CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (PLENARY)

CASE OF VAN DER MUSSELE v. BELGIUM

(Application no. 8919/80)

JUDGMENT

STRASBOURG

23 November 1983

In the Van der Mussele case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court* and composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. E. GARCÍA DE ENTERRÍA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. J. GERSING,

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

Having deliberated in private on 23 and 24 February and on 26 and 27 October 1983,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application (no. 8919/80) against the Kingdom of Belgium lodged with the Commission on 7 March 1980 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian national, Mr. Eric Van der Mussele.

2. The Commission's request was lodged with the registry of the Court on 19 July 1982, within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

(art. 44, art. 48) and to the declaration made by the Kingdom of Belgium recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request 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 4 § 2 of the Convention and Article 1 of Protocol No. 1, taking those Articles either alone (art. 4-2, P1-1) or in conjunction with Article 14 (art. 14+4-2, art. 14+P1-1) of the Convention.

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 13 August 1982, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. M. Zekia, Mr. Thór Vilhjálmsson, Mr. G. Lagergren, Mr. J. Pinheiro Farinha and Mr. E. García de Enterría (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Having assumed the office of President of the Chamber (Rule 21 § 5), Mr. Wiarda ascertained, through the Registrar, the views of the Agent of the Belgian Government ("the Government") and of the Commission's Delegates regarding the procedure to be followed. On 25 August, he directed that the Agent should have until 25 November to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar.

5. On 28 September 1982, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 48).

6. The Government's memorial was received at the registry on 29 November. On 20 January 1983, the Secretary to the Commission informed the Registrar that the Delegates would present their own observations at the hearings. On the same day, after consulting, through the Registrar, the Agent of the Government and the Commission's Delegates, the President directed that the oral proceedings should open on 22 February 1983.

7. The hearings were held in public at the Human Rights Building, Strasbourg, on the said day. Immediately prior to their opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government:

Mr. J. NISET, Legal Adviser
at the Ministry of Justice, *Agent*,
Mr. E. JAKHIAN, avocat, *Counsel*;

- for the Commission:

Mr. M. MELCHIOR,
Mr. J.-C. SOYER, *Delegates*,
Mr. A.-L. FETTWEIS, avocat,
Mr. E. VAN DER MUSSELE, applicant,

assisting the Delegates (Rule 29 § 1, second sentence, of the Rules of Court).

The Court heard their addresses and their replies to questions put by it and by certain of its members.

8. On 11 and 22 February, the Registrar had received partly from the Secretary to the Commission and partly from Mr. Fettweis, the applicant's claims under Article 50 (art. 50) of the Convention and several documents. The Agent of the Government, for his part, supplied to the Court certain additional information by means of two letters which were received at the registry on 11 and 23 March 1983.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant is a Belgian national born in 1952. He resides in Antwerp where he exercises the profession of avocat (lawyer). After being enrolled as a pupil avocat on 27 September 1976, he at once opened his own chambers without ever working in the chambers of another avocat; his pupil-master, however, entrusted him with a number of cases and gave him some payment for the work done in regard to them.

Mr. Van der Mussele terminated his pupillage on 1 October 1979 and has since then been entered on the register of the Ordre des avocats (Bar Association).

10. On 31 July 1979, the Legal Advice and Defence Office of the Antwerp Bar appointed Mr. Van der Mussele, pursuant to Article 455 of the Judicial Code, to defend one Njie Ebrima, a Gambian national. The latter, who had been arrested two days earlier on suspicion of theft and of dealing in, and possession of, narcotics, had applied under Article 184 bis of the Code of Criminal Procedure for the assistance of an officially appointed avocat.

11. On 3 and 28 August 1979, Mr. Ebrima appeared before a Chamber (chambre du conseil) of the Antwerp Court of First Instance (tribunal de première instance), which was supervising the investigation, for the purpose of a decision as to whether the warrant of arrest issued against him by the investigating judge should remain in force. The Chamber confirmed the warrant on both occasions. It also added to the initial charges a further count of publicly using a false name. Mr. Ebrima appealed against these two orders, but the Indictments Chamber of the Antwerp Court of Appeal upheld them on 14 August and 11 September respectively.

On 3 October 1979, the Court of First Instance sentenced him to six months' and eight days' imprisonment for theft, public use of a false name and illegal residence; he was acquitted on the remaining charges. On his appeal, the Court of Appeal on 12 November reduced the length of the sentence to that of the period he had spent in detention on remand.

The applicant had acted for Mr. Ebrima throughout these proceedings and estimated that he devoted from seventeen to eighteen hours to the matter. Mr. Ebrima was released on 17 December 1979 following representations made by the applicant to the Minister of Justice; he had in the meantime been placed at the disposal of the immigration police with a view to deportation.

12. The following day, the Legal Advice and Defence Office notified Mr. Van der Mussele - whose pupillage had finished more than two and a half months earlier (see paragraph 9 above) - that it was releasing him from the case and that because of Mr. Ebrima's lack of resources no assessment of fees and disbursements could be made against him. The latter amounted on this occasion to 3,400 BF, made up of 250 BF for preparation of the case-file, 1,800 BF for correspondence, 1,300 BF for travel to and from the prison, the Court of First Instance and the Court of Appeal, and 50 BF in respect of court costs for the copy of a document.

13. The applicant stated that during his pupillage he had dealt with approximately 250 cases, including about 50 cases - representing some 750 hours of work - on which he had acted as officially appointed avocat. He also said that his net monthly income before tax was only 15,800 BF in his first and second years, increasing to 20,800 BF in the third.

II. RELEVANT LEGISLATION AND PRACTICE

A. The profession of avocat in Belgium, in general

14. Although it is in various respects regulated by legislation, the profession of avocat in Belgium is a liberal profession; under Article 444 of the Judicial Code, "avocats exercise their profession freely in the interests of justice and truth".

15. In each of the country's twenty-seven judicial districts, there is an Ordre des avocats; it is independent of the executive and endowed with legal personality in public law and its Council takes decisions "without appeal" with regard to entry on the register of avocats and admission to pupillage (Articles 430 and 432 of the Judicial Code).

A pupillage normally lasting three years is a pre-requisite to entry on the register of avocats (Article 434 and the second paragraph of Articles 435 and 436). Subject to the powers of the General Council of the National Ordre, the Council of the district Ordre determines the obligations of pupils

(Articles 435 and 494). In the main these consist of attending at a pupil-master's chambers, attending hearings, following courses on the rules of professional conduct and the art of advocacy (Article 456, third paragraph) and acting as defence counsel in cases assigned by the Legal Advice and Defence Office (Article 455). The Council of the Ordre ensures that these obligations are complied with and may, if need be, prolong the pupillage "without prejudice to the right to refuse entry on the register"; any pupil who is unable, after five years at the latest, to show that he or she has satisfied the said obligations "may be omitted from the roll" of pupils (Article 456, second and fourth paragraphs).

Pupils in principle enjoy the same rights as their colleagues who are already entered on the register of avocats. However, they may not plead before the Court of Cassation or the Conseil d'État (Article 439), vote in elections of the chairman or other members of the Council of the Ordre (Article 450) or deputise for judges and members of the public prosecutor's department.

16. In the oath that he takes at the end of his pupillage, the avocat undertakes, amongst other things, not to advise or appear in any case which he does not consider to the best of his knowledge and belief to be just (Article 429). Subject to the exceptions provided for by law, for example in Article 728 of the Judicial Code and Article 295 of the Code of Criminal Procedure, avocats - including pupil avocats - enjoy an exclusive right of audience before the courts (Article 440 of the Judicial Code). They pay a subscription to the Ordre (Article 443) and social security contributions.

17. The Council of the Ordre sanctions or punishes as a disciplinary matter offences and misconduct, without prejudice, where appropriate, to proceedings before the courts (Article 456, first paragraph). It will hear disciplinary cases on application made by its chairman, either of his own motion or following a complaint or after a written notification from the procureur général (public prosecutor) (Article 457). The Council may, depending on the circumstances, warn, censure, reprimand, suspend for a maximum of one year or strike a name off the register of avocats or the roll of pupils (Article 460).

Both the avocat concerned and the procureur général may challenge such a decision - finding the avocat guilty or not guilty - by applying to the competent disciplinary appeal board (Articles 468 and 472). The disciplinary appeal board is composed of a chairman (who is the first president of the Court of Appeal or a president of a chamber delegated by him), four assessors (who are avocats) and a secretary (who is a member or former member of the Council of the Ordre des avocats); the procureur général or a judicial officer from his department delegated by him fulfils the functions of prosecuting authority (Articles 473 and 475).

The avocat concerned or the procureur général may refer the decision of the disciplinary appeal board to the Court of Cassation (Article 477).

B. Officially appointed avocats

1. At the time of the facts in issue

18. In Belgium, as in many other Contracting States, there exists a long tradition that the Bar should provide legal representation, if need be on a free basis, for indigent persons. At the time of the relevant facts, the Council of the Ordre des avocats was under a duty to make provision for "the assistance of persons of insufficient means" by setting up a "Legal Advice and Defence Office" in such manner as it should determine (Article 455, first paragraph, of the Judicial Code). "Obviously ill-founded cases [were not to] be allocated" (second paragraph of the same Article), but in criminal matters the Legal Advice and Defence Office had to make an officially appointed - or "pro Deo" - avocat available to any indigent accused who so requested at least three days before the hearing (Article 184 bis of the Code of Criminal Procedure).

Officially appointed avocats were thus designated by the Office by virtue of a statutory competence conferred by the State. In Antwerp and Liège a system of rotation was used whereas in Brussels the matter was dealt with on a more flexible basis. The Office almost always selected pupil avocats who, if need be, had to continue acting in the case even after the end of their pupillage, as occurred in the present circumstances (see paragraph 12 above). It nonetheless happened - in less than one per cent of the cases - that a difficult case was entrusted to a more experienced avocat.

19. Under the third paragraph of Article 455 of the Judicial Code, pupil avocats were required to "report to the [Legal Advice and Defence] Office on the steps they [had] taken in the cases entrusted to them"; such cases accounted on average for approximately one quarter of their working time, especially during their third year. The Ordres des avocats would decline to enter a pupil avocat on the register unless he had acted as officially appointed avocat on a sufficient number of occasions; the Antwerp Ordre enjoyed considerable discretion in the matter since no minimum or maximum was laid down in its pupillage regulations.

Pupil avocats could invoke the so-called "conscience clause" laid down in Article 429 of the Judicial Code (see paragraph 16 above) or objective grounds of incompatibility. In the event of an unjustified refusal to deal with cases that the Office wished to allocate to him, the Council of the Ordre could extend the pupillage of a pupil avocat to a maximum period of five years, strike his name off the roll of pupils or refuse his application for entry on the register of avocats for failure to perform fully his obligations (Article 456, second and fourth paragraphs).

20. Officially appointed avocats were entitled neither to remuneration nor to reimbursement of their expenses. Nevertheless, the Legal Advice and Defence Office could, "depending upon the circumstances, ... fix the

amount which the [assisted] party [was] required to pay either by way of advance provision or as fees" (Article 455, final paragraph, of the Judicial Code). In practice such awards tended to be somewhat exceptional - in approximately one case out of four at Antwerp - and, what is more, pupil avocats only succeeded in actually recovering a fraction - roughly one quarter - of the amounts so fixed.

2. The Act of 9 April 1980

21. The position described in the preceding paragraph has changed in one respect subsequent to the end of the applicant's pupillage: an Act of 9 April 1980 "intended to furnish a partial solution to the problem of legal aid and regulating the remuneration of pupil avocats appointed to provide legal aid" has amended Article 455 by, inter alia, inserting the following provisions:

> "The State shall grant to the pupil avocat appointed by the Legal Advice and Defence Office compensation in respect of the services which he was appointed to render.
>
> After obtaining the opinion of the General Council of the National Ordre des avocats, the King shall prescribe, by Decree laid before the Council of Ministers, the conditions governing the granting, scale and manner of payment of such compensation."

In certain circumstances, the State will be able to take action against the assisted person to recover the compensation awarded.

The Act is not retroactive. Furthermore, for the moment it remains inoperative since budgetary reasons have up till now prevented the bringing into force of the Royal Decree provided for under Article 455.

C. Official appointment, official assignment, legal aid

22. The official appointment of an avocat should not be confused with two other possibilities which are likewise often included in the notion of legal aid, namely

- "official assignment", which is provided for under the law in various circumstances where the intervention of an avocat is obligatory, independently of the means of the person concerned (Articles 446, second paragraph, and 480 of the Judicial Code, Article 290 of the Code of Criminal Procedure, etc.);
- "legal aid" in the narrow sense, which "consists of exempting, in whole or in part, persons whose income is insufficient to meet the costs of proceedings, including extrajudicial proceedings, from paying stamp duty, registration duty, registry and copying fees and any other expenditure involved", and of providing "the services of public and publicly appointed officers free" for such persons (Articles 664 and 699 of the Judicial Code).

D. Legal aid and public or publicly appointed officers

23. Indigent persons requiring the services of notaries, bailiffs or avocats of the Court of Cassation may apply for the appointment by the Legal Aid Bureau (see paragraph 22 above) of the persons who are under a duty to give their services free of charge (Articles 664, 665, 685 and 686 of the Judicial Code).

The State reimburses the latter persons for their out-of-pocket expenditure (Article 692) but grants no remuneration, the one exception being bailiffs who receive the equivalent of one quarter of their usual fees (Article 693).

PROCEEDINGS BEFORE THE COMMISSION

24. In his application of 7 March 198O to the Commission (no. 8919/80), Mr. Van der Mussele called in question his appointment by the Antwerp Legal Advice and Defence Office to assist Mr. Njie Ebrima; he complained, not of this appointment as such, but because a refusal to act would have made him liable to sanctions and because he had not been entitled to any remuneration or reimbursement of his expenses. In his submission, these circumstances gave rise both to "forced or compulsory labour" contrary to Article 4 § 2 (art. 4-2) of the Convention and to treatment incompatible with Article 1 of Protocol No. 1 (P1-1). He further claimed that, in breach of Article 14 of the Convention taken in conjunction with Article 4 (art. 14+4), there was discrimination in this respect between avocats and certain other professions.

25. The Commission declared the application admissible on 17 March 1981. In its report of 3 March 1982 (Article 31 of the Convention) (art. 31), the Commission concluded that there had been no breach of

- Article 4 § 2 (art. 4-2) of the Convention, by ten votes to four;
- Article 1 of Protocol No. 1 (P1-1), by nine votes to five;
- Article 14 of the Convention, taken in conjunction with the two above-mentioned Articles (art. 14+4-2, art. 14+P1-1), by seven votes to seven, with the casting vote of the President (Rule 18 § 3 of the Commission's Rules of Procedure).

The report contains two dissenting opinions.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

26. At the hearings on 22 February 1983, counsel for the Government reaffirmed in substance the final submissions set out in the memorial of 25 November 1982 in which the Government requested the Court to hold

> "that Mr. Van der Mussele has not been the victim of any violation of the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that accordingly application no. 8919/80 lodged by him is without foundation".

AS TO THE LAW

I. SCOPE OF THE PRESENT CASE

27. Mr. Van der Mussele complained essentially of the fact that he had been required to defend Mr. Ebrima without receiving any remuneration or being reimbursed his expenses. This was, in his eyes, a typical example that he had selected in order to call in question the obligations imposed on Belgian avocats, and in particular on pupil avocats, in connection with pro Deo cases. He mentioned similar appointments in about fifty other cases, but formally speaking his grievances do not relate to those other appointments.

In proceedings originating in an "individual" application (Article 25 of the Convention) (art. 25), the Court has to confine its attention, as far as possible, to the issues raised by the concrete case before it. However, it appears from the material before the Court that the appointment complained of cannot be reviewed from the standpoint of the Convention without putting it in the general context both of the relevant Belgian legislation applicable at the time and of the practice followed thereunder; the Commission’s Delegates rightly drew attention to this.

II. RESPONSIBILITY OF THE BELGIAN STATE

28. Before the Commission and in their memorial to the Court, the Government submitted that there was no primary or subordinate legislation that obliged avocats to accept work entrusted to them by a Legal Advice and Defence Office: their duty to act for indigent persons was said to derive solely from professional rules freely adopted by the Ordres des avocats themselves. According to the Government, the Belgian State did not prescribe either how appointments were to be made or their effects; it was

therefore not answerable for any infringements of the Convention's guarantees that might be occasioned by implementation of the professional rules.

29. This argument, to which counsel for the Government did not revert at the hearings before the Court, was not accepted by the applicant or the Commission. Neither does it convince the Court.

Under the Convention, the obligation to grant free legal assistance arises, in criminal matters, from Article 6 § 3 (c) (art. 6-3-c); in civil matters, it sometimes constitutes one of the means of ensuring a fair trial as required by Article 6 § 1 (art. 6-1) (see the Airey judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26). This obligation is incumbent on each of the Contracting Parties. The Belgian State - and this was not contested by the Government - lays the obligation by law on the Ordres des avocats, thereby perpetuating a state of affairs of long standing; under Article 455, first paragraph, of the Judicial Code, the Councils of the Ordres are to make provision for the assistance of indigent persons by setting up Legal Advice and Defence Offices (see paragraph 18 above). As was pointed out by the applicant, the Councils have "no discretion as regards the principle itself": legislation "compels them to compel" members of the Bar to "defend indigent persons". Such a solution cannot relieve the Belgian State of the responsibilities it would have incurred under the Convention had it chosen to operate the system itself.

Moreover, the Government recognised at the hearings that "the obligation", for pupil avocats, "to act as defence counsel in cases assigned by the Legal Advice and Defence Office" arose from Article 455 of the Judicial Code; in paragraph 21 of their memorial, they had already conceded that Belgian law, by not making any provision for indemnifying pupil avocats, acknowledged at least implicitly that the latter have to bear the expenses incurred in dealing with the cases in question.

In addition, the Belgian Bars, bodies that are associated with the exercise of judicial power, are, without prejudice to the basic principle of independence necessary for the accomplishment of their important function in the community, subject to the requirements of the law. The relevant legislation states their objects and establishes their institutional organs; it endows with legal personality in public law each of the Councils of the twenty-seven local Ordres and the General Council of the National Ordre (see paragraph 15 above).

30. The responsibility of the Belgian State being thus engaged in the present case, it has to be ascertained whether that State complied with the provisions of the Convention and of Protocol No. 1 art. 4, art. 14, P1-1) relied on by Mr. Van der Mussele.

III. ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION, TAKEN ALONE (art. 4)

31. The applicant maintained that he had had to perform forced or compulsory labour incompatible with Article 4 (art. 4) of the Convention. Under that Article (art. 4):

> "1. ...
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> 3. For the purpose of this Article (art. 4) the term "forced or compulsory labour" shall not include:
>
> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 (art. 5) of this Convention or during conditional release from such detention;
>
> (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
>
> (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
>
> (d) any work or service which forms part of normal civic obligations."

Four members of the Commission considered that this had been the case, but a majority of ten of their colleagues arrived at the opposite conclusion. The Government contended, as their principal submission, that the labour in question was not "forced or compulsory" or, in the alternative, that it formed part of the applicant's "normal civic obligations".

32. Article 4 (art. 4) does not define what is meant by "forced or compulsory labour" and no guidance on this point is to be found in the various Council of Europe documents relating to the preparatory work of the European Convention.

As the Commission and the Government pointed out, it is evident that the authors of the European Convention - following the example of the authors of Article 8 of the draft International Covenant on Civil and Political Rights - based themselves, to a large extent, on an earlier treaty of the International Labour Organisation, namely Convention No. 29 concerning Forced or Compulsory Labour.

Under the latter Convention (which was adopted on 28 June 1930, entered into force on 1 May 1932 and was modified - as regards the final clauses - in 1946), States undertook "to suppress the use of forced or compulsory labour in all its forms within the shortest possible period" (Article 1 § 1); with a view to "complete suppression" of such labour, States were permitted to have recourse thereto during a "transitional period", but

"for public purposes only and as an exceptional measure, subject to the conditions and guarantees" laid down in Articles 4 et seq. (Article 1 § 2). The main aim of the Convention was originally to prevent the exploitation of labour in colonies, which were still numerous at that time. Convention No. 105 of 25 June 1957, which entered into force on 17 January 1959, complemented Convention No. 29, by prescribing "the immediate and complete abolition of forced or compulsory labour" in certain specified cases.

Subject to Article 4 § 3 (art. 4-3), the European Convention, for its part, lays down a general and absolute prohibition of forced or compulsory labour.

The Court will nevertheless take into account the above-mentioned ILO Conventions - which are binding on nearly all the member States of the Council of Europe, including Belgium - and especially Convention No. 29. There is in fact a striking similarity, which is not accidental, between paragraph 3 of Article 4 (art. 4-3) of the European Convention and paragraph 2 of Article 2 of Convention No. 29. Paragraph 1 of the last-mentioned Article provides that "for the purposes" of the latter Convention, the term "forced or compulsory labour" shall mean "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". This definition can provide a starting-point for interpretation of Article 4 (art. 4) of the European Convention. However, sight should not be lost of that Convention's special features or of the fact that it is a living instrument to be read "in the light of the notions currently prevailing in democratic States" (see, inter alia, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 34, § 95).

33. It was common ground between those appearing before the Court that the services rendered by Mr. Van der Mussele to Mr. Ebrima amounted to "labour" for the purposes of Article 4 § 2 (art. 4-2). It is true that the English word "labour" is often used in the narrow sense of manual work, but it also bears the broad meaning of the French word "travail" and it is the latter that should be adopted in the present context. The Court finds corroboration of this in the definition included in Article 2 § 1 of Convention No. 29 ("all work or service", "tout travail ou service"), in Article 4 § 3 (d) (art. 4-3-d) of the European Convention ("any work or service", "tout travail ou service") and in the very name of the International Labour Organisation (Organisation internationale du Travail), whose activities are in no way limited to the sphere of manual labour.

34. It remains to be ascertained whether there was "forced or compulsory" labour. The first of these adjectives brings to mind the idea of physical or mental constraint, a factor that was certainly absent in the present case. As regards the second adjective, it cannot refer just to any form of legal compulsion or obligation. For example, work to be carried out

in pursuance of a freely negotiated contract cannot be regarded as falling within the scope of Article 4 (art. 4) on the sole ground that one of the parties has undertaken with the other to do that work and will be subject to sanctions if he does not honour his promise. On this point, the minority of the Commission agreed with the majority. What there has to be is work "exacted ... under the menace of any penalty" and also performed against the will of the person concerned, that is work for which he "has not offered himself voluntarily".

35. The definition given in Article 2 § 1 of ILO Convention No. 29 leads the Court to inquire firstly whether there existed in the circumstances of the present case "the menace of any penalty".

Had Mr. Van der Mussele refused without good reason to defend Mr. Ebrima, his refusal would not have been punishable with any sanction of a criminal character. On the other hand, he would have run the risk of having the Council of the Ordre strike his name off the roll of pupils or reject his application for entry on the register of avocats (see paragraph 19 above); these prospects are sufficiently daunting to be capable of constituting "the menace of [a] penalty", having regard both to the use of the adjective "any" in the definition and to the standards adopted by the ILO on this point ("Abolition of Forced Labour": General Survey by the Committee of Experts on Application of Conventions and Recommendations, 1979, paragraph 21).

36. It must next be determined whether the applicant "offered himself voluntarily" for the work in question.

According to the majority of the Commission, the applicant had consented in advance to the situation he complained of, so that it ill became him to object to it subsequently. Their argument ran as follows. On the eve of embarking on his career, the future avocat will make "a kind of prospective assessment": he will weigh up the pros and cons, setting the "advantages" of the profession against the "drawbacks" it entails. And here the drawbacks were "perfectly foreseeable" by the future avocat since he was not unaware either of the existence or of the scope of the obligations he would have to bear as regards defending clients free of charge, obligations that were "limited" both in quantity (about fourteen cases each year) and in time (the period of pupillage). He also had knowledge of the corresponding advantages: the freedom he would enjoy in carrying out his duties and the opportunity he would have of familiarising himself with life in the courts and of "establishing for himself a paying clientele". One of the distinctive features of compulsory labour was therefore lacking and this was sufficient to establish that there had not been a violation of Article 4 § 2 (art. 4-2).

This argument, which was supported by the Government, correctly reflects one aspect of the situation; nevertheless, the Court cannot attach decisive weight thereto. Mr. Van der Mussele undoubtedly chose to enter the profession of avocat, which is a liberal profession in Belgium,

appreciating that under its rules he would, in accordance with a long-standing tradition, be bound on occasions to render his services free of charge and without reimbursement of his expenses. However, he had to accept this requirement, whether he wanted to or not, in order to become an avocat and his consent was determined by the normal conditions of exercise of the profession at the relevant time. Nor should it be overlooked that what he gave was an acceptance of a legal régime of a general character.

The applicant's prior consent, without more, does not therefore warrant the conclusion that the obligations incumbent on him in regard to legal aid did not constitute compulsory labour for the purposes of Article 4 § 2 (art. 4-2) of the Convention. Account must necessarily also be taken of other factors.

37. On the basis of jurisprudence of its own which dates back to 1963 (admissibility decision on application no. 1468/62, Iversen v. Norway, Yearbook of the Convention, vol. 6, pp. 327-329) and which it has subsequently re-affirmed, the Commission expressed the opinion that for there to be forced or compulsory labour, for the purposes of Article 4 § 2 (art. 4-2) of the European Convention, two cumulative conditions have to be satisfied: not only must the labour be performed by the person against his or her will, but either the obligation to carry it out must be "unjust" or "oppressive" or its performance must constitute "an avoidable hardship", in other words be "needlessly distressing" or "somewhat harassing". After examining the issue "as a supplementary consideration", the Commission concluded by a majority that the second condition was no more satisfied than the first condition.

The Court would observe that the second criterion thus applied is not stated in Article 2 § 1 of ILO Convention No. 29. Rather it is a criterion that derives from Article 4 and the following Articles of that Convention, which are not concerned with the notion of forced or compulsory labour but lay down the requirements to be met for the exaction of forced or compulsory labour during the transitional period provided for under Article 1 § 2 (see "ILO-internal minute - January 1966", paragraph 2).

Be that as it may, the Court prefers to adopt a different approach. Having held that there existed a risk comparable to "the menace of [a] penalty" (see paragraph 35 above) and then that relative weight is to be attached to the argument regarding the applicant's "prior consent" (see paragraph 36 above), the Court will have regard to all the circumstances of the case in the light of the underlying objectives of Article 4 (art. 4) of the European Convention in order to determine whether the service required of Mr. Van der Mussele falls within the prohibition of compulsory labour. This could be so in the case of a service required in order to gain access to a given profession, if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession, that the service could not be treated as having been voluntarily

accepted beforehand; this could apply, for example, in the case of a service unconnected with the profession in question.

38. The structure of Article 4 (art. 4) is informative on this point. Paragraph 3 (art. 4-3) is not intended to "limit" the exercise of the right guaranteed by paragraph 2 (art. 4-2), but to "delimit" the very content of this right, for it forms a whole with paragraph 2 (art. 4-2) and indicates what "the term ‘forced or compulsory labour’ shall not include" (ce qui "n’est pas considéré comme ‘travail forcé ou obligatoire’"). This being so, paragraph 3 (art. 4-3) serves as an aid to the interpretation of paragraph 2 (art. 4-2).

The four sub-paragraphs of paragraph 3 (art. 4-3-a, art. 4-3-b, art. 4-3-c, art. 4-3-d), notwithstanding their diversity, are grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs. The final sub-paragraph, namely sub-paragraph (d) (art. 4-3-d) which excludes "any work or service which forms part of normal civil obligations" from the scope of forced or compulsory labour, is of especial significance in the context of the present case.

39. When viewed in the light of the foregoing considerations, the circumstances complained of can be seen to be characterised by several features, each of which provides a standard of evaluation.

The services to be rendered did not fall outside the ambit of the normal activities of an avocat; they differed from the usual work of members of the Bar neither by their nature nor by any restriction of freedom in the conduct of the case.

Secondly, a compensatory factor was to be found in the advantages attaching to the profession, including the exclusive right of audience and of representation enjoyed by avocats in Belgium as in several other countries (see paragraph 16 above); the exceptions to which the applicant drew attention (ibid.) do not divest the rule of its substance.

In addition, the services in question contributed to the applicant’s professional training in the same manner as did the cases in which he had to act on the instructions of paying clients of his own or of his pupil-master. They gave him the opportunity to enlarge his experience and to increase his reputation. In this respect, a certain degree of personal benefit went hand in hand with the general interest which was foremost.

Moreover, the obligation to which Mr. Van der Mussele objected constituted a means of securing for Mr. Ebrima the benefit of Article 6 § 3 (c) (art. 6-3-c) of the Convention. To this extent, it was founded on a conception of social solidarity and cannot be regarded as unreasonable. By the same token, it was an obligation of a similar order to the "normal civic obligations" referred to in Article 4 § 3 (d) (art. 4-3-d). The Court is not required on the present occasion to rule on the correctness of the argument of the minority of the Commission to the effect that the almost routine allocation of pro-Deo cases to pupil avocats might not be fully consonant

with the need to provide effective legal aid to impecunious litigants (see the Artico judgment of 13 May 198O, Series A no. 37, pp. 15-16, § 33).

Finally, the burden imposed on the applicant was not disproportionate. According to his own evidence, acting for Mr. Ebrima accounted for only seventeen or eighteen hours of his working time (see paragraph 11 above). Even if one adds to this the other cases in which he was appointed to act during his pupillage - about fifty in three years, representing, so he said, a total of some seven hundred and fifty hours (see paragraph 13 above) -, it can be seen that there remained sufficient time for performance of his paid work (approximately two hundred cases).

40. In point of fact, the applicant did not challenge the principle, as such, of the obligation in question; his complaint was limited to two aspects of the manner in which the obligation was implemented, namely the absence of fees and more especially the non-reimbursement of incurred expenditure (see paragraphs 12, 20 and 24 above). He felt it unjust - and on this the minority of the Commission concurred with him - to entrust the free representation of the most needy citizens to pupil avocats who themselves were in receipt of insufficient resources and to make them bear the cost of a public service instituted by law. He drew attention to the fact that for many years the successive chairmen of the Ordre des avocats in Belgium have regarded such a state of affairs as intolerable.

For their part, the Government acknowledged that the practice complained of was inspired by a "paternalism" that was now "outmoded". They asserted that the traditional stance of a profession jealous of its independence accounted for the fact that Belgium had delayed in "endeavouring", by means of the Act of 9 April 1980 (see paragraph 21 above), "to bring its standards" in this sphere to "the level of other States, notably European": until recent times, so the Government stated, the Bar had viewed with "distrust" State-payment of pupil avocats, the idea of an official scale of fees inspiring deep-rooted hostility amongst its members.

The Commission also described as unfortunate a legal situation which in its opinion, while being compatible with Article 4 (art. 4), no longer meets "the requirements of modern life". Pointing out that if pupil avocats were remunerated their professional training would not suffer thereby, the Commission expressed the wish for a prompt and effective implementation of the Act of 9 April 1980.

The Court has not overlooked this aspect of the problem. While remunerated work may also qualify as forced or compulsory labour, the lack of remuneration and of reimbursement of expenses constitutes a relevant factor when considering what is proportionate or in the normal course of affairs. In this connection, it is noteworthy that the respective laws of numerous Contracting States have evolved or are evolving, albeit in varying degrees, towards the assumption by the public purse of the cost of paying lawyers or trainee lawyers appointed to act for indigent litigants. The

Belgian Act of 9 April 1980 is an example of this development; that Act, once it has been implemented, should bring about a significant improvement, without thereby threatening the independence of the Bar.

At the relevant time, the state of affairs complained of undoubtedly caused Mr. Van der Mussele some prejudice by reason of the lack of remuneration and of reimbursement of expenses, but that prejudice went hand in hand with advantages (see paragraph 39 above) and has not been shown to be excessive. The applicant did not have a disproportionate burden of work imposed on him (ibid.) and the amount of expenses directly occasioned by the cases in question was relatively small (see paragraph 12 above).

The Court would recall that Mr. Van der Mussele had voluntarily entered the profession of avocat with knowledge of the practice complained of. This being so, a considerable and unreasonable imbalance between the aim pursued - to qualify as an avocat - and the obligations undertaken in order to achieve that aim would alone be capable of warranting the conclusion that the services exacted of Mr. Van der Mussele in relation to legal aid were compulsory despite his consent. No such imbalance is disclosed by the evidence before the Court, notwithstanding the lack of remuneration and of reimbursement of expenses - which in itself is far from satisfactory.

Having regard, furthermore, to the standards still generally obtaining in Belgium and in other democratic societies, there was thus no compulsory labour for the purposes of Article 4 § 2 (art. 4-2) of the Convention.

41. In view of this conclusion, the Court need not determine whether the work in question was in any event justified under Article 4 § 3 (d) (art. 4-3-d) as such and, in particular, whether the notion of "normal civic obligations" extends to obligations incumbent on a specific category of citizens by reason of the position they occupy, or the functions they are called upon to perform, in the community.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 4 (art. 14+4)

42. The applicant also invoked Article 14 read in conjunction with Article 4 (art. 14+4). Article 14 (art. 14) provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

43. Article 14 (art. 14) complements the other substantive provisions of the Convention and the Protocols. It may be applied in an autonomous manner as breach of Article 14 (art. 14) does not presuppose breach of those other provisions. On the other hand, it has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms"

safeguarded by the other substantive provisions (see, inter alia, the Marckx judgment of 13 June 1979, Series A no. 31, pp. 15-16, § 32). As the Court has found that there was no forced or compulsory labour for the purposes of Article 4 (art. 4), the question arises whether the facts in issue fall completely outside the ambit of that Article (art. 4) and, hence, of Article 14 (art. 14). However, such reasoning would be met by one major objection. The criteria which serve to delimit the concept of compulsory labour include the notion of what is in the normal course of affairs (see paragraph 38 above). Work or labour that is in itself normal may in fact be rendered abnormal if the choice of the groups or individuals bound to perform it is governed by discriminatory factors, which was precisely what the applicant contended had occurred in the present circumstances.

Consequently, this is not a case where Article 14 (art. 14) should be held inapplicable; the Government, moreover, did not contest the point.

44. In a memorial of 27 October 1980 filed before the Commission, Mr. Van der Mussele stated that he was not complaining of any discrimination between pupil avocats and avocats entered on the register He did not alter his attitude before the Court, and the Court sees no reason for examining the issue of its own motion.

45. On the other hand, in the applicant's submission, Belgian avocats are subject, in respect of the matters under consideration, to less favourable treatment than that of members of a whole series of other professions. In legal aid cases, the State accords remuneration to judges and registrars, pays the emoluments of interpreters (Article 184 bis of the Code of Criminal Procedure and Article 691 of the Judicial Code) and, "in lieu of the legally aided person", advances "the travel and subsistence expenses of judicial, public or publicly appointed officers, the costs and fees of experts, the allowances of witnesses ..., the disbursements and one quarter of the salaries of bailiffs as well as the disbursements of other public or publicly appointed officers" (Article 692 of the Judicial Code and paragraph 23 above). Medical practitioners, veterinary surgeons, pharmacists and dentists, for their part, are not required to provide their services free of charge to indigent persons. According to the applicant, these all represented instances of arbitrary inequality, being devoid of any "objective and reasonable justification" (see the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 34, § 10); they thereby contravened Articles 14 and 4 (art. 14+4) taken together. The minority of the Commission shared this view, at least to a large extent.

46. Article 14 (art. 14) safeguards individuals, placed in analogous situations, from discrimination (see the above-mentioned Marckx judgment, Series A no. 31, p. 15, § 32). Yet between the Bar and the various professions cited by the applicant, including even the judicial and parajudicial professions, there exist fundamental differences to which the Government and the majority of the Commission rightly drew attention,

namely differences as to legal status, conditions for entry to the profession, the nature of the functions involved, the manner of exercise of those functions, etc. The evidence before the Court does not disclose any similarity between the disparate situations in question: each one is characterised by a corpus of rights and obligations of which it would be artificial to isolate one specific aspect.

On the basis of the applicant's grievances, the Court accordingly does not find any breach of Articles 14 and 4 taken together (art. 14+4).

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 (P1-1)

47. Mr. Van der Mussele finally relied on Article 1 of Protocol No. 1 (P1-1), which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

48. His arguments do not bear examination in so far as they relate to the absence of remuneration. The text set out above is limited to enshrining the right of everyone to the peaceful enjoyment of "his" possessions; it thus applies only to existing possessions (see, mutatis mutandis, the above-mentioned Marckx judgment, Series A no. 31, p. 23, § 50). In the instant case, however, the Legal Advice and Defence Office of the Antwerp Bar decided on 18 December 1979 that no assessment of fees could be made, because of Mr. Ebrima's lack of means (see paragraph 12 above). It follows, as the Commission unanimously inferred, that no debt in favour of the applicant ever arose in this respect.

Consequently, under this head, there is no scope for the application of Article 1 of Protocol No. 1 (P1-1), whether taken on its own or together with Article 14 (art. 14+P1-1) of the Convention; moreover, Mr. Van der Mussele invoked the latter Article solely in conjunction with Article 4 (art. 14+4).

49. The matter cannot be put in the same terms as far as the non-reimbursement of expenses is concerned, since Mr. Van der Mussele was required to pay certain sums out of his own pocket in this connection (see paragraph 12 above).

That does not suffice, however, to warrant the conclusion that Article 1 of Protocol No. 1 (P1-1) is applicable.

In many cases, a duty prescribed by law involves a certain outlay for the person bound to perform it. To regard the imposition of such a duty as constituting in itself an interference with possessions for the purposes of Article 1 of Protocol No. 1 (P1-1) would be giving the Article a far-reaching interpretation going beyond its object and purpose.

The Court sees no valid cause to think otherwise in the instant case.

The expenses in question were incurred by Mr. Van der Mussele in acting for his pro Deo clients. Although in no wise derisory (the epithet bestowed on them by the Government), these expenses were relatively small and resulted from the obligation to perform work compatible with Article 4 (art. 4) of the Convention.

Article 1 of Protocol No. 1 (P1-1), whether taken alone or in conjunction with Article 14 (art. 14+P1-1) of the Convention, is thus not applicable in this connection.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of Article 4 (art. 4) of the Convention, taken on its own or in conjunction with Article 14 (art. 14+4), or of Article 1 of Protocol No. 1 (P1-1).

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-third day of November, one thousand nine hundred and eighty-three.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The separate concurring opinion of Mr. Thór Vilhjálmsson, joined by Mrs. Bindschedler-Robert and Mr. Matscher, is annexed to the present judgment, in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 50 § 2 of the Rules of Court.

G.W.
M.-A.E.

CONCURRING OPINION OF MR. THÓR VILHJÁLMSSON, JOINED BY MRS. BINDSCHEDLER-ROBERT AND MR. MATSCHER

Mr. Van der Mussele can, in my opinion, properly complain of an interference by public authorities with his right of property, but only as regards the non-reimbursement of his expenses. In this connection, it is material that he was forced to incur the expenditure in question as a result of a legal duty imposed on him by the State. In my opinion, Article 1 of Protocol No. 1 (P1-1) is thus applicable in regard to this point.

Nevertheless, I find no violation of the right to "the peaceful enjoyment of [one’s] possessions" as guaranteed by the first sentence of the first paragraph. I have two reasons for this conclusion. Firstly, the relevant amounts, whilst not meriting the description of "derisory" bestowed on them by the Government, were not exorbitant. Secondly, the applicant was working as a pupil with a view to qualifying as an avocat. He must have been acquainted with the pupillage system before he entered the profession. Whilst the pupillage system doubtless presented for him disadvantages as well as advantages, in the present context it must be looked at as a whole. In my opinion, the disadvantages did not outweigh the advantages to such a degree that it is possible to find a breach. I have accordingly voted for non-violation of Article 1 of Protocol No. 1 (P1-1).