B. The Government

71. As a result of tradition, Danish courts of first instance operate in relatively small jurisdictions. This helps to create confidence between the court and the local population. Another result of tradition is that the local court is empowered to deal with all kinds of cases, criminal and civil. This judicial system means that normally the judge in charge is one and the same person both during the preliminary stage and during the concluding trial. However, the division found in a number of European countries into so-called investigating judges and so-called trial judges is unknown in Denmark. In small rural jurisdictions the fact that one and the same judge handles the case at the initial stage as well as during the trial is the inevitable consequence of having only one judge in the respective jurisdiction. However, this set-up for the courts in Denmark should be seen in connection with the function of Danish courts in the criminal procedure.

72. The preliminary investigations conducted in Denmark serve a dual purpose, that is to provide all the information required to determine whether the accused should be indicted, and, if so, to collect material to clarify the choice of penalty. The investigation in criminal cases is conducted by the police under the supervision of the prosecuting authorities. Ordinarily, courts do not enter a criminal case in the investigative phase.

73. If, however, in the course of the investigations, a dispute arises between police and counsel over the powers etc. of the police or counsel, the matter shall be taken to court for its decision. The services of the court may also be needed in the investigative phase if either the prosecuting authority or the defence requests that evidence should be taken in camera at the initial stage because it is feared that the evidence will otherwise be lost before the trial.

74. Furthermore certain investigative measures are deemed to involve such severe interference with citizens' rights that they can only be taken by court order. This means that, as a general rule, measures such as search, telephone tapping, seizure and detention on remand can only be imposed if a court, after hearing the arguments and counter-arguments of the parties, finds the contemplated measure justifiable. Also decisions concerning commissions rogatory under the European Convention on Mutual Assistance in Criminal Matters are usually taken by the court at the request of the police.

75. Reference to court of such questions is motivated by the wish to have an impartial authority appraise whether the police should be permitted to take enforcement measures as suggested. In this manner the court ensures that the relevant provisions of the Administration of Justice Act are observed.

76. While investigations are under way the court plays a completely neutral, supervisory role. It takes no initiatives on its own and acts only at the request of the police or counsel, and only if there is disagreement between the two or if the police contemplates applying such onerous measures as mentioned above.

77. It is in particular on this point that the Danish system differs from other well-known systems of law under which the investigations are conducted by an examining judge. A fairly similar system was found in Denmark up to 1978. According to that system the procedure, usually applied prior to institution of criminal proceedings, was a combination of police investigations and preliminary investigations in court. The aim of the change of system introduced in 1978 was precisely to establish that investigations by an examining judge, while police investigations were being carried out, were at variance with the position of a judge in the administration of justice. For that reason, the functions of the judge are now confined to acting as supervisor.

78. In this context it should be emphasised that the questions on which the court takes decisions in the course of investigations differ essentially from the theme before the judge during trial. In the investigation phase the judge's sole task is to take a decision on questions in dispute between police and counsel and to ascertain whether legal conditions exist for applying certain serious enforcement measures. Hence, it is not up to the judge to take a decision on the question of guilt in connection with the deliberations of the police as to what line of approach should be adopted with regard to the investigation. Neither shall the judge take a decision on whether or not the accused should be indicted, or in any way be involved in deliberations thereon.

79. Regarding the question of detention on remand the judge must naturally take account of any information available at the current stage of the proceedings which may suggest the guilt of the defendant when determining whether the requisite suspicion for detention on remand is at hand. However, a judge's deliberation prior to a decision on remand in custody is of a nature very different from his deliberation prior to the sentencing in a trial. To sentence a person for a crime requires certainty of the defendant's guilt. Hence, there has to be proof of guilt. To remand in custody, on the other hand, it is sufficient that there is a well-founded suspicion. It is consistent with this line of thought that it has not been written into the Danish rules governing compensation from the State for unwarranted remand in custody that compensation shall be given only if the authorities have committed an error by remanding in custody. If the defendant is acquitted, he is entitled to compensation no matter how well founded his imprisonment was according to the information available at that time.

80. Furthermore the Government point out that the knowledge of the case which the judge acquires during the investigation of bulky and lengthy cases may assist in a more efficient planning of proceedings to the advantage of both defendant and prosecution. This is both appropriate and desirable and may best be likened to those situations in which a judge prior to the proceedings prepares himself carefully for a case.

81. Once the investigation is completed the second stage of the trial is the preferment of charges. In Denmark the decision to bring charges is that of the prosecuting authority alone. In no way are the courts involved.

82. When charges have been preferred the trial itself is held before the sentencing court, usually with the assistance of lay judges. The trial may run into procedural difficulties and disputes requiring a decision, for instance, with respect to the production of evidence. It goes without saying that such questions must be settled by the sentencing court. It may also become necessary to decide whether to proceed with the remand in custody. It would indeed be wholly unacceptable if another court, while the case is pending before the sentencing court, were to have rivalling competence to rule on a question of remand in custody. It cannot be assumed that the sentencing court, by ruling on the question of remand in custody while the trial is in process, disqualifies itself from passing sentence in that case.

83. In the Government's view there is accordingly under the present system, during investigation as well as during trial, a clear line of distinction between, on the one hand, the functions of the police and the prosecuting authority and, on the other hand, the functions of the court. This distinction entails that throughout the investigation process the court exercises only supervisory functions. Furthermore it plays an entirely neutral role. That the same judge sits in matters before the court during the investigation phase and during the trial should therefore not, in the Government's opinion, give rise to any problems of competence.

84. In the questions raised by the Commission reference is made to the judgments of the European Court of Human Rights in the Piersack case (Eur. Court H.R., Piersack judgment of 1 October 1982, Series A No. 53) and the De Cubber case (Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A No. 86). Furthermore reference is made to the Commission's Report in the case of Ben Yaacoub v. Belgium (Comm. Report 7.5.85). The instant case differs, on decisive points, from those cases.

85. First, as mentioned above, there is in Denmark no concurrence of the functions of the prosecuting authority and the judge. Pursuant to the Constitution and the Administration of Justice Act as well as in practice, the judge who makes the order for detention on remand and the judge who delivers judgment are independent of the prosecuting authority and of any other authorities.

86. Second, the judge who makes decisions on legal steps to be taken in the course of the investigation plays an unobtrusive and neutral role. He acts only on request of either the prosecuting authority or the accused and his counsel. He does not take part in the deliberations of the prosecuting authority as to whether or not the accused should be indicted. The judge's tasks are only to take a decision on questions in dispute between police and counsel and to ensure that the conditions laid down in the Administration of Justice Act have been satisfied. Hence, the judge's role is solely to guarantee that the accused is protected by the rule of law. In particular regarding the Ben Yaacoub case and the powers of the Belgian court in chambers the Government stress the significant difference that a Danish court has no comparable powers in the preliminary stages of a trial, nor should it be ignored that the proceedings before the court in chambers were secret, whereas hearings before Danish courts are, in principle, always public.

87. Against this background, the Government are of the opinion that the fact that the judges who made decisions during the investigation process were the same as those who delivered judgment was not in violation of the applicant's right under Article 6 of the Convention to have a fair hearing. The system applied in Denmark is furthermore applied by a number of other Contracting States. According to the information available to the Government, there is nothing in the systems of law of those States which prevents a judge who takes part in trial and adjudication from having sat on previous occasions when the prosecuting authority demanded detention on remand or requested permission to carry out investigation measures involving severe interference with the accused's rights.

88. Regarding the commissions rogatory the Government point out that in no instance did the trial judge take any part in those proceedings abroad. The involvement of the judge in that respect comprised the function of controlling the gathering of comprehensive and well-founded information on all relevant aspects of the case in question. The letters rogatory first of all have the aim of providing the necessary factual basis for the legal proceedings. Furthermore, it is difficult to maintain that generally the decision to send letters rogatory is in itself a potential harm to the legal position of the applicant. This is also corroborated by the fact that the prosecuting authority, as well as the defence, have access to the judge in matters of sending out letters rogatory. The court's assistance in letters rogatory was due to the fact that the international conventions providing for legal assistance prescribe that the petition must be issued by a judicial authority. So, even though in Denmark it is not a court but rather the police and the prosecuting authority who are charged with gathering information during the investigation, Denmark has opted to submit letters rogatory to the courts in their capacity of judicial authorities in order to comply with the formalities prescribed by the international conventions.

89. Normally, however, the courts will not examine the substance of such letters rogatory from the prosecuting authority. For this reason alone it is obvious that one cannot question the fairness of the proceedings at the City Court and the impartiality of the Court on the ground that the Court had taken a number of decisions requesting the co-operation of other countries in obtaining material relevant to the case.

IV. OPINION OF THE COMMISSION

A. Point at issue

90. The only point at issue which according to the Commission's decision on the admissibility remains to be determined is whether the Copenhagen City Court, when convicting and sentencing the applicant on 1 November 1982, and the High Court for Eastern Denmark, when deciding on 2 March 1984 on his appeal against the judgment, were "impartial tribunals" as required by Article 6 para. 1 of the Convention, having regard to the fact that the judges participating in these judgments had previously taken decisions on the applicant's detention on remand as well as a number of procedural decisions in his case, including decisions to ask for additional evidence abroad (commissions rogatory).

B. Article 6 of the Convention

91. The relevant part of Article 6 para. 1 of the Convention reads as follows:

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

92. It has not been disputed in this case that this provision applies both to the proceedings before the Copenhagen City Court and to the proceedings before the High Court. From its case-law and that of the European Court of Human Rights, the Commission furthermore recalls that the fundamental guarantees of Article 6 para. 1, including impartiality, must also be provided by any courts of appeal which a Contracting State may have chosen to set up (cf. for example Eur. Court H.R., Monnell and Morris judgment of 2 March 1987, Series A No. 115, para. 54).

93. The Commission is accordingly called upon to consider not only the proceedings in the City Court but also the proceedings in the High Court.

94. The European Court of Human Rights has stated that the guarantee of impartiality required by Article 6 of the Convention implies a double guarantee: first the subjective requirement that the judge shall be unbiased, and secondly, an objective requirement that the situation must be such as to exclude any legitimate doubts about his impartiality (Eur. Court H.R., Piersack judgment of 1 October 1982, Series A No. 53, p. 14, para. 30).

95. As regards the subjective requirement, the Commission finds that no evidence has been adduced which could raise any doubts on this point. In this context the Commission also recalls that the personal impartiality of a judge must be presumed until the contrary is established (Eur. Court H.R., Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A No. 43, p. 25, para. 58).

96. As regards the objective requirement, it is recalled that the Commission and the Court have previously had the opportunity to examine cases where the composition of a court was such that it could be considered to affect its impartiality.

97. In finding a violation of Article 6 para. 1 in the case of Piersack v. Belgium (mentioned above) the Court considered that if "an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality" (p. 15, para. 30(d)). The impartiality of the tribunal which had to determine the merits of the charge was in such circumstances capable of appearing open to doubt.

98. In the case of De Cubber v. Belgium (Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A No. 86) the Court also found a violation of Article 6 para. 1 of the Convention. It was noted that the Belgian investigating judge was independent, did not have the status of a party to criminal proceedings, should assemble evidence in favour of as well as against the accused, was not empowered to commit for trial and, in his report to the chambre du conseil, expressed no opinion on the accused's guilt.

99. However, the investigating judge was placed under the supervision of the procureur général and, where the suspected offender had been caught in the act, could take any action which the procureur du Roi was empowered to take. He enjoyed very wide-ranging powers throughout an investigation which was inquisitorial in nature, secret and not conducted in the presence of both parties. He had the advantage over his colleagues on the trial court of having, well before the hearing, a particularly detailed knowledge of the files he had assembled. In these circumstances his presence on the bench provided grounds for some legitimate misgivings on the part of the accused.

100. In the Ben Yaacoub case (Ben Yaacoub v. Belgium, Comm. Report 7.5.85) the Commission found that the applicant's case was not heard by an impartial tribunal within the meaning of Article 6 of the Convention in that the same person had dealt with the case in question, first in the chambre du conseil and subsequently as a member of the trial court. The Commission noted that the chambre du conseil had a number of functions and that, in particular, it had to ensure that the investigation was complete and to commit the accused for trial, where there existed sufficient indications of guilt. Moreover, the chambre du conseil decided periodically on the detention on remand of the accused. The case has subsequently been referred to the European Court of Human Rights.

101. Turning to the facts of the present case, the Commission first recalls some basic features of the system operating in Denmark where a criminal case is investigated and brought before the court by the police and the prosecutor. Depending on the particular circumstances of the case the prosecutor may request the court to detain the

applicant on remand and the court may decide to do so when the requirements set out in Section 762 of the Administration of Justice Act are fulfilled. The period of detention is under constant judicial control in that it may never exceed four weeks without a new court decision. When, as in the present case, the trial lasts for more than four weeks the trial court also determines, at the request of the public prosecutor, whether it is necessary to keep the accused in detention during the trial. When deciding on the question of detention the court must be satisfied under Section 762 sub-section 1 that there is a justified reason to believe that the suspect has committed the offence and that there is specific reason to believe that the suspect, if at large, will abscond or commit new offences or impede the ongoing investigation. Under sub-section 2 of the same Section, detention may furthermore be imposed if the public interest so requires, and if there is a particularly strong suspicion indicating that the suspect has committed the offence. It is clear, therefore, that in considering the necessity of detention on remand the judge does not take any position on the applicant's guilt, the power to do so resting exclusively with the trial court.

102. In the present case the Commission recalls that the judge Claus Larsen, who presided over the applicant's trial before the City Court, had, on 15 different occasions before the trial started, taken decisions to prolong the applicant's detention on remand and that he had also, in some of these decisions, prolonged the applicant's solitary confinement. In the period preceding the trial he had taken a number of procedural decisions regarding the applicant's case, including two decisions to obtain evidence abroad (commissions rogatory) as well as decisions on seizure of property, his right to correspondence etc.

103. Moreover, during the trial judge Larsen took over 20 decisions to prolong the applicant's detention on remand, on four occasions together with two lay judges who participated in the trial. During the trial, judge Larsen took a number of other procedural decisions, including those requesting further evidence from abroad.

104. Before the appeal proceedings started in the High Court, one of the judges participating in those proceedings had participated in a decision on the applicant's solitary confinement, and after the case had been brought on appeal to the High Court, the judges who later decided on the appeal took a number of decisions to prolong the applicant's detention on remand.

105. The question which the Commission has to consider is therefore whether the fact that the judges in the City Court and the High Court, who decided on the applicant's guilt and on the punishment which was to be imposed on him, had previously on numerous occasions prolonged his detention on remand and taken various procedural decisions regarding his case, could be held to make the City Court and the High Court lack impartiality when deciding on his guilt and his punishment.

106. When looking at the present case against the background of the Court's and the Commission's previous case-law, the Commission first notes certain differences in respect of the institutional framework forming the background of the different cases. The Commission considers that if different functions are attributed to different organs by the rules of criminal procedure applicable in a given country, it may generally be assumed that the legislator, by separating the functions and attributing them to different persons, intended to protect the impartiality of the courts. Doubts as to impartiality may therefore arise where a judge has earlier fulfilled functions attributed to a different organ. On the other hand, a similar presumption does not arise where a judge exercised different functions all of which have been attributed to the court under the institutional framework of the legal system concerned.

107. From this point of view, the present case can be clearly distinguished from the Piersack and De Cubber cases. In those two cases there was an incompatibility of functions in the sense that a judge, who had to determine impartially whether an accused person was guilty, had previously exercised certain other functions in connection with the investigation or the prosecution of the offences concerned. Such was not the situation in the present case.

108. However, there are more similarities between the present case and the Ben Yaacoub case. In both cases the judges decided to detain the person concerned on remand and, in dealing with the case before the trial, acquired a certain knowledge of it before deciding on the question of guilt.

109. As regards the question of detention on remand, the Commission notes that under the Danish legal system the task of detaining a suspected criminal on remand has been entrusted to a court in order to ensure that a matter affecting a person's personal freedom is examined neutrally and impartially. In countries which, like Denmark, do not have the system of an investigating judge, the preliminary investigation is usually in the hands of the police or the public prosecutor, but certain decisions, for instance on detention on remand, must be taken by a court. The fact that judicial decisions are required on such matters is an important safeguard for the individual.

110. In countries where the court, and not an investigating judge, decides on questions of detention on remand, it may happen that a judge who takes such a decision is subsequently called upon to preside over, or participate in, the trial against the detained person. The decision to detain on remand and the decision to convict or acquit and to determine punishment are both of a judicial character. It is a well-known distinction to all judges, and it must also be clear to the general public, that whereas a reasonable suspicion is usually sufficient to detain on remand, much stronger evidence is required in order that the accused shall be found guilty. In fact, the Convention itself recognises this difference by distinguishing between detention after conviction by a court (Article 5 para. 1 (a)) and detention of a person on reasonable suspicion of having committed an offence (Article 5 para. 1 (c)).

111. As regards the fact that in the present case the judges who had taken decisions on the applicant's detention on remand and on various procedural matters must necessarily have acquired a certain knowledge of the case before the trial, the Commission considers that the mere fact of having knowledge about a case cannot be considered to make the court prejudiced in regard to the issue of the applicant's guilt. In many European systems it is normal for any trial court judge to acquire such knowledge by studying the case-file before the trial. Such a system cannot, in the Commission's opinion, in itself be considered to give a well founded reason for questioning the court's impartiality.

112. The main points on which the present case differs from the Ben Yaacoub case are that in the present case, unlike in the case of an investigating judge, the judges took no initiative of their own during the investigation, but they acted only at the request of the public prosecutor or of the applicant's counsel, e.g. on questions of detention or in order to resolve disagreements between them. Their decisions were normally taken in the presence of the applicant and in open court, except where they decided to exclude the public, and after both parties had been given the opportunity of presenting their views. The judges were independent of the prosecution and they did not have an investigating judge's task of eliciting and assembling the necessary information. Neither did they make any assessment of the result of the investigation and, unlike in the Ben Yaacoub case, they did not decide, on the basis of the strength of the evidence against the accused person, to commit him for trial.

113. Consequently, the Commission finds it established that the present case can be distinguished from the above-mentioned cases previously examined by the Court and the Commission. Moreover, the Commission notes that a similar practice is known from a number of other countries which are parties to the Convention.

114. For these reasons the Commission finds that lack of impartiality cannot reasonably be found in the mere fact that a judge who participates in a trial or in appeal proceedings regarding conviction and sentence has previously decided to detain the accused on remand, or taken various procedural decisions in his regard. In the present case, no other ground has been found, which could give reason to doubt the impartiality of the City Court or the High Court. The Commission is therefore of the opinion that the applicant was heard by impartial tribunals within the meaning of Article 6 para. 1 of the Convention.

Conclusion

115. The Commission concludes, by nine votes to seven, that there has been no violation of Article 6 para. 1 of the Convention.

Secretary to the Commission — Acting President of the Commission

(H. C. KRÜGER) — (G. SPERDUTI)

**OPINION DISSIDENTE DE M. VANDENBERGHE
A LAQUELLE SE RALLIENT MM. ERMACORA, TENEKIDES, KIERNAN,
GÖZÜBÜYÜK, WEITZEL ET BATLINER**

1. Je regrette de ne pouvoir me rallier à l'opinion de la majorité de la Commission dans la présente affaire. J'estime en effet que la notion d'impartialité, telle qu'elle a été développée par la Commission et par la Cour, et son application aux faits de la présente affaire devrait conduire plutôt à la conclusion que M. Hauschildt n'a pas été jugé par un "tribunal impartial", comme l'exige l'article 6 par. 1 de la Convention.

2. Je limiterai mon propos à l'impartialité de la juridiction de première instance ("City Court") car la cour d'appel ("High Court") ne s'est nullement prononcée sur la composition du siège du tribunal de première instance. Il n'est donc pas indispensable d'analyser la question de l'impartialité de la juridiction supérieure (v. mutatis mutandis, Cour Eur. D.H., arrêt De Cubber du 26 octobre 1984, par. 33).

A. Sur les traits essentiels de la notion de "tribunal impartial", au sens de l'article 6 par. 1 de la Convention

3. A cet égard, il y a lieu de se référer aux paragraphes 94 à 100 du rapport de la Commission. Il convient toutefois, à mon avis, de compléter ces références par d'autres considérations émises par la Cour, en particulier lorsqu'elle a été amenée à donner un contenu concret à ladite notion d'impartialité.

4. Ainsi, lorsqu'il s'agit du principe fondamental de l'impartialité du juge, la Cour a souligné qu'une interprétation restrictive de l'article 6 par. 1 de la Convention ne cadrait pas avec l'objet et le but de cette disposition eu égard à la place éminente qu'occupe dans une société démocratique, au sens de la Convention, le droit à un procès équitable (Cour Eur. D.H., arrêt Delcourt du 17 janvier 1970, par. 25 et arrêt De Cubber précité, par. 30).

5. Pour déterminer si une juridiction est ou non impartiale, il faut adopter une démarche objective et prendre en compte des considérations de caractère fonctionnel et organique (Cour Eur. D.H., arrêt De Cubber précité, par. 26).

6. A cet égard, même les apparences peuvent revêtir de l'importance et comme l'énonce l'adage anglais : "justice must not only be done, it must also be seen to be done"; ceci implique que doit se récuser tout juge dont on peut légitimement craindre un manque d'impartialité. Il y va de la confiance que les tribunaux d'une société démocratique se doivent d'inspirer aux justiciables, à commencer, au pénal, par les prévenus (Cour Eur. D.H., arrêt Piersack du 1 octobre 1982, par. 30 et arrêt De Cubber précité, par. 26 in fine). Il suffit dès lors que l'impartialité d'un tribunal puisse légitimement sembler au prévenu sujette à caution pour qu'un problème se pose sous l'angle de l'article 6 par. 1 (arrêt De Cubber précité, loc. cit.).

7. Par ailleurs, la notion de "tribunal impartial" ne doit pas être interprétée "in abstracto". La Cour ne saurait se limiter à des considérations d'ordre général en la matière. Une telle notion exige logiquement une interprétation prétorienne lui donnant une définition matérielle plutôt que formelle (v. par analogie Cour Eur. D.H., arrêt Le Compte, van Leuven et De Meyere, par. 45). En effet, la Cour a pour souci dominant, dans cette matière comme dans d'autres, de "regarder au-delà des apparences et d'analyser les réalités de la situation litigieuse" (v. Cour Eur. D.H., arrêt van Droogenbroeck du 24 juin 1982, par. 38 et arrêt Sporrong et Lönnroth du 23 septembre 1982, par. 63).

8. Le cadre jurisprudentiel de la notion de "tribunal impartial" ainsi préliminairement complété, je tâcherai à présent d'y insérer les faits de la cause avant de conclure.

B. Sur l'application de la notion de "tribunal impartial" à la présente affaire

9. Il me semble clair que cette affaire présente certaines similitudes avec l'affaire Piersack, mais surtout avec les affaires De Cubber et Ben Yaacoub (cette dernière encore pendante devant la Cour). Il est vrai que ces trois affaires concernaient le système juridique belge, lequel connaît deux phases de la procédure pénale, à savoir la phase d'instruction et la phase de jugement, à chacune correspondant une juridiction qui lui est spéciale et qui est indépendante de l'autre. En principe, la juridiction de jugement statue d'après une instruction orale, publique et contradictoire qui se fait devant elle.

10. Il est constant que l'organisation judiciaire danoise comme d'autres systèmes judiciaires de certains Etats parties à la Convention, ne connaît pas l'existence d'un juge d'instruction, ni logiquement la répartition de fonctions susindiquée. La majorité de la Commission n'a pas manqué de le noter, à juste titre (v. par. 106 du rapport). Au Danemark, l'instruction préparatoire est assurée par la police ou par le ministère public, mais les questions concernant la détention préventive ainsi qu'un certain nombre d'actes d'instruction doivent être décidés par une juridiction (v. par. 109 du rapport).

11. Toutefois, la question n'est pas là : la Convention n'astreint sûrement pas les Etats membres à créer un système doté d'un juge d'instruction. Ils sont libres de se doter d'une organisation judiciaire, avec ses particularités propres, pourvu que les justiciables jouissent pleinement des garanties fondamentales prévues dans la Convention, en particulier dans son article 6.

12. Il n'est donc pas pertinent dans ce contexte d'affirmer qu'en Belgique le problème de l'impartialité se posait dans les affaires susmentionnées, en particulier parce que le législateur prévoit que différentes fonctions doivent être exercées par des magistrats distincts (cf. par. 106 du rapport). Ainsi posée, la question s'enferme dans un certain formalisme. Ce qui est essentiel en l'occurrence est d'analyser le contenu matériel des actes accomplis avant le procès par M. Larsen, qui a présidé le tribunal qui a condamné le requérant, afin de déterminer si, aux yeux de ce dernier, l'impartialité dudit tribunal pouvait ou non légitimement paraître sujette à caution.

13. Or, à cet égard, il convient de mettre en exergue les éléments suivants du cas d'espèce :

- M. Hauschildt a été arrêté et détenu pour avoir été impliqué dans une affaire de fraude et de détournement de fonds d'une considérable complexité (le tribunal de première instance a tenu plus de 130 audiences et a condamné le requérant à sept ans d'emprisonnement).

- Avant l'audience de jugement, M. Larsen a décidé à quinze reprises de refuser la mise en liberté provisoire du requérant. En outre, à cinq occasions le même magistrat a prolongé l'isolement cellulaire du requérant et a pris d'autres mesures concernant la saisie de biens et de documents appartenant au requérant et sa correspondance.

- A partir du 5 septembre 1980 (le requérant fut condamné en première instance le 1er novembre 1982) le maintien en détention provisoire du requérant a été motivé notamment par le fait qu'il y avait des soupçons bien étayés que le requérant avait commis l'infraction en question ("particular confirmed suspicion"), au sens de l'article 762 par. 2 de la loi sur l'administration de la justice ("Administration of Justice Act") (v. rapport de la Commission par. 42).

- M. Larsen a présidé ensuite le tribunal de première instance qui, assisté par deux juges laïques, a condamné le requérant.

- Pendant le procès, le tribunal a encore refusé à vingt reprises la mise en liberté provisoire du requérant, en invoquant notamment la disposition susmentionnée de la loi sur l'administration de la justice.

14. Ces éléments suffisent amplement, à mon avis, pour que l'on puisse estimer que M. Hauschildt dut éprouver de l'inquiétude lorsqu'il a retrouvé, en tant que président du tribunal appelé à statuer sur le bien-fondé de l'accusation, le même magistrat qui avait accompli auparavant les actes énumérés ci-avant.

15. Cela d'autant plus que ce magistrat, à la différence de ses collègues (laïques), connaissait déjà de manière particulièrement approfondie le dossier, ainsi que la personnalité de l'accusé. Aussi conçoit-on qu'il puisse, aux yeux de l'intéressé, paraître occuper une situation lui permettant de jouer un rôle capital dans la juridiction de jugement, voire s'être formé par avance une opinion qui risque de peser lourd dans la balance au moment de la décision (v. mutatis mutandis, arrêt De Cubber précité, par. 30). Cette connaissance approfondie du dossier par M. Larsen ne saurait être confondue avec l'étude préalable d'un dossier pénal par un magistrat afin de préparer l'audience de jugement, comme semble croire la majorité de la Commission (cf. par. 111 du rapport de la Commission). En effet, dans la présente affaire, cette connaissance a été acquise par des décisions qu'il a été amené à prendre, en tant que juge, avant l'audience : il a considéré publiquement et à maintes reprises que les infractions reprochées étaient graves et qu'il y avait des soupçons particulièrement solides que le requérant les eût commises.

16. De ce fait, aux yeux du justiciable, il existait un risque trop important que M. Larsen fût empreint des éléments connus avant le procès et qu'au moment du jugement il ne disposât pas du recul nécessaire pour ne fonder sa conviction sur la culpabilité du requérant que sur les preuves apportées au cours des débats et contradictoirement discutées devant lui. Il n'est pas exclu enfin que ce risque s'aggravât avec le temps, vu le nombre de décisions judiciaires prises, rendant par là même de plus en plus théorique la présomption d'innocence dont le requérant devait pouvoir se prévaloir.

17. Il va sans dire en effet que, dans les affaires pénales, la sauvegarde des droits de la défense constitue un élément essentiel dans un Etat de Droit. Les droits de la défense doivent être exercés d'une manière effective (Cour Eur. D.H. arrêt Artico du 13.5.1980, par. 33) et cet exercice est par nature indissociablement lié au principe même de l'impartialité de la juridiction de jugement. Devant celle-ci, l'accusé est présumé innocent et doit disposer d'un certain "supplément d'âme" pour présenter sa défense. Si l'accusé se trouve, comme en l'espèce, devant un magistrat qui, avant l'audience de jugement a pris pendant des mois toute une série de décisions d'importance considérable pour la défense, celle-ci se heurte inévitablement à une "barrière psychologique" l'empêchant de présenter efficacement devant lui sa version des faits.

18. En conclusion, j'estime qu'au vu des circonstances propres de l'affaire, M. Hauschildt était en droit d'avoir des appréhensions légitimes sur la présence de M. Larsen comme président de la juridiction de première instance. L'impartialité de cette dernière pouvait dès lors paraître sujette à caution.