prosecutor in a case in which he had acted as investigating judge contravened Article 5 § 3 (art. 5-3). Again, in the instant case the senior deputy auditeur militaire, Mr. Van Even, did in fact combine the functions of investigating magistrate (as chairman of the Board of Inquiry) and officer of the public prosecutor's department: having conducted the investigation, he represented the public prosecutor's office on 11 May and 23 June 1982 when the Court Martial gave its decision on Mr. Pauwels' applications for release, and on 23 June 1982 it was he who signed the summons initiating proceedings before that

court; in its judgment of 27 February 1985, the Courts-Martial Appeal Court had moreover itself recognised that Mr. Van Even had acted in the prosecution.

32. The Commission likewise considered that Mr. Van Even could not be regarded as independent of the parties since he was liable to become one of the parties himself and had indeed become a party.

33. On the second point - independence of the executive - Mr. Pauwels stated that there was no statutory provision providing guarantees of this: auditeurs militaires were appointed and dismissed by the King and were subordinate to the Minister of Justice. For want of any precedent, it could not be inferred from Article 414 of the Judicial Code that the Minister's disciplinary powers extended only to an auditeur militaire's duty as public prosecutor and not to his judicial functions. Furthermore, the fact that Article 76 CMCP said nothing about the auditeur général's supervision of the latter functions did not mean that such supervision was precluded.

The applicant claimed that in his own case the auditeur général had sent instructions to the auditeur militaire and thus indirectly to Mr. Van Even while the latter was still completing the investigation; as evidence of this he pointed to the letter sent to his lawyer on 16 June 1982 by the auditeur général, in which the latter wrote that he had asked the auditeur militaire to bring the case before the Court Martial as soon as possible (see paragraph 14 above).

34. Having regard to its previous conclusion (see paragraph 32 above), the Commission did not deem it necessary to give an opinion on this aspect of the issue.

35. The Government considered the case to have been disposed of as regards the principles involved and regretted that the applicant's "exaggerated claims" had prevented a friendly settlement being reached.

They no longer maintained that the plurality of Mr. Van Even's functions as senior deputy auditeur militaire was not contrary to the Convention. They considered, however, that he had conducted the investigation completely independently and had subsequently played only a very minor role in the prosecution, on three occasions.

On 11 May and 23 June 1982, Mr. Van Even acted as the public prosecutor's representative at Field Court Martial "A" when it considered Mr. Pauwels' applications for release. In the Government's view, that fact did not entail any prolongation of the applicant's detention on remand, whose duration of 94 days was very short in relation to the period of imprisonment to which he was sentenced (see paragraph 16 above).

Lastly, again on 23 June 1982, Mr. Van Even signed the summons requiring the applicant to appear for trial on 5 July. According to the Government, Mr. Pauwels suffered no prejudice since his conviction was the outcome of a fresh summons which was not issued by Mr. Van Even.

36. The Government claimed that there had been no fault on the part of the Belgian State. They recognised that the 1814 and 1899 Acts on military justice did not meet the requirements of the Convention as the Court had progressively defined them, but they laid stress on the measures taken to prevent any combining of the functions of investigation and prosecution in the future - measures which they claimed made fresh legislation unnecessary. In the first place, the Government relied on the auditeur général's circulars of 29 March 1983 and 11 March 1985 (see paragraph 21 above), while conceding that they "obviously [had] no legal effect". They also relied on the Courts-Martial Appeal Court's judgment of 18 December 1985 (see paragraph 22 above); in this connection, they had no doubt that the Court of Cassation would follow the European Court's case-law if a similar question arose in an appeal on points of law.

With reference to the Ben Yaacoub judgment of 27 November 1987 (Series A no. 127-A, pp. 8-9, § 15), they asked the Court, finally, to hold that there had been a clear reversal of Belgian case-law and that, accordingly, the problem to which the case gave rise appeared henceforth no longer to subsist in Belgium.

37. The Court takes formal note of the developments in Belgium, namely the auditeur général's circulars of 29 March 1983 and 11 March 1985 and the Courts-Martial Appeal Court's judgment of 18 December 1985. It finds, however, that the principles laid down in those circulars did not operate in the instant case, which preceded them in time. Neither does the question of striking the case out of the list arise, since the Court has not been "informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter" (Rule 48 of the Rules of Court).

It must therefore determine the merits.

Although an auditeur militaire in Belgium is hierarchically subordinate to the auditeur général and the Minister of Justice, he is completely independent in the performance of the duties devolving upon him both as a member of the public prosecutor's office and as chairman of the Board of Inquiry (see paragraph 19 above).

The only issue which really arises is whether in the instant case Mr. Van Even, in his capacity as chairman of the Board of Inquiry, afforded the guarantees of impartiality inherent in the concept of "officer authorised by law to exercise judicial power" when he could be - and in fact was - called upon to act in the same case, in respect of the same defendant, as prosecuting authority and thus as a party.

38. In two cases concerning Dutch legislation on military arrest and detention (the *de Jong, Baljet and van den Brink* judgment previously cited, p. 24, § 49, and the *van der Sluijs, Zuiderveld and Klappe* judgment previously cited, p. 19, § 44), the Court found that an auditeur-militair was also liable to have to act in one and the same case as prosecuting authority after the case had been sent for trial by a court martial; it concluded from

that fact that he could not be independent of the parties at that preliminary stage precisely because he was likely to become one of the parties at the next stage of the procedure.

