In the Hauschildt case*,

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* Note by the registry: The case is numbered 11/1987/134/188.
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.

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court, and composed of the following judges:

Mr R. Ryssdal, President,
Mr J. Cremona,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr B. Walsh,
Sir Vincent Evans,
Mr R. Macdonald,
Mr C. Russo,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr J. De Meyer,
Mr N. Valticos,
Mr S.K. Martens,
Mrs E. Palm,
Mr B. Gomard, ad hoc judge,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 28 September 1988, 27 January, 22 February and 29 April 1989,

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

PROCEDURE

1. The case was referred to the Court by the European Commission

of Human Rights ("the Commission") on 16 October 1987, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 10486/83) against Kingdom of Denmark lodged with the Commission on 27 October 1982 under Article 25 (art. 25) by a Danish citizen, Mr Mogens Hauschildt.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Denmark recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 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).

3. The Chamber to be constituted included, as ex officio members, Mr J. Gersing, the elected judge of Danish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 30 November 1987, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr J. Pinheiro Farinha, Mr R. Macdonald, Mr R. Bernhardt, Mr A. Spielmann and Mr J. De Meyer (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Professor B. Gomard was appointed by the Government of Denmark ("the Government") on 1 August 1988 to sit as an ad hoc judge in place of Mr Gersing, who had died, and Mr C. Russo replaced Mr Pinheiro Farinha, who was prevented from taking part in the consideration of the case (Rules 22 para. 1, 23 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the President's orders and directions, the registry received on 29 April 1988 the applicant's memorial and on 16 May 1988 the Government's memorial.

By letter of 4 August 1988, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, the representatives who would be appearing before the Court, the President directed on 4 August 1988 that the oral proceedings should open on 26 September 1988 (Rule 38).

6. The hearing took place in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before it opened, the Chamber held a preparatory meeting, in the course of which it decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

There appeared before the Court:

(a) for the Government

Mr T. Lehmann, Ministry of Foreign Affairs, Agent,

Mr I. Foighel, Professor of Law, Counsel,

Mr J. Bernhard, Ministry of Foreign Affairs,

Mr K. Hagel-Sørensen, Ministry of Justice,

Mr J. Hald, Ministry of Justice,

Mrs N. Holst-Christensen, Ministry of Justice, Advisers;

(b) for the Commission

Mr H. Danelius, Delegate;

(c) for the applicant

Mr G. Robertson, Barrister-at-Law, Counsel,

Mr F. Reindel,

Mr K. Starmer, Advisers.

The Court heard addresses by Mr Lehmann and Mr Foighel for the Government, by Mr Danelius for the Commission and by Mr Robertson and Mr Reindel for the applicant, as well as their replies to its questions. The Agent of the Government and counsel for the applicant filed several documents during the hearing.

7. On various dates between 26 September 1988 and

27 January 1989, the registry received the applicant's claims under Article 50 (art. 50) of the Convention and the observations of the Government and the Commission thereon.

AS TO THE FACTS

I. The particular facts of the case

8. The applicant, Mr Mogens Hauschildt, who is a Danish citizen born in 1941, currently resides in Switzerland.

In 1974, he established a company, Scandinavian Capital Exchange PLC ("SCE"), which traded as a bullion dealer and also provided financial services. SCE became the largest bullion dealer in Scandinavia, with associated companies in Sweden, Norway, the Netherlands, the United Kingdom and Switzerland. The applicant was appointed its managing director.

9. Over the years and until the end of 1979, difficulties arose between SCE and the Danish National Bank, the Internal Revenue Service and the Ministry of Trade. They concerned the flow of money to and from SCE and its associated companies abroad.

A. Criminal proceedings against the applicant

1. Investigation stage

10. On 30 January 1980 the Internal Revenue Service forwarded a complaint to the police in which it stated that the activities of the applicant and SCE seemed to involve violations of the Danish tax laws and the Penal Code.

After obtaining a warrant from a court, the police arrested the applicant, seized all available documents at the seat of the company and closed its business on 31 January 1980.

11. The applicant was brought before the Copenhagen City Court (Københavns byret) the following day and charged with fraud and tax evasion. The court directed that he should be kept under arrest for three consecutive periods of twenty-four hours; no objection was raised.

On 2 February 1980, after hearing the prosecution and the defence, the City Court held that the charges were not ill-founded and remanded the applicant in custody in solitary confinement under sections 762 and 770(3) of the Administration of Justice Act (Retsplejeloven -

"the Act"; see paragraphs 33 and 36 below).

As a result of successive decisions, a number of which were taken by Judge Claus Larsen, Mr Hauschildt was held in detention on remand until the public trial began before the City Court on 27 April 1981 (see paragraphs 19-21 below). He also spent some time in solitary confinement (31 January to 27 August 1980).

12. During the investigation stage, the police seized further documents and property. Inquiries were also carried out in the United Kingdom, the Netherlands, Belgium, Switzerland, Liechtenstein and the United States of America. In accordance with the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters, the judge of the City Court on several occasions authorised the prosecution to seek co-operation from other European countries in securing documents as well as in other matters (see paragraph 22 below).

On 4 February 1981 the indictment, which ran to 86 pages, was served on Mr Hauschildt. He was charged with fraud and embezzlement on eight counts involving approximately 45 million Danish crowns.

2. First-instance proceedings

13. The trial at first instance began before the City Court, sitting with one professional judge, Judge Larsen, and two lay judges, on 27 April 1981. According to the applicant, he had complained about the presiding judge before the trial, but no formal request was made on the matter. At the trial he was advised by his lawyers that section 60(2) of the Act debarred any challenge of the judge on the basis of the pre-trial decisions that he had made (see paragraphs 20-22 and 28 below).

14. In the course of over 130 court sittings at the trial the City Court heard some 150 witnesses as well as the applicant and examined a substantial number of documents. Furthermore, opinions from appointed experts, in particular accountants, were taken into consideration. The court also issued numerous orders concerning the remand in custody and solitary confinement of the applicant, the sending of commissions rogatory and other procedural matters (see paragraph 24 below).

15. The City Court, with Judge Larsen presiding, gave judgment on 1 November 1982. It found Mr Hauschildt guilty on all counts and sentenced him to seven years' imprisonment.

3. Appeal proceedings

16. The applicant appealed to the High Court of Eastern Denmark (Østre Landsret). This court sat with three professional judges and three lay judges. Its jurisdiction extended to both the law and the facts, and involved a trial de novo.

The hearing of the appeal began on 15 August 1983. Before the appeal hearing, the applicant had raised with the presiding judge an objection against one of the judges on the ground of his involvement in a City Court decision to seize the applicant's correspondence and assets. However, counsel for the defence refused to argue this point on the basis of section 60(2) of the Act, and Mr Hauschildt withdrew the objection.

17. On 2 March 1984 the High Court found the applicant guilty on six of the eight counts and sentenced him to five years' imprisonment. The extensive character of the fraud was treated as an aggravating factor. On the other hand, the court took into account the fact that the applicant had been held in custody on remand since 31 January 1980, and considered this detention harsher than regular imprisonment. Mr Hauschildt was released on the same day.

18. The applicant's subsequent application for leave to appeal to the Supreme Court (Højesteret) was rejected by the Ministry of Justice on 4 May 1984.

B. Mr Hauschildt's detention on remand and other procedural matters

1. At the investigation stage

19. As already mentioned (see paragraph 11 above), the City Court judge had decided on 2 February 1980 to remand Mr Hauschildt in custody in solitary confinement. In the judge's opinion, there were reasons to believe that the applicant, if at large, would abscond or impede the investigation (section 762(1) nos. 1 and 3 and section 770(3) of the Act; see paragraphs 33 and 36 below). As justification for the detention he listed the following elements:

(1) the circumstance that the applicant had lived outside Denmark until 1976 and at the time of his arrest was planning to move to Sweden;

(2) his economic interests abroad;

(3) the importance of the case;

(4) the risk of his obstructing the investigation by exerting influence on persons in Denmark and abroad.

20. In accordance with section 767 of the Act, the applicant's continued detention on remand was subject to regular judicial control carried out at maximum intervals of four weeks. The elements set out in the initial decision of 2 February 1980, which had been taken by Judge Rasmussen, were the basis for the applicant's detention until 10 April 1980.

On 10 April the City Court judge, Mr Larsen, who was subsequently to preside over the trial court that heard the applicant's case (see paragraph 13 above), also relied on section 762(1) no. 2 as a ground for his remand in custody (danger of his committing new crimes; see paragraph 33 below). The reason prompting that decision was the fact that the applicant had, whilst in custody, secretly communicated with his wife and asked her to remove money from certain bank accounts as well as certain personal property. Subsequently, on 30 April, the same judge ordered her detention on remand and the stopping of a letter written by the applicant.

At a later stage, when ruling on 5 September 1980 on an appeal against an order of further remand in custody, the High Court referred in addition to sub-section 2 of section 762 (see paragraph 33 below), since the investigations carried out by the police at that time indicated a possible loss by the injured parties of approximately 19,5 million Danish crowns. From 24 September on, Judge Larsen also relied additionally on this sub-section.

The applicant's detention on remand continued to be based on each of the three paragraphs of sub-section (1) and on sub-section (2) of section 762 (see paragraph 33 below) until 17 August 1982 when paragraph 3 of sub-section (1) was no longer relied on.

21. As from the applicant's arrest on 31 January 1980 and until the trial started on 27 April 1981, police investigations and his continuing detention on remand necessitated decisions to be taken by the City Court sitting with one professional judge. A total of approximately forty court sittings were held in connection with the case during this period, twenty of which were concerned with remand in custody and, from 31 January to 27 August 1980, also with the question of solitary confinement. Fifteen of these decisions were taken by Judge Larsen (10 April, 30 April, 28 May, 25 June, 20 August, 27 August, 24 September, 15 October, 12 November, 3 December and

10 December 1980 and 4 February, 25 February, 11 March and 8 April 1981). On five of these occasions he ordered prolongation of the applicant's solitary confinement (10 April, 30 April, 28 May, 25 June and 20 August 1980). On 27 August 1980, however, he terminated the solitary confinement.

22. During this period, the City Court decided on three occasions (5 March, 16 June and 13 August), on application by the police, to request the co-operation of other countries in securing documents and in other matters (see paragraph 12 above). Two of these decisions were taken by Judge Larsen (16 June and 13 August 1980).

The City Court judge was furthermore called on to rule on a number of other procedural matters such as the seizure of the applicant's property and documents, his contacts with the press, access to police reports, visits in prison, payment of defence counsel fees and correspondence. Besides the order of 30 April 1980 to detain Mr Hauschildt's wife on remand (see paragraph 20 above), Judge Larsen gave directions on 28 May 1980 as to the stopping of another of the applicant's letters, on 12 November 1980 as to the seizure of a certain amount of money which allegedly belonged to the applicant, on 4 February 1981 as to a change of defence counsel, and finally on 11 March 1981 as to the applicant's access to certain parts of the police files. These rulings were delivered at the request either of the prosecutor or of the defence counsel.

23. Mr Hauschildt brought various decisions taken by the City Court judge before the High Court sitting on appeal with three professional judges. On five occasions the High Court was called upon to inquire into the applicant's continued remand in custody. Altogether thirteen different judges participated in these decisions, none of whom was subsequently involved in the appeal proceedings regarding conviction and sentence. The same applied to the six judges who heard appeals on other procedural matters.

2. During the trial at first instance

24. During Mr Hauschildt's trial, from 27 April 1981 to 1 November 1982 (see paragraphs 13-15 above), the City Court, sitting with Judge Larsen as presiding judge and two lay judges, was also required to give rulings on a number of procedural matters. In particular, the court prolonged the applicant's detention on remand twenty-three times on the basis of section 762(1) and (2). Except on two occasions, these orders were made by Judge Larsen and, on four, he was joined by the two lay judges. Furthermore, from 2 July to 7 October 1981, the applicant was kept in solitary confinement at

the request of the prosecuting authorities. Although the first order to this effect was made by another judge, Judge Larsen on two occasions prolonged the solitary confinement. In addition, on five occasions, he authorised the seeking of the co-operation of other countries.

25. The applicant entered nineteen appeals against these various rulings to the High Court. On twelve occasions, the High Court upheld the decision of the City Court concerning remand in custody. Fourteen judges participated in these judgments, none of whom was subsequently involved in the hearing of the applicant's appeal against conviction and sentence. The applicant's other appeals related to matters such as the appointment of defence counsel, the hearing of further witnesses, the issue of search warrants, custody in solitary confinement and travel expenses for defence counsel. Twelve different judges took part in these decisions. On 14 July 1981 three High Court judges upheld the order continuing the applicant's solitary confinement, one of whom also sat on the court for the hearing of the applicant's appeal against judgment.

3. During the appeal proceedings

26. According to Danish law, the applicant was still considered as being in custody on remand during the appeal proceedings (see paragraphs 16-17 above). The High Court had accordingly to review the detention at least every four weeks. Out of the nineteen renewals ordered, ten were ordered before the hearing opened, whereas the remaining nine were ordered during the sittings. With a few exceptions all decisions concerning detention on remand were adopted by the same judges as took part in the proceedings on appeal. During the hearing (15 August 1983 to 2 March 1984), the professional judges were joined by three lay judges.

The above-mentioned rulings of the High Court were based on section 762(1) no. 1 and 762(2) of the Act (see paragraph 33 below). The court attached particular importance to the gravity of the charges and to the fact that the applicant had lived abroad and still had substantial economic interests abroad.

27. The applicant twice obtained leave from the Ministry of Justice to bring the issue of his continued detention on remand before the Supreme Court. On 26 January 1983 the Supreme Court upheld the decision of the High Court, while considering that the detention should also be based on section 762(1) no. 2 (see paragraph 33 below). In fact, some of the offences for which the applicant had been convicted by the City Court had been committed whilst he had been in

custody on remand. On 9 December 1983 the Supreme Court directed that the detention should continue but be based solely on section 762(1) nos. 1 and 2 (see paragraph 33 below). The majority of the court found that the public interest no longer required the applicant to be kept in custody under section 762(2).

II. Relevant domestic law

28. The challenge of a judge is governed by sections 60 to 63 of the Act:

Section 60

"(1) No one may act as a judge in a case where he,

1. is himself a party to the case, or has an interest in its outcome, or, if it is a criminal case, has suffered injury as a result of the criminal offence;

2. is related by blood or marriage to one of the parties in a civil case or with the accused in a criminal case, whether in lineal ascent or descent or collaterally up to and including first cousins, or is the spouse, guardian, adoptive or foster parent or adoptive or foster child of one of the parties or of the accused;

3. is married, or related by blood or marriage in lineal ascent or descent or collaterally up to and including first cousins, to a lawyer or other person representing one of the parties in a civil case or, in a criminal case, to the injured party or his representative or to any public prosecutor or police officer appearing in such a case or to the accused's defence counsel;

4. has appeared as a witness or as an expert (syn- og skønsmand) in the case, or, if the case is a civil one, has acted in it as a lawyer or otherwise as representative of one of the parties, or, if the case is a criminal one, as a police officer, public prosecutor, defence counsel or other representative of the injured party;

5. has dealt with the case as a judge in the lower instance, or, if it is a criminal case, as member of the jury or as lay judge.

(2) The fact that the judge may previously have had to deal with a case as a result of his holding several official functions shall not disqualify him, when there is no ground, in the circumstances of the case, to presume that he has any special interest in the outcome of the case."

Section 61

"In the situations mentioned in the preceding section, the judge shall, if he sits as a single judge, withdraw from sitting on the court by a decision pronounced by himself. If he sits on the court together with other judges, he shall inform the court of the circumstances which according to the preceding section may disqualify him. Likewise, the other judges on the court, whenever aware of such circumstances, are entitled and have the duty to raise the question of disqualification, whereafter the question is decided by the court, without the judge in question being excluded from taking part in the decision."

Section 62

"(1) The parties can not only demand that a judge withdraw from sitting in the instances referred to in section 60 but may also object to a judge hearing a case when other circumstances are capable of raising doubt about his complete impartiality. In such instances the judge, too, if he fears that the parties cannot trust him fully, may withdraw from sitting even when no objection is lodged against him. Where a case is heard by several judges, any one of them may raise the question whether any of the judges on the bench should step down on account of the circumstances described above.

(2) The questions which might arise under this section shall be decided in the same manner as is laid down in section 61 in regard to the situations enumerated in section 60."

Section 63

"The question whether or not a judge should remain on the bench, which when raised by one of the parties in civil matters is treated as other procedural objections, should as far as possible be raised before the beginning of the oral hearing. This question may be decided without the parties having been given the opportunity to submit comments."

29. According to the Government, no case-law on section 60(2) had been established by the Supreme Court at the time when the applicant's case was pending before the Danish courts. However, by a ruling of 12 March 1987, the Supreme Court held that if a judge has directed the remand in custody of a person charged with a criminal offence, this shall not in itself be deemed to disqualify the judge from taking

part in the subsequent trial and delivery of judgment.

30. In connection with an amendment extending the application of section 762(2) (see paragraph 35 below), section 60 was amended on 10 June 1987 by the Danish Parliament. Sub-section (2) as amended now provides that "no one shall act as a judge in the trial if, at an earlier stage of the proceedings, he has ordered the person concerned to be remanded into custody solely under section 762(2), unless the case is tried as a case in which the accused pleads guilty."

This amendment came into force on 1 July 1987.

31. In Denmark, the investigation is carried out by the prosecuting authorities, with the assistance of the police, and not by a judge. The functions of the police at the investigation stage are regulated by sections 742 and 743 of the Act, which provide:

Section 742

"(1) Information about criminal offences shall be submitted to the police.

(2) The police shall set in motion an investigation either on the basis of such information or on their own initiative where there is a reasonable ground for believing that a criminal offence which is subject to public prosecution has been committed."

Section 743

"The aim of the investigation is to clarify whether the requirements for establishing criminal responsibility or for imposing any other sanction under criminal law are fulfilled and to produce information to be used in the determination of the case as well as to prepare the case for trial."

32. Section 746 of the Act governs the role of the court:

"The court shall settle disputes concerning the lawfulness of measures of investigation taken by the police as well as those concerning the rights of the suspect and the defence counsel, including requests from the defence counsel or the suspect concerning the carrying out of further investigation measures. The decision shall be taken on request by order of the court."

33. Arrest and detention on remand are dealt with in sections 760 and 762 of the Act:

Section 760

"(1) Any person who is taken into custody shall be released as soon as the reason for the arrest is no longer present. The time of his release shall appear in the report.

(2) Where the person taken into custody has not been released at an earlier stage he shall be brought before a judge within 24 hours after his arrest. The time of his arrest and of his appearance in court shall appear in the court transcript."

Section 762

"(1) A suspect may be detained on remand when there is a justified reason to believe that he has committed an offence which is subject to public prosecution, provided the offence may under the law result in imprisonment for one year and six months or more and if

1. according to information received concerning the suspect's situation there is specific reason to believe that he will evade prosecution or execution of judgment, or

2. according to information received concerning the suspect's situation there is specific reason to fear that, if at large, he will commit a new offence of the nature described above, or

3. in view of the circumstances of the case there is specific reason to believe that the suspect will impede the investigation, in particular by removing evidence or by warning or influencing others.

(2) A suspect may furthermore be detained on remand when there is a 'particularly confirmed suspicion' [translation supplied by the Government of the Danish phrase saerlig bestyrket mistanke] that he has committed an offence which is subject to public prosecution and which may under the law result in imprisonment for six years or more and when respect for the public interest according to the information received about the gravity of the case is judged to require that the suspect should not be at liberty.

(3) Detention on remand may not be imposed if the offence can be expected to result in a fine or in light imprisonment (haefte) or if the deprivation of liberty will be disproportionate to the interference with the suspect's situation, the importance of the case and the outcome expected if the suspect is found guilty."

34. Sub-section 2 of section 762 is applicable even in the absence of any of the conditions set out in sub-section 1. Section 762(2) was first inserted in the Act in 1935, following an aggravated rape case. In the Parliamentary record concerning this amendment (Rigsdagstidende, 1934-35 Part B, col. 2159), it is stated:

"When everyone assumes that the accused is guilty and therefore anticipates serious criminal prosecution against him, it may in the circumstances be highly objectionable that people, in their business and social lives, still have to observe and endure his moving around freely. Even though his guilt and its consequences have not yet been established by final judgment, the impression may be given of a lack of seriousness and consistency in the enforcement of the law, which may be likely to confuse the concept of justice."

35. Section 762(2) was amended in 1987 in order to extend its application to certain crimes of violence which were expected to entail a minimum of sixty days' imprisonment. In reply to a criticism in an editorial in the newspaper Politiken, the Danish Minister of Justice wrote on 30 December 1986:

"In so far as it ... has been suggested that the Bill opens possibilities for the imprisonment of innocent persons, I find reason to stress that my proposed Bill makes it a condition that there is a particularly confirmed suspicion [the Minister's emphasis] that the accused has committed the crime before he can be remanded in custody. Thus there has to be a very high degree of clarity with regard to the question of guilt before the provision can be applied and this is the very means of ensuring that innocent persons are not imprisoned."

36. Solitary confinement is governed by section 770(3) of the Act, which at the relevant time read as follows:

"On application by the police the court may decide that the detainee shall be totally or partially isolated if the purpose of the detention on remand so requires."

This provision was amended on 6 June 1984.

PROCEEDINGS BEFORE THE COMMISSION

37. Mr Hauschildt first wrote to the Commission on 26 August 1980. In this and further communications registered as application no. 10486/83, he referred to Articles 3, 5, 6, 7 and 10 (art. 3, art. 5, art. 6, art. 7,

art. 10) of the Convention and Article 1 of Protocol No. 4 (P4-1). As regards Article 6 (art. 6), he claimed that he did not receive a fair trial by an impartial tribunal within a reasonable time; in support of this contention, he pointed out, inter alia, that the presiding judge of the City Court and the High Court judges, who had respectively convicted him and examined his appeal, had taken before and during his trials numerous decisions regarding his detention on remand and other procedural matters.

38. On 9 October 1986 the Commission declared the application admissible as regards this last complaint but inadmissible in all other respects.

In its report adopted on 16 July 1987, the Commission expressed the opinion that there had been no violation of Article 6 para. 1 (art. 6-1) of the Convention (nine votes to seven). The full text of the Commission's opinion and of the collective dissenting opinion contained in the report is reproduced as an annex to this judgment.

AS TO THE LAW

I. PRELIMINARY OBJECTION OF NON-EXHAUSTION OF DOMESTIC REMEDIES

39. The Government pleaded before the Court - as they had already unsuccessfully done before the Commission - that the application was inadmissible for failure to exhaust domestic remedies (Article 26 of the Convention) (art. 26). In support of this preliminary objection, they argued that, in so far as Mr Hauschildt feared that Judge Larsen and the judges of the High Court lacked impartiality as a consequence of having made several pre-trial decisions in his case, he could have challenged them under sections 60(2) and 62 of the Act (see paragraph 28 above), but never did so.

40. The applicant countered by explaining that he had been advised by counsel that the Act did not permit such a course of action. This advice was based on reading section 62 of the Act in conjunction with section 60(2) and inferring therefrom that challenge of a judge relying on the fact of his having given pre-trial decisions - that is having acted in an official function other than that of trial judge - could be successfully made only on the ground that he had some "special interest in the outcome of the case" (section 60(2)). This ground, in the opinion of counsel, did not apply in the instant case.

The Government described this construction of the relevant sections of the Act as a "quite obvious misinterpretation". On their own

interpretation, it would have been open to the applicant to challenge both Judge Larsen and the High Court judges on the ground that their responsibility for a number of pre-trial decisions raised doubts as to their complete impartiality. In support of this contention, they referred to a decision of 12 March 1987 by the Danish Supreme Court, where it was held that the making of orders as to detention on remand at the pre-trial stage should not per se be deemed to disqualify the judge from sitting in the subsequent trial (see paragraph 29 above).

41. It is incumbent on the Government to satisfy the Court that the remedy in question was available and effective at the relevant time - that is to say, at the opening of Mr Hauschildt's trial (27 April 1981) and at the opening of the hearing on appeal (15 August 1983).

The Court cannot share the Government's view that the interpretation put on sections 60(2) and 62 of the Act by counsel for the defence was quite obviously wrong.

The Government have not alleged ascertainable facts - such as previous case-law or doctrine - which should have caused counsel for the defence to have doubts concerning his interpretation of the Act. On the contrary, they did not deny that for several years nobody had ever challenged a trial judge on the ground of his having made pre-trial decisions in the case. The latter fact suggests general acceptance of the system, or at least of the interpretation relied on by counsel for the defence. The Supreme Court's decision of 12 March 1987, whatever its relevance to the circumstances of the present case, does not alter the position as it existed at the time of Mr Hauschildt's trial (see, inter alia and mutatis mutandis, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, pp. 32-33, para. 61).

It is significant, moreover, that both Judge Larsen and the President of the High Court, although aware of the apprehensions and unease harboured by Mr Hauschildt (see paragraphs 13 and 16 above), did not think it necessary to take any initiative themselves, notwithstanding the wording of sections 61 and 62 (see paragraph 28 above).

In the circumstances, counsel for the defence could well at the time reasonably believe that any objection on the basis of a particular judge having made several pre-trial decisions was doomed to failure.

42. The Court concludes that the Government have not shown that there was available under Danish law at the relevant time an effective remedy to which the applicant could be expected to have resorted.

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

43. Mr Hauschildt alleged that he had not received a hearing by an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1) which, in so far as relevant, provides:

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

The applicant, while not objecting in principle to a system such as that existing in Denmark whereby a judge is entrusted with a supervisory role in the investigation process (see paragraphs 32-33 above), criticised it in so far as the very same judge is then expected to conduct the trial with a mind entirely free from prejudice. He did not claim that a judge in such a position would conduct himself with personal bias, but argued that the kind of decisions he would be called upon to make at the pre-trial stage would require him, under the law, to assess the strength of the evidence and the character of the accused, thereby inevitably colouring his appreciation of the evidence and issues at the subsequent trial. In the applicant's submission, a defendant was entitled to face trial with reasonable confidence in the impartiality of the court sitting in judgment on him. He contended that any reasonable observer would consider that a trial judge who had performed such a supervisory function could not but engender apprehension and unease on the part of the defendant. The same reasoning applied in principle to appeal-court judges responsible for decisions on detention pending appeal or other procedural matters.

As to the facts of his own case, Mr Hauschildt pointed out above all that the presiding judge of the City Court, Judge Larsen, had taken numerous decisions on detention on remand and other procedural matters, especially at the pre-trial stage. He referred in particular to the application of section 762(2) of the Act (see paragraphs 20 and 33 above). He expressed similar objections as regards the judges of the High Court on account of their dual role during the appeal proceedings (see paragraph 26 above) and also, in relation to some of them, because of their intervention at the first-instance stage (see paragraphs 16 and 25 above).

44. The Government and the majority of the Commission considered that the mere fact that a trial judge or an appeal-court judge had previously ordered the accused's remand in custody or issued various procedural directions in his regard could not reasonably be taken to affect the judge's impartiality, and that no other ground had been established in the

present case to cast doubt on the impartiality of the City Court or the High Court.

On the other hand, a minority of the Commission expressed the opinion that, having regard to the circumstances of the case, Mr Hauschildt was entitled to entertain legitimate misgivings as to the presence of Judge Larsen on the bench of the City Court as presiding judge.

45. The Court's task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to or affected Mr Hauschildt gave rise to a violation of Article 6 para. 1 (art. 6-1).

46. The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the De Cubber judgment of 26 October 1984, Series A no. 86, pp. 13-14, para. 24).

47. As to the subjective test, the applicant has not alleged, either before the Commission or before the Court, that the judges concerned acted with personal bias. In any event, the personal impartiality of a judge must be presumed until there is proof to the contrary and in the present case there is no such proof.

There thus remains the application of the objective test.

48. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see, mutatis mutandis, the De Cubber judgment previously cited, Series A no. 86, p. 14, para. 26).

This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive (see the Piersack judgment of 1 October 1982, Series A no. 53, p. 16, para. 31). What is decisive is whether this fear can be held objectively

justified.

49. In the instant case the fear of lack of impartiality was based on the fact that the City Court judge who presided over the trial and the High Court judges who eventually took part in deciding the case on appeal had already had to deal with the case at an earlier stage of the proceedings and had given various decisions with regard to the applicant at the pre-trial stage (see paragraphs 20-22 and 26 above).

This kind of situation may occasion misgivings on the part of the accused as to the impartiality of the judge, misgivings which are understandable, but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be so treated depends on the circumstances of each particular case.

50. As appears from sections 742 and 743 of the Act (see paragraph 31 above), in Denmark investigation and prosecution are exclusively the domain of the police and the prosecution. The judge's functions on the exercise of which the applicant's fear of lack of impartiality is based, and which relate to the pre-trial stage, are those of an independent judge who is not responsible for preparing the case for trial or deciding whether the accused should be brought to trial (sections 746, 760, 762 and 770 - see paragraphs 32, 33 and 36 above). This is in fact true of the decisions referred to by the applicant, including those concerning the continuation of his detention on remand and his solitary confinement. Those decisions were all given at the request of the police, which request was or could have been contested by the applicant, assisted by counsel (see paragraphs 23 and 24 above). Hearings on these matters are as a rule held in open court. Indeed, as to the nature of the functions which the judges involved in this case exercised before taking part in its determination, this case is distinguishable from the Piersack and the De Cubber cases (judgments previously cited) and from the Ben Yaacoub case (judgment of 27 November 1987, Series A no. 127-A, p.7, para. 9).

Moreover, the questions which the judge has to answer when taking such pre-trial decisions are not the same as those which are decisive for his final judgment. When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether prima facie the police have grounds for their suspicion; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. Suspicion and a formal finding of guilt are not to be treated as being the same (see, for example, the Lutz judgment of 25 August 1987, Series A no. 123-A, pp. 25-26, para. 62).

In the Court's view, therefore, the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality.

51. Nevertheless, special circumstances may in a given case be such as to warrant a different conclusion. In the instant case, the Court cannot but attach particular importance to the fact that in nine of the decisions continuing Mr Hauschildt's detention on remand, Judge Larsen relied specifically on section 762(2) of the Act (see paragraph 20 above). Similarly, when deciding, before the opening of the trial on appeal, to prolong the applicant's detention on remand, the judges who eventually took part in deciding the case on appeal relied specifically on the same provision on a number of occasions (see paragraphs 26-27 above).

52. The application of section 762(2) of the Act requires, inter alia, that the judge be satisfied that there is a "particularly confirmed suspicion" that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is "a very high degree of clarity" as to the question of guilt (see paragraphs 34-35 above). Thus the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous.

The Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered objectively justified.

53. The Court thus concludes that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention.

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

54. Under 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."

The applicant submitted that, should the Court find a violation of Article 6 (art. 6), his conviction should be quashed and any disqualifications or restrictions placed on him removed. The Court, however, is not empowered under the Convention to provide for the quashing of a judgment or to give any directions on the last-mentioned matters (see, mutatis mutandis, the Gillow judgment of 14 September 1987, Series A no. 124-C, p. 26, para. 9).

The applicant also sought compensation for damage and reimbursement of costs and expenses.

A. Damage

55. Mr Hauschildt submitted that a finding of a violation of Article 6 (art. 6) would cast doubt on his conviction and that this, in turn, would bring into question the lawfulness of each of his 1,492 days of detention on remand. Accordingly, he sought compensation comparable to that to which he would have been entitled if the trial court had found him not guilty, to be calculated on the basis of 500/1,000 Danish crowns (DKr) per day.

The applicant also contended that his health had suffered due to the 309 days he had spent in solitary confinement, that his reputation had been seriously injured and that his lengthy detention on remand had caused him a substantial loss of income.

56. In their observations of 10 October 1988 and 23 January 1989, the Government pointed to the existence of a remedy at national level, in that, under section 977(3) of the Act, Mr Hauschildt could ask the Special Court of Revision (Den saerlige Klageret) to refer the case back to the City Court if there were a high degree of probability that the evidence had not been properly evaluated.

The Court notes in this respect that the violation found in the present judgment (see paragraph 53 above) relates to the composition of the courts concerned and not to their assessment of the evidence. Accordingly, the remedy in question does not allow reparation for the consequences of the violation, within the meaning of Article 50 (art. 50) (see, mutatis mutandis, the De Cubber judgment of 14 September 1987, Series A no. 124-B, pp. 17-18, para. 21).

57. It will be recalled that, with regard to the judges concerned, the Court has excluded personal bias (see paragraph 47 above). What it has found is that, in the circumstances of the case, the impartiality of the relevant tribunals was capable of appearing to be

open to doubt and that the applicant's fears in this respect can be considered to be objectively justified (see paragraph 52 above). This finding does not entail that his conviction was not well founded. The Court cannot speculate as to what the result of the proceedings might have been if the violation of the Convention had not occurred (see the above-mentioned De Cubber judgment, Series A no. 124-B, p. 18, para. 23). Indeed the applicant has not even attempted to argue that the result would have been more favourable to him, and moreover, given the established lack of personal bias, the Court has nothing before it that would justify such a conclusion.

The Court thus agrees with the Government and the Commission that no causal link has been established between the violation found and the alleged damage in question.

58. Mr Hauschildt also claimed compensation for non-pecuniary damage, on the ground that he had lost the opportunity of being tried by an impartial tribunal. The Delegate of the Commission submitted that an amount, which he did not quantify, should be awarded under this head.

The Court, however, is of the view that, in the particular circumstances of the case, its finding in the present judgment will constitute in itself adequate just satisfaction under this head.

B. Costs and expenses

59. The Delegate of the Commission viewed favourably the applicant's claim for reimbursement of costs and expenses, although he did not indicate any amount. The Government reserved their right, should it prove necessary, to set up a "counterclaim".

The Court considers, however, that it has sufficient material to take a decision on this point.

1. Proceedings outside Strasbourg

60. Mr Hauschildt sought reimbursement of the costs he had incurred:

(a) in respect of the investigation and first-instance trial in Denmark (3,061,960 DKr);

(b) in respect of several bankruptcy proceedings pending in Denmark (7,100,000 DKr); and

(c) in Switzerland and other European countries in connection with the bankruptcy of Hauschildt & Co (1,700,000 Swiss francs).

61. The Court is unable to accept these claims.

As to item (a), this rests on the erroneous assumption that the finding of a violation in this case operates so as to erase the applicant's conviction. As to items (b) and (c), it is not established that there is any connection between the violation found in the present judgment and the bankruptcy proceedings referred to.

2. Proceedings in Strasbourg

62. Mr Hauschildt also sought reimbursement of the following items referable to the proceedings before the Convention institutions, totalling £26,463:

(a) fees of his counsel, Mr Robertson (£11,048), and Mr Reindel (£5,770);

(b) translation fees (£1,725);

(c) fees of Ms Eva Smith, who prepared for him a report on the relevant Danish legislation (£420);

(d) his own personal costs and expenses (£7,500).

63. The Court has no reason to suppose that the foregoing expenditure was not actually incurred. However, it entertains doubts as to whether part of it - especially as regards Mr Hauschildt's personal costs and expenses - was necessarily incurred and as to whether all the items can be considered reasonable as to quantum.

In these circumstances, the Court is unable to award the totality of the sums claimed. Making an assessment on an equitable basis, it finds that the applicant should be reimbursed £20,000.

FOR THESE REASONS, THE COURT

1. Rejects by fourteen votes to three, as unfounded, the Government's preliminary objection of non-exhaustion of domestic remedies;

2. Holds by twelve votes to five that there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention;

3. Holds unanimously that Denmark is to pay to the applicant, for

costs and expenses £20,000 (twenty thousand pounds sterling);

4. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 May 1989.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

(a) concurring opinion of Mr Ryssdal;

(b) joint dissenting opinion of Mr Thór Vilhjálmsson, Mrs Palm and Mr Gomard;

(c) joint dissenting opinion of Mr Gölcüklü and Mr Matscher;

(d) concurring opinion of Mr De Meyer.

Initialled: R.R.

Initialled: M.-A.E.

CONCURRING OPINION OF JUDGE RYSSDAL

The first sentence of section 62(1) of the Administration of Justice Act entitles the parties to object to a judge hearing a case when circumstances, other than those referred to in section 60, "are capable of raising doubt about his complete impartiality". This wording would seem to indicate that Mr Hauschildt could have challenged Judge Larsen and the High Court judges on the ground that they had applied section 762(2) of the Act in pre-trial decisions concerning his detention on remand.

However, having regard to the specific provision in section 60(2) of the Act and to the fact that it was common practice in Denmark at the relevant time not to challenge a trial judge on the ground of his having made pre-trial decisions in the same case, I have come to the

conclusion that Mr Hauschildt could not be expected to have objected to the judges in question. I therefore agree that the Government's plea of non-exhaustion of domestic remedies must be rejected.

JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, PALM AND GOMARD

1. Sections 60(2) and 62 of the Administration of Justice Act ("the Act"), which are cited in full in paragraph 28 of the Court's judgment, clearly indicate - in accordance with the explanations given on pages 21 and 22 of the original proposal, dated March 1875, that led to the adoption of the Act - that normally a judge in a criminal case is not disqualified because he has had to deal with the case in another capacity before trial, but that disqualification may ensue because of special circumstances as mentioned in those sections. Consequently an appeal founded on the system itself, i.e. on the fact that judges who delivered pre-trial decisions are not normally disqualified from taking part in the trial, would undoubtedly have been unsuccessful. The relevant questions in the present case, however, are whether on a special appeal the Court of Appeal (the High Court) or the Supreme Court would have found that the impartiality of Judge Larsen or of the High Court judges was impaired because of his or their involvement in the case before the first-instance or the second-instance trial. Under the relevant provisions of the Act, the result of an appeal alleging that the first-instance judge or the second-instance judges lacked impartiality would have depended on the circumstances of the case as it stood before the City Court or later before the High Court. At that time - in 1981 and in 1983 - all relevant information could have been produced to and evaluated by the High Court or the Supreme Court. The only information available now, years later, in the case before this Court is a simple list of the number and contents of decisions made by various judges. It is not possible to arrive, solely on the basis of such a list, at a well-informed opinion on the partiality or impartiality of the trial judges.

Mr Hauschildt and his counsel decided at the relevant time against raising the question of impartiality. Mr Hauschildt's present application is therefore, in our opinion, inadmissible because of failure to exhaust domestic remedies (Article 26 of the Convention) (art. 26).

2. If Mr Hauschildt's application is not found inadmissible for failure to have recourse to an available and relevant domestic remedy as required by Article 26 (art. 26) of the Convention, the objection of partiality now raised by him has to be examined and decided in the

present case.

As stated in paragraph 50 of the Court's judgment, the mere fact that a member of the trial court has also taken part as a judge in preliminary decisions in the case does not in itself justify fears as to his or her impartiality. The doubts that have been raised as to whether this is also true where the decisions have been rendered under section 762(2) of the Act are an indication that the wording of this particular provision - as it appears in the translations - may not be fortunate. This, however, does not alter the fact that the strong traditions of the judiciary and the ability of the judges, deriving from their education and training, provide the necessary effective and visible guarantee of impartiality. Judicial control of the question whether the prosecution has reasonable grounds for requesting detention on remand, solitary confinement, searches and seizure, etc. is a function that is different from the court's evaluation of the evidence presented by the parties at the trial. For authorisation of detention on remand, information is not presented in the same way as evidence during the hearings before the trial court. The procedure is a summary one. Court sittings at the pre-trial stage are concluded in a matter of hours, whereas both of Mr Hauschildt's trials lasted for months. After the City Court had passed judgment, that judgment became an important factor for the High Court judges in determining whether Mr Hauschildt should remain in custody during his de novo trial on appeal.

The role of judges at the pre-trial stage is confined to ascertaining whether the prosecution's requests satisfy the conditions set out in the relevant section(s) of the Act. This judicial control may be exercised by any judge or panel of judges belonging to the competent court. In the present case the City Court's first - and important - decision that Mr Hauschildt be detained on remand, that of 1 and 2 February 1980, was rendered not by Judge Larsen but by another judge (Mr Dalgas Rasmussen). Where the court proceedings last for several months, as in Mr Hauschildt's case, the rule in section 767 of the Act that detention on remand cannot be authorised for more than four weeks necessitates continued decisions on this matter during the trial.

Judgment in Mr Hauschildt's case - as in other cases - was passed on the basis of the evidence presented and commented on by both parties at the trials, first before the City Court and later before the High Court. There is no indication whatsoever of any lack of impartiality on the part of the judges involved in Mr Hauschildt's case. There was no objective or reasonable subjective ground to fear that either Judge Larsen or the High Court judges could have had any improper motive

when passing judgment. There is no indication that any of the judges involved in Mr Hauschildt's case was not able - as qualified, professional judges are able - to form his opinion on the basis of the materials presented at the trial and of nothing else. Mr Hauschildt has not pointed to any ground for doubting the impartiality of the judges other than their having taken part in various decisions before and during trial, as described in paragraphs 10 et seq. of the European Court's judgment.

For these reasons, Mr Hauschildt's complaint that his case was not tried by an impartial tribunal must be rejected. In our opinion, Article 6 (art. 6) of the Convention has not been violated in the present case.

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND MATSCHER

(Translation)

The majority of the Court rightly considered that - in a system such as that existing in Denmark, where there is no division of responsibilities between investigating judge and trial judge, with all the guarantees inherent in such a division of responsibilities - the mere fact that a trial judge or an appeal-court judge also takes certain pre-trial decisions, in particular concerning detention on remand, is not sufficient in itself to justify apprehensions as to the impartiality of the judge in question.

However, the majority reached the opposite conclusion, and found a violation of Article 6 para. 1 (art. 6-1), in this case on the ground that the trial judge and the appeal-court judges took several decisions on the continuation of the applicant's detention on remand and based those decisions specifically on section 762(2) of the Danish Administration of Justice Act, whose application requires a "particularly confirmed suspicion".

It is our view that this fact does not justify the majority's conclusion. In a legal system in which the function of investigating judge does not exist (and its existence is in no way required by the Convention), it naturally falls to the trial judge (or appeal-court judge) to take all the pre-trial measures which call for the intervention of a judge. Indeed it is of course the trial judge (or appeal-court judge) who is the most familiar with the case and who consequently is the best placed to determine the appropriateness of or the necessity for the measures envisaged, even if this assessment requires him to adopt a fairly clear-cut position on the case. This does not mean however that he may be regarded as lacking sufficient

impartiality to decide the merits of the case.

Nor do we find the quantitative argument particularly convincing. In a case involving economic offences of a wide-ranging and extremely complicated nature, it will inevitably be necessary for the judge to make several interventions in the investigation and, acccordingly, to take a number of decisions concerning the extension of detention on remand.

CONCURRING OPINION OF JUDGE DE MEYER

I fully subscribe to the operative provisions of the judgment and to most of its reasoning. I cannot, however, agree with paragraph 50.

The "pre-trial functions" relating to detention on remand or to solitary confinement which were exercised in the present case by certain judges under sections 760, 762 and 770(3) of the Danish Administration of Justice Act, as applicable at the relevant time, were not essentially different from those which were exercised by the investigating judge in the De Cubber case.

In my view, the mere fact that a trial judge has previously exercised such functions in the case which he has to try, objectively justifies legitimate fears as to his impartiality, and this applies not only to functions exercised under section 762(2), but also to functions exercised under the other provisions just referred to.