The same conclusion is inevitable in the instant case. On the one hand, Belgian legislation provides for a system similar to that of the Netherlands; and on the other, pursuant to the Code of Military Criminal Procedure, Mr. Van Even did indeed, in Mr. Pauwels' case, combine the functions of investigation and prosecution. That being so, his impartiality was capable of appearing to be open to doubt (see, *mutatis mutandis*, the Piersack judgment of 1 October 1982, Series A no. 53, p. 16, § 31, and the De Cubber judgment of 26 October 1984, Series A no. 86, p. 16, § 30). There was therefore a breach of Article 5 § 3 (art. 5-3).

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

39. By Article 50 (art. 50) of the Convention,

"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."

Under this provision the applicant sought an amendment of Belgium's legislation, compensation for damage, reimbursement of costs and an order requiring the respondent State to pay a fine.

A. Legislative amendment

40. In the first place, Mr. Pauwels wished to secure "reform of Belgian domestic law concerning military personnel".

In a letter of 8 January 1988 the Government stated that such reform was a matter for Parliament and that, having regard to the current political situation, they were not in a position to take any steps in that direction.

The Delegate of the Commission made no comment on the matter.

41. The Court notes that its judgments leave to the State concerned the choice of the means to be used in its domestic legal system to give effect to its obligation under Article 53 (art. 53) (see, as the most recent authority and *mutatis mutandis*, the Belilos judgment of 29 April 1988, Series A no. 132, p. 33, § 78).

B. Damage

42. Mr. Pauwels claimed that he had suffered both pecuniary and non-pecuniary damage by reason of the violation of Article 5 § 3 (art. 5-3) of the Convention and he sought financial compensation.

1. Pecuniary damage

43. In the first place, he argued that his "unlawful" deprivation of liberty had caused him damage inasmuch as he had forfeited his salary (from 1 April 1982 onwards) and his pension (from 1 January 1983). The applicant did not submit any figure, however. He proceeded on the assumption that an independent and impartial judge would have released him, and he pointed out that the Courts-Martial Appeal Court eventually acquitted him of the main charge of embezzling DM 500,000.

The Government, on the other hand, thought that there was no causal link between the violation alleged by the applicant and the prejudice resulting from his loss of liberty. It was not to be forgotten that the decision whether or not to release Mr. Pauwels lay with the Court Martial, an independent and impartial court.

The Delegate of the Commission was of the view that the damage which could give rise to an award of just satisfaction was the damage resulting from the deprivation of liberty that Mr. Pauwels would not have suffered if he had had the benefit of the guarantees of Article 5 § 3 (art. 5-3). The evidence, however, did not afford any reason to suppose that the applicant's detention on remand would probably have been brought to an end if a judicial officer other than Mr. Van Even - that is to say an independent judicial officer - had chaired the Board of Inquiry. In short, no pecuniary damage had flowed from the breach of the Convention.

44. The Court shares this view and therefore dismisses the claim.

2. Non-pecuniary damage

45. The applicant claimed compensation of 5,000,000 BF in respect of non-pecuniary damage. He contended that he had suffered on account of his separation from his family and because an unfavourable picture had been given of him.

46. The Court does not perceive any causal link between the alleged non-pecuniary damage and the violation it has found. It consequently dismisses the claim.

C. Costs and expenses

47. Thirdly, Mr. Pauwels sought reimbursement of costs and expenses relating to the proceedings in Cologne and Brussels and before the

Convention institutions. The costs claimed (court and registry fees, translations, hotels, etc.) amount to 327,396 BF and the expenses relating to the proceedings in respect of detention on remand total 390,586 BF, comprising 44,400 BF for travel and 346,186 BF in "administrative charges". No figure was given for lawyer's fees.

The Government were inclined to think that the applicant had taken into account costs that had no connection with the Strasbourg proceedings, which related solely to the issue of the detention on remand; this appeared to be the case in particular with the very substantial translation fees and part of the travel expenses. They also submitted that the Court should reject the figure of 346,186 BF, which they considered to be "very large" and to be unsupported by vouchers.

The Delegate of the Commission left it to the Court to assess the merits of this claim, in the light of the Government's observations.

48. An award may be made under Article 50 (art. 50) in respect of costs and expenses that (a) were actually and necessarily incurred by the injured party in order to seek, through the domestic legal system, prevention or rectification of a violation, to have the same established by the Commission and later by the Court and to obtain redress therefor; and (b) are reasonable as to quantum (see, among many other authorities, the *Belilos* judgment previously cited, Series A no. 132, p. 33, § 79).

The only violation the Court has found concerns the applicant's detention on remand, and certain of the amounts claimed do not appear to relate to costs actually and necessarily incurred for the purposes mentioned above.

Seeing, furthermore, that a number of the supporting documents submitted are inadequate, that some of the amounts sought are excessive, and that no basis for calculating the fees has been provided, the Court can only award the applicant, by way of an equitable assessment, a sum of 150,000 BF.

D. Order requiring the Belgian State to pay a fine

49. Lastly, the applicant requested the Court to order the respondent State to pay a fine of 10,000 BF for each day's delay in complying with the Strasbourg judgment.

Neither the Agent of the Government nor the Delegate of the Commission expressed any view on this matter.

50. The Contracting States have undertaken to abide by the judgment of the Court in any case to which they are party (Article 53) (art. 53), and it is for the Committee of Ministers of the Council of Europe to supervise execution of the judgment (Article 54) (art. 54). Accordingly, the Court can only dismiss this application.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 5 § 3 (art. 5-3) of the Convention;
2. Holds that the respondent State is to reimburse the applicant 150,000 (one hundred and fifty thousand) Belgian francs in respect of costs and expenses;
3. Rejects 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 26 May 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar