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Views of the Human Rights Committee under
the Optional Protocol to the International Covenant
on Civil and Political Rights*

- Eighty-first session -

Communication No. 943/2000

Submitted by: Guido Jacobs (not represented by counsel)

Alleged victim: The author

State party: Belgium

Date of communication: 15 March 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 July 2004

Having concluded its consideration of communication No. 943/2000 submitted to the Committee by Guido Jacobs under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the optional protocol

1. The author is Mr. Guido Jacobs, a Belgian citizen, born on 21 October 1948 at Maaseik (Belgium). He claims to be a victim of violations by Belgium of articles 2, 3, 14, paragraph 1, 19, paragraph 1, 25 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

(The Covenant entered into force for Belgium on 21 July 1983 and the Optional Protocol to the Covenant on 17 August 1994.)

The facts as submitted by the author

2.1 On 2 February 1999 the *Moniteur belge* published the Act of 22 December 1998 amending certain provisions of part two of the Judicial Code concerning the High Council of Justice, the nomination and appointment of magistrates and the introduction of an evaluation system.

2.2 As amended, article 259 bis-1, paragraph 1, of the Judicial Code provides that the High Council of Justice (**1**) shall comprise 44 members of Belgian nationality, divided into one 22-member Dutch-speaking college and one 22-member French-speaking college. Each college comprises 11 justices and 11 non-justices.

2.3 Article 259 bis-1, paragraph 3, stipulates:

"The group of non-justices in each college shall have no fewer than four members of each sex and shall be composed of no fewer than:

1. Four lawyers with at least 10 years' professional experience at the bar;
2. Three teachers from universities or colleges in the Flemish or French communities with at least 10 years' professional experience relevant to the High Council's work;
3. Four members holding at least a diploma from a college in the Flemish or French community and with at least 10 years' professional experience in legal, economic, administrative, social or scientific affairs relevant to the High Council's work [...]."

2.4 Article 259 bis-2, paragraph 2, also stipulates:

"Non-justices shall be appointed by the Senate by a two-thirds majority of those voting. Without prejudice to the right to submit individual applications, candidates may be put forward by each of the bar associations and each of the universities and colleges in the French community and the Flemish community. In each college, at least five members shall be appointed from among the candidates proposed."

2.5 Lastly, in accordance with paragraph 4 of the same article, "a list of alternate members of the High Council shall be drawn up for the duration of the term [...]. For non-justices this list shall be drawn up by the Senate [...] and shall comprise the candidates who are not appointed."

2.6 Article 259 bis-2, paragraph 5, stipulates that nominations should be sent to the Chairman of the Senate, by registered letter posted within a strict deadline of three months following the call for candidates.

2.7 On 25 June 1999, the Senate published in the *Moniteur belge* a call for candidates for a

non-justice seat on the High Council of Justice.

2.8 On 16 September 1999, Mr. G. Jacobs, first legal assistant in the Council of State, submitted his application within the legal three-month period.

2.9 On 14 October 1999, the Senate published a second call.

2.10 On 29 December 1999, the Senate elected the members of the High Council of Justice. The author was not elected but was included in the list of alternates for non-justices as provided in article 295 bis-2, paragraph 4.

The complaint

3.1 The author alleges violations of the rule of law, namely the Act of 22 December 1998, and of the Senate's application of that rule.

3.2 With regard to the rule of law, the author considers that article 259 bis-1, paragraph 3, violates articles 2, 3, 25 and 26 of the Covenant on the following grounds.

3.3 The author claims that the introduction of a gender requirement, namely that four non-justice seats in each college be reserved for women and four for men, makes it impossible to carry out the required comparison of the qualifications of candidates for the High Council of Justice. In his view, such a condition means that candidates with better qualifications may be rejected in favour of others whose only merit is that they meet the gender requirement. The author claims that, in his case, the gender requirement works against male candidates but it could in the future be disadvantageous to women, and that this is discriminatory.

3.4 The author also maintains that it is strictly forbidden to apply a gender requirement to appointments by third parties (employers) under the Act of 7 May 1999 on the equal treatment of men and women with regard to working conditions, access to employment and promotion opportunities, access to an independent profession and supplementary social security schemes. The author maintains that the High Council of Justice comes under this Act, and that the application of the gender requirement in this regard is thus discriminatory.

3.5 In the author's view, on the basis of an analysis by the legal department of the Council of State, **(2)** application of the gender requirement to the entire group of non-justices could equally lead to discrimination among the candidates in the three categories within that group.

3.6 As to the application of the rule of law, the author considers that the Flemish non-justices were appointed without regard for established procedure, with no interviews or any attempt at profiling the candidates, and without comparing their qualifications, in violation of articles 2, 19 and 25 of the Covenant.

3.7 The author claims that the key criterion for these appointments was membership of a political party, that is, nepotism: non-justice seats were allocated to the sister of a senator, a senator's assistant and a minister's personal assistant. The candidates' required records of 10 or more years of professional experience relevant to the High Council's work were neither considered nor compared. He adds that one senator resigned in protest against political nepotism and informed the press of his views, and that a candidate sent a letter to the senators demonstrating that his qualifications were superior to those of the successful candidates.

3.8 The author contends that the application of the gender requirement also led to a violation of the principle of equality inasmuch as the appointment of men only, in the category of university professors, created inequality among the various categories of the non-justice group.

3.9 The author claims that the effect of a second call for candidates for one of the non-justice seats was to accept candidatures after the closing date for applications following the first call,

which is illegal and discriminatory.

3.10 The author also argues that the appointment of non-justice alternates in alphabetical order is against the law, demonstrates that qualifications are not compared and results in discrimination between the appointed candidates and the alternates.

3.11 Lastly, the author states that there is no appeal procedure for contesting the above-mentioned violations for the following reasons.

3.12 He considers that article 14 of the coordinated laws on the Council of State does not allow any appeal to the Council of State concerning appointments. He also concludes that it is not possible to request the Court of Arbitration (**3**) for a preliminary ruling on article 259 bis-1 of the Act of 22 December 1998.

3.13 In the author's view, the jurisdiction of the Council of State when trying cases of abuse of power derives from article 14, paragraph 1, of the above-mentioned laws, which stipulates that the administrative section hands down decisions on applications for annulment filed on grounds of breach of forms of action, either appropriate or prescribed on pain of avoidance, overstepping or wrongful use of authority, against acts or regulations of the various administrative authorities or administrative rulings in disputes.

3.14 The author states that decisions by the legislature fall outside the competence of the Council of State and that, until 1999, the same applied in principle to all acts, even administrative acts, of a body of any of the legislative assemblies. In this connection, he cites Council of State ruling No. 69/321 of 31 October 1997, which dismissed, on the grounds that the Council was not competent to rule on the legality of the act in question, an application for annulment brought by Mr. Meester de Betzen-Broeck against a decision by the Council of the Brussels-Capital Region not to include him in the recruitment reserve for a job as an accountant because he had failed the Regional Council's language test. He also refers to Court of Arbitration ruling No. 31/96 of 15 May 1996, issued in response to the Council of State's request for a preliminary ruling in the same proceedings (Council of the Brussels-Capital Region) on article 14, paragraph 1, of the coordinated laws on the Council of State. The plaintiff in that ruling claimed that article 14 violated the principle of equality in that it did not allow the Council of State to hear appeals against purely administrative decisions by legislative assemblies concerning civil servants. The Court of Arbitration ruled that the absence of a right of appeal against administrative decisions by a legislative assembly or its bodies, whereas such an action could be brought against the administrative decisions of an administrative authority, violated the constitutional principles of equality and non-discrimination. The Court further considered that the discrimination did not stem from article 14 but was rather the result of a gap in the legislation, namely the failure to institute a right of appeal against administrative decisions by legislative assemblies and their bodies.

3.15 Lastly, and as a subsidiary claim, the author cites this failure to institute a remedy against the Senate's appointment of non-justice members of the High Court of Justice as a violation of articles 2 and 14 of the Covenant, inasmuch as such a remedy can be sought against administrative decisions by an administrative authority.

3.16 The author adds that he has not been able to appeal against the provision in question, namely, article 295 bis-1, paragraph 3, directly to the Court of Arbitration, since the required legitimate interest was lacking during the six-month period allowed for appeal. In his view, the interest condition was met only when his application was submitted and validated, in other words, outside the six-month limit. The author also emphasizes that he could not have known that the provision in question would necessarily give rise to an illegal appointment.

3.17 The author considers that he has met the condition of having exhausted domestic legal remedies and states that the matter has not been submitted to another procedure of international investigation or settlement.

The State party's observations on the admissibility of the communication

4.1 In its observations of 12 March 2001 and 23 August 2002, the State party disputes the admissibility of the communication.

4.2 As regards the rule of law, the State party maintains that the Special Act on the Court of Arbitration of 6 January 1989 did permit the author to appeal against the relevant part of the Act of 22 December 1998.

4.3 The State party says that the Court of Arbitration rules, inter alia, on applications for annulment of an act or part thereof on grounds of a violation of articles 6 and 6 bis of the Constitution. These articles - now articles 10 and 11 - of the Constitution enshrine the principles of equality and non-discrimination and are general in their scope. Article 11 prohibits all discrimination, whatever its origin. The State party stresses that the principle of non-discrimination contained in the Constitution applies to all the rights and freedoms granted to Belgians, including those flowing from international treaties to which Belgium has acceded. **(4)**

4.4 The State party specifies that article 2, 2° of the Court of Arbitration Act provides that appeals may be lodged by any physical person or legal entity with a proven interest. In the State party's view, the Court of Arbitration gives "interest" a wide interpretation, that is, from the moment when an individual may be affected, directly and adversely, by the rule disputed. Article 3, paragraph 1, of the Act also stipulates that applications to overturn an act must be lodged within six months of its publication.

4.5 The State party recalls that article 295 bis-1, paragraph 3, of the Judicial Code was published in the *Moniteur belge* on 2 February 1999, which means that the time limit for an appeal to the Court of Arbitration expired on 2 August 1999. The call for non-justice candidates for the High Council of Justice was published on 25 June 1999. Following this call, which repeated the provision in question, the author submitted his application to the Senate. In the State party's view, it should be noted that when the call for candidates was published, Mr. G. Jacobs was within the legal time limit for requesting the Court of Arbitration to overturn the provision in question. The State party considers that the author met the necessary conditions and had the necessary interest for lodging such an appeal.

4.6 As regards the application of the rule of law, the State party points out that the author had the possibility of lodging an appeal with the courts and tribunals of the Belgian judiciary.

4.7 The State party contends that a court is expected to hear subjective disputes, the status of which is governed by articles 144 and 145 of the Constitution. Article 144 attributes exclusive jurisdiction to the court in disputes concerning civil rights while article 145 confers on the court provisional powers, which the law may override, in disputes concerning political rights. In the State party's view, legislative bodies therefore remain subject to supervision by the courts and tribunals insofar as their decisions concern civil or political rights.

4.8 The State party considers that the author does not show that he would be unable to challenge the legality of the Senate's decision in the courts and tribunals of the judiciary in the context of a dispute relating to civil or political rights. In the State party's view, the provision in dispute does not therefore have the effect of depriving the author of all legal remedies since Mr. G. Jacobs can assert his rights as regards the Senate's appointment of members of the High Council of Justice in the ordinary courts.

4.9 As regards the subsidiary claim of violation of the principles of equality and non-discrimination due to the failure to institute a remedy against the Senate's decision to appoint non-justice members to the High Council of Justice whereas such action could be introduced against the administrative decisions by an administrative authority, the State party maintains that the author cannot legitimately invoke Court of Arbitration ruling No. 31/96 of 15 May 1996, insofar as it was pursuant to this ruling that the coordinated laws on the Council of State were

amended. Article 14, paragraph 1, provides: "The section hands down decisions on applications for annulment filed on grounds of breach of forms of action, either appropriate or prescribed on pain of avoidance, overstepping or wrongful use of authority, against acts or regulations of the various administrative authorities, or against administrative decisions by legislative assemblies or their organs, including the mediators instituted within such assemblies, the Court of Accounts and the Court of Arbitration, and the organs of the judiciary and the High Council of Justice, concerning public contracts and the members of their personnel."

4.10 The State party explains that in the case in question the appointment of members of the High Council of Justice cannot be considered a purely administrative act by the Senate but is to a large extent an act forming part of the exercise of its legislative powers. It stresses that the establishment of the High Council of Justice is of great importance in society and cannot be compared with the recruitment of personnel by the legislature. Reference should be made here to the constitutional principle of the separation of powers. In the State party's view, this implies that an authority subordinate to one branch of government cannot substitute its judgement for that of an authority stemming from another branch exercising its discretion, such as the legislature's discretionary power in the appointment of members of the High Council of Justice. Referring to Court of Arbitration ruling No. 20/2000 of 23 February 2000 and ruling No. 63/2002 of 28 March 2002, the State party explains that, based on the principle of the separation of powers, it may be maintained that the appointment of members of the High Council of Justice is not subject to appeal since the legislature, which includes the Senate, is independent. The State party therefore considers that the lack of an appeal to the Council of State to challenge the appointment of the members of the High Council of Justice is in no way a violation of the principles of equality and non-discrimination since such appointment may be compared to a legislative decision.

The author's comments on the State party's observations concerning admissibility

5.1 In his comments of 14 July 2001 and 13 October 2002 the author maintains and develops his arguments.

5.2 As to the rule of law, the author disputes the State party's argument on the possibility of application to the Court of Arbitration for annulment. He asserts that an appeal could not be lodged until the applications for appointment had been accepted or at least submitted, since before this any appeal would have constituted an *actio popularis*. Mr. Jacobs' application was submitted on 16 September 1999 and accepted on 21 September 1999, that is, after the six-month legal time limit for appeal set out in the Act of 2 February 1999. The author concludes that he therefore did not meet the condition of direct, personal and definite interest for filing an appeal within the required period.

5.3 Concerning the application of the rule of law, the author begins by considering that the lack of an appeal to the Council of State in his case is confirmed by the State party's observations and therefore constitutes a violation of articles 2 and 14 of the Covenant. Contrary to the State party, the author considers, as does the Court of Arbitration in its ruling No. 31/96, that the separation of powers cannot be interpreted as implying that the Council of State has no jurisdiction when a legislative body is party to the dispute to be decided, and that appointments by the Senate cannot be regarded as legislative decisions. With reference to the rulings of the Court of Arbitration cited by the State party (No. 20/2000 and No. 63/2002), the author points out that at the time this was a matter of internal organization among members of Parliament or justices, while he contends that in the case in question it is a matter of appointments to a *sui generis* entity at the intersection of the separate branches of government and not part of the legislature as such; this means that the lack of any appeal against the appointment of its members violates the principle of equality.

5.4 The author adds that the State party's argument comparing "the importance in society" of members of the High Council and personnel in the legislature is of no relevance whatsoever. He considers that the reference to discrimination concerns not these two groups but rather decisions emanating from a legislative assembly (in this case the appointment of members of

the High Council of Justice) and from an administrative authority (the appointment of justices), and that it is also unclear how "importance in society" might justify the lack of any appeal, particularly as such a check on lawfulness in no sense means that the court which rules on the appeal may substitute its judgement for that of another authority exercising discretionary power.

5.5 As regards the State party's argument as to the appeal the author might lodge with the courts and tribunals of the judiciary, first, concerning the question of access to Belgian courts, the author considers that the State party cannot simply confine itself to a general reference to the Constitution without precise indications as to the specific legal basis required to bring an action and as to the competent court. The State party also, he says, omits any reference to relevant applicable case law. As to the case law of the European Court of Human Rights, **(5)** the author maintains that when citing local remedies the defendant State must prove that its legal system offers opportunities for efficient and appropriate remedies, something the State party does not do adequately in the current case.

5.6 The author claims that the lack of an appropriate appeal mechanism means that the courts cannot put an end to the violation. In the case in question, the courts cannot annul the disputed decision. Furthermore, for cases in which Parliament has some degree of discretion, the court cannot order compensation in kind (lack of a positive injunction). Believing that the State party probably refers to the possibility of bringing the matter before the court of first instance pursuant to article 1382 of the Civil Code, and asserts that this would not be an effective action. Supposing that a claim for damages could be considered an appropriate appeal mechanism, it is, in the author's view, an impossible action to bring in practice. Citing various legal analyses concerning Belgium, the author concludes that the legislature and the judiciary cannot be held legally responsible.

The State party's observations on the merits of the communication

6.1 In its observations of 12 March 2001 and 23 August 2002, the State party asserts that the communication is without grounds.

6.2 As regards the rule of law, the State party explains that the objective being pursued is to ensure an adequate number of elected candidates of each sex. It adds that the presence of women on the High Council of Justice corresponds to the wish of Parliament to encourage equal access by men and women to public office in accordance with article 11 bis of the Constitution.

6.3 Recalling the debate on this issue during the travaux préparatoires for the Act of 22 December 1998, the State party stresses that legislators felt there should be no fewer than four men and four women among the 11 justices and the 11 non-justices, in order to avoid any underrepresentation of either sex in either group. In the State party's view, the report on this proposal further underlines that, since the High Council of Justice also serves as an advisory body, each college must be composed of members of both sexes. Parliament thus wished to apply the principles set out in the Act of 20 July 1990 to encourage balanced representation of men and women on advisory bodies. The State party considers that it follows from this that the provision in question, namely, article 295 bis-1, paragraph 3, has a legitimate objective.

6.4 The State party further maintains that the provision for 4 out of the 11 candidates - or just over one third - to be of a different sex does not result in a disproportionate restriction on candidates' right of access to the civil service. This rule is intended to ensure balanced representation of the two sexes and, in the State party's view, is both the only means of attaining the legitimate goal and also the least restrictive.

6.5 The State party accordingly considers that these provisions to ensure effective equality do not depart from the principles which prohibit discrimination on grounds of sex.

6.6 As regards the allegation of discrimination among persons appointed by the legislative

authorities and by third parties, the State party refers to the Act of 20 July 1990 to encourage balanced representation of men and women on bodies with advisory capacity. It says that this Act imposes some degree of gender balance and is applicable whenever a body - for example, the High Council of Justice - has advisory capacity. The State party therefore considers that there is no discrimination since the gender balance rule applies to all consultative bodies.

6.7 As to the author's reference to employers in support of the allegation of discrimination against him, the State party asserts that the aforementioned Act of 7 May 1999 is not applicable in this case, and refers to article 3, paragraph 1, of the Act which describes workers in the following terms: "Persons who perform work under a contract of employment and persons who perform work under the authority of a third party other than under a contract of employment, including apprentices." In the State party's view, the author's reasoning falls short in legal terms since he compares situations which are not comparable: the members of the High Council of Justice cannot be described as "workers" within the meaning of the aforementioned Act, since they do not perform work.

6.8 As to the allegation of discrimination by subgroup, the State party, referring to the travaux préparatoires for the Act of 22 December 1998, **(6)** points out that the legislature did indeed take account of the observations of the Council of State to which the author refers. It stresses that the Government has submitted an amendment to an amendment to modify paragraph 3 of article 295 bis-1 by adding that the group of non-justices should include at least four members of each sex in each college.

6.9 In the State party's view, then, the Act has redressed the balance between the aim of the measure, namely to promote equality between men and women where it might not currently exist, and one of the principal aims of the law, namely to establish a High Council of Justice made up of individuals objectively selected for their competence. The State party explains, on the one hand, that the group of non-justices, the counterpart to the group of justices, is a distinct group whose members must all have 10 years' experience; and on the other, that within the groups of justices and non-justices, the rules relating to the sex of candidates are reasonable and justified by the legitimate ends sought by those rules.

6.10 With regard to the application of the rule of law and the complaint that the non-justices were appointed on the basis of their membership of a political party, the State party explains that the High Council of Justice was created, and the mandate system introduced, by the amendment of article 151 of the Constitution. That article sets forth the basic principles regarding the independence of the judiciary, the composition and terms of reference of the High Council of Justice, the procedures for appointing and designating magistrates, and the mandate and evaluation systems.

6.11 The State party argues that, although the High Council of Justice is regulated by article 151 of the Constitution, its composition (justices and non-justices) and its terms of reference (it has no judicial powers) preclude its being considered as a body representing the judiciary. The Council is in effect a *sui generis* body and does not form part of any of the three branches of government. According to the State party, it is an intermediary body linking the judiciary (whose independence it is bound to respect), the executive and the legislature.

6.12 The State party explains that the presence of non-justices helps the justices to avoid too narrow an approach to their work on the Council, and makes an essential contribution in terms of the perspective and experience of those exposed to the strictures of the law. The State party maintains, however, that this does not entail appointing individuals who are incapable of assisting the High Council in the performance of its tasks.

6.13 The State party further claims that, for the appointment of non-justices, there was every reason to establish a system that aimed, on the one hand, to prevent intervention by political bodies and thus further "politicization" and, on the other, to compensate for the inevitably somewhat undemocratic nature of the choice of candidates put forward by each of the occupational groups concerned.

6.14 According to the State party, it was for this reason that Parliament opted in the Constitution for a mixed system in which all non-justices are appointed by the Senate on a two-thirds majority of votes cast, but 5 of the 11 vacant places in each college must be filled with candidates put forward by the bar associations, colleges and universities. The system allows each of these institutions to put forward one or more candidates who meet the legal requirements (not necessarily belonging to the same occupational groups as the submitting group) and are considered suitable for office.

6.15 In the State party's opinion, the purpose and the effect of creating the High Council of Justice was to depoliticize judicial appointments. Candidates must be elected by the Senate, by a two-thirds majority of those voting, i.e., a relative majority, which ensures depoliticization of the system.

6.16 The State party also describes in detail the procedure applied in appointing the non-justices in the case under consideration.

6.17 In all, there were 106 non-justice candidates, 57 French speakers and 49 Dutch speakers; their curricula vitae and files were available for consultation by senators at the Senate registry. Given the large number of candidates, it was decided, for practical reasons, not to conduct interviews. Allowing 15 to 30 minutes per person, interviewing 106 candidates would have taken a minimum of 26½ to 53 hours. The constraints of the parliamentary timetable made it impossible to devote that amount of time to interviews. It would have meant either setting aside several successive days or staggering the interviews over a period of weeks. In any case, it would not have been possible to conduct interviews in similar conditions for all candidates, since the same senators would probably not have been able to attend every one. Thus, according to the State party, a document-based procedure provided the best means of observing the principle of non-discrimination. The State party also emphasizes that the Senate has no constitutional, legal or regulatory obligation to conduct interviews.

6.18 The State party recalls that the appointment of non-justices must take into account five different criteria (each college must comprise at least four lawyers, three teachers from a college or university in the French or Flemish Community, four members who hold at least one qualification from a college in the French or Flemish Community, four members of each sex and five members put forward by universities, colleges and/or bar associations); it explains that, because of the number of criteria and the overlap between them, the Senate bodies decided to draw up a list of recommended candidates. Any other procedure, it seems, would have been unworkable, or even have discriminated against certain candidates. Taking a vote on each individual, for example, would have meant organizing at least 22 separate ballots. If in one such ballot no candidate obtained a two-thirds majority, as might well be expected, a second round of voting would have to be organized, thereby increasing the total number of ballots. At the same time, it would have been necessary to ensure, from ballot to ballot, that all the membership requirements for each college had been met: if, after eight members of, say, the French-speaking college had been appointed, the Senate had found it had appointed only one lawyer candidate, only the remaining lawyer candidates would still have been eligible. At some point, then, it might have become possible only to vote for certain candidates. The same problem would have arisen had the voting been based on categories. The State party points out that the use of the recommended list method in nomination and appointment procedures is established practice in the Senate and the Chamber of Representatives.

6.19 In order to draw up the list of recommended candidates, the officers of the Senate met on 17 December 1999, French speakers and Dutch speakers separately. It was decided to allow one member of each political group to attend the meeting. This made it possible for all groups, including the only one not represented among the Senate officers, to take an active part in the consideration of the candidates. The officers received all candidates' curricula vitae in advance of the meeting, and the candidates' files were available for consultation at the Senate registry once applications had closed. The representatives of the political groups examined the curricula vitae of all candidates during the meetings held to draw up the list, and all the candidates' files and curricula vitae were therefore available throughout each meeting. The procedure adopted to draw up the recommended list for the Dutch-speaking college, for example, was described in

detail at the Senate plenary of 23 December 1999. As explained at the time, the first Vice-President of the Senate went through all the applications one by one and, when each participant had given an opinion, 16 candidates were selected. The list of 16 candidates was then considered in relation to the five above-mentioned criteria and 13 candidates were retained (for 11 seats). Finally, after a lengthy discussion, the names of 11 candidates were chosen for the list.

6.20 In actually appointing the non-justices at the plenary of 23 December 1999, senators had the option, in a secret ballot, of either approving the recommended list or, if the list did not meet with their agreement, selecting candidates themselves. They were therefore given a two-part ballot paper, with (a) the recommended list of 11 French-speaking candidates and 11 Dutch-speaking candidates and with a single box to be marked; and (b) a list of all the candidates' names, divided into three categories, "qualification-holders", "lawyers" and "teachers", with a box beside each name. The ballot paper also included the legal provisions stipulating the criteria for membership of the Council. Those members who supported the recommended list were required to mark the box above that list. Those who did not wish to approve the recommended list were required to cast 22 votes for their preferences, with a maximum of 11 for French-speaking candidates and 11 for Dutch-speaking candidates.

6.21 The result of the secret ballot was as follows:

Votes cast: 59

Blank or spoiled ballots: 2

Valid votes: 57

Two-thirds majority: 38

The recommended list obtained 54 votes.

6.22 Thus, according to the State party, it can be seen that a thorough examination of the candidates' curricula vitae and a comparison of their qualifications took place before either the recommended list was drawn up or the Senate plenary made the appointments. Furthermore, the State party considers that the author's complaints about politicization and nepotism are based on statements in the press and are unsupported by any evidence.

6.23 With regard to the complaint of discrimination between the subgroups, the State party refers to its arguments on the rule of law, presented above.

6.24 As to the complaint of discrimination between candidates in connection with the Senate's second call for applications, the State party explains that the second call was issued because the first call had produced insufficient applications: for the Dutch-speaking college there had been two applications from female candidates, yet, under article 295 bis-1, paragraph 3, of the Judicial Code, the group of non-justices in the High Council must comprise at least four members of each sex, per college, and that requirement must be met at the time the Council is constituted. The State party explains that the law, the case law of the Council of State, and parliamentary practice all permitted the Senate to issue a second call for applications, and that the second call was addressed to all who wished to apply, including those who had already responded to the first call (thus allowing the author to resubmit his application). Furthermore, according to the State party, applications sent in response to the first call remained valid, as was explicitly stated in the second call. The State party concludes that there was no discrimination and emphasizes that, without a second call for applications from non-justices, it would not have been possible to form a High Council of Justice in accordance with the Constitution.

6.25 In response to the complaint of discrimination on the grounds that the non-justice alternates had been ranked in alphabetical order, unlike the justices, the State party points out

that the law on the one hand explicitly stipulates that the justices shall be ranked by number of votes obtained, and on the other leaves the Senate free to rank the non-justices as it pleases. (7) However, according to the State party, an alphabetical listing of the candidates does not imply an alphabetical order of succession. The State party explains that the order of succession in fact depends on which seat falls vacant, i.e. which subgroup the outgoing non-justice belongs to. When a seat falls vacant, the Senate must appoint a new member, and in order to do so it must first determine the profile of the successor, i.e. determine what conditions the new member must fulfil if the composition of the Council is to continue to comply with the law. In the first place, then, it must establish which candidates are eligible, and that will depend on the qualifications of both the retiring or deceased member and the remaining members. All candidates whose appointment would be consistent with the equitable arrangements required by law will be eligible for appointment. It is therefore quite incorrect to claim that the successors would have been appointed in alphabetical order, in violation of the principle of equality.

Comments by the author on the State party's observations concerning the merits of the communication

7.1 In his comments of 14 July 2001, 15 February 2002 and 13 October 2002, the author stands by his complaints against the State party.

7.2 Referring to the *Kalanke* judgement (European Court judgement C-450/93,

of 17 October 1995), which found that there is discrimination where persons with equal qualifications are automatically given priority on grounds of sex in sectors where they are underrepresented, the author repeats that, in this case, the principle of appointment on a quota basis, i.e. without comparing applicants' qualifications, is a violation of the principle of equality. The author adds that, while female applicants might be given priority where applicants of different sexes had equal qualifications (although that in itself might be questionable), that would nevertheless be possible only provided the rules guaranteed that, in every individual case where a male/female applicant had equivalent qualifications to a female/male applicant, an objective evaluation of the applications would be made, examining all the requirements to be met by the individual applicant, and that, where one or more of the qualifications tipped the balance in favour of the female or male applicant, any priority given to men or women would be waived. In the author's view, fixed quotas - and, even more, floating quotas - prevent this from happening. The author also contends that the State party's argument that, in this case, the only way to ensure balanced representation of the two sexes is to introduce quotas, is baseless and unacceptable. The author maintains that there are other steps Parliament could take, namely the elimination of social barriers, to facilitate access to such positions by particular groups. He adds that there is no inequality between men and women in the case under consideration, since too few applications were submitted by the group of women (applications from only two Dutch-speaking women following the first call), which, in the author's view, means that the purpose of the exercise is illegitimate. The author also points out that the State party's reference to article 11 bis of the Constitution is irrelevant insofar as that article was added on 21 February 2002, and thus did not exist at the time the disputed rule was established.

7.3 As to the complaint of discrimination between individuals appointed by the legislature and those nominated by third parties, the author contests the State party's invocation of the Act of 20 July 1990, on the promotion of balance between men and women in advisory bodies, insofar as, in his view, the High Council of Justice is more than simply an advisory body. The author claims it is the Act of 7 May 1999 on equal treatment of men and women - which prohibits gender requirements - that is applicable in this case. He considers that it is applicable to the Senate's call for applications on the one hand, since it covers public-sector employers in particular, and to the members of the High Council of Justice on the other hand, since, in his view, and contrary to the State party's contention, they do perform work. He does nevertheless acknowledge that that work is not performed "under the authority of another person", as the law in question requires.

7.4 Concerning the complaint of discrimination against a subgroup, the author recalls that, following the advice of the Council of State, Parliament had indeed made a distinction between the group of justices and the group of non-justices. He maintains, however, that in setting quotas for the non-justices, Parliament repeated the very error the Council of State had warned against. As a result, the author believes, there is an imbalance that cannot be rationally justified between, on the one hand, the degree of institutionalized discrimination among candidates for high public office and, on the other, the promotion of equality between men and women (which is supposedly lacking) and one of the principal aims of the Act, which is to create a High Court of Justice composed of individuals selected for their abilities.

7.5 In respect of the application of the rule of law, the author claims that non-justice members were appointed on political grounds and that there was no comparison of the candidates' qualifications, again because of the establishment of quotas favouring women.

7.6 The author repeats that the second call for candidates was illegal (the three-month time limit for submission of applications being a strict deadline) and asserts that it allowed candidates to be appointed by virtue of their sex, thanks to the quota, and through nepotism. In the author's view, the High Council of Justice could have been constituted without a second call, insofar as article 151 of the Constitution, which establishes the Council, does not provide for quotas based on sex. As to the list of successors required by law, the author considers that such a list should govern the order of succession.

Issues and proceedings before the Committee relating to admissibility

8.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 With regard to the contested provision, namely, article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the State party's argument that the author could have appealed to the Court of Arbitration. After having also considered the author's arguments, the Committee is of the opinion that Mr. Jacobs is correct in maintaining that he was not in a position to lodge such an appeal since he was unable to meet the requirement of direct personal interest within the prescribed time limit of six months from publication of the Act, and he cannot be held responsible for the lack of a remedy (see paragraph 5.2).

8.4 The Committee further notes that the author was unable to submit an appeal to the Council of State, as indeed the State party confirms in arguing that the lack of a right of appeal was due to the principle of the separation of powers (see paragraph 4.10).

8.5 With regard to the application of the Act of 22 December 1998 and in particular article 295 bis-1, the Committee takes note of the author's claim that the remedies before certain other Belgian courts and tribunals mentioned by the State party did not constitute effective remedies in the present case. The Committee recalls that it is implicit in rule 91 of its rules of procedure and in article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant should submit to the Committee all information at its disposal, which, at the stage where the Committee must take a decision on the admissibility of a communication, means detailed information on the remedies available, in the particular circumstances of their case, to individuals claiming to be victims of violations of their rights. The Committee notes that the State party has referred only in general terms to the remedies available under Belgian law, and has failed to provide any information whatsoever on the remedy applicable in the present case, or to demonstrate that it would have been effective and available. In the light of these facts, the Committee considers that the author has met the conditions set forth in article 5, paragraph

2 (b) of the Optional Protocol.

8.6 With regard to the author's complaint of violations of article 19, paragraph 1, of the Covenant, the Committee considers that the facts presented are not sufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol, in respect of this part of the communication.

8.7 With regard to the complaint of a violation of article 14, paragraph 1, of the Covenant, the Committee considers that the case under consideration is not concerned with the determination of rights and obligations in a suit at law; it is inconsistent *ratione materiae* with the article invoked and thus inadmissible under article 3 of the Optional Protocol.

8.8 Lastly, the Committee finds that the communication is admissible inasmuch as it appears to raise issues under articles 2, 3, 25 (c) and 26 of the Covenant, and should be considered as to the merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Consideration on the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the written information communicated by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant, arising from article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the author's arguments challenging the gender requirement for access to a non-justice seat on the High Council of Justice on the grounds that it is discriminatory. The Committee also notes the State party's argument justifying such a requirement by reference to the law, the objective of the measure, and its effect in terms of the appointment of candidates and the constitution of the High Council of Justice.

9.3 The Committee recalls that, under article 25(c) of the Covenant, every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to have access, on general terms of equality, to public service in his or her country. In order to ensure access on general terms of equality, the criteria and processes for appointment must be objective and reasonable. State parties may take measures in order to ensure that the law guarantees to women the rights contained in article 25 on equal terms with men. **(8)** The Committee must therefore determine whether, in the case before it, the introduction of a gender requirement constitutes a violation of article 25 of the Covenant by virtue of its discriminatory nature, or of other provisions of the Covenant concerning discrimination, notably articles 2 and 3 of the Covenant, as invoked by the author, or whether such a requirement is objectively and reasonably justifiable. The question in this case is whether there is any valid justification for the distinction made between candidates on the grounds that they belong to a particular sex.

9.4 In the first place, the Committee notes that the gender requirement was introduced by Parliament under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies. **(9)** The aim in this case is to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there. **(10)** On this point, the Committee finds the author's assertion that the insufficient number of female applicants in response to the first call proves there is no inequality between men and women to be unpersuasive in the present case; such a situation may, on the contrary, reveal a need to encourage women to apply for public service on bodies such as the High Council of Justice, and the need for taking measures in this regard. In the present case, it appears to the Committee that a body such as the High Council of Justice could legitimately be perceived as requiring the incorporation of perspectives beyond one of juridical expertise only. Indeed, given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that

perspective to be included in a body involved in judicial appointments. Accordingly, the Committee cannot conclude that the requirement is not objective and reasonably justifiable.

9.5 Secondly, the Committee notes that the gender clause requires there to be at least four applicants of each sex among the 11 non-justices appointed, which is to say just over one third of the candidates selected. In the Committee's view, such a requirement does not in this case amount to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. Furthermore, and contrary to the author's contention, the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience. With regard to the author's argument that the gender requirement could give rise to discrimination between the three categories within the group of non-justices as a result, for example, of only men being appointed in one category, the Committee considers that in that event there would be three possibilities: either the female applicants were better qualified than the male, in which case they could justifiably be appointed; or the female and male applicants were equally well qualified, in which case the priority given to women would not be discriminatory in view of the aims of the law on the promotion of equality between men and women, as yet still lacking; or the female candidates were less well qualified than the male, in which case the Senate would be obliged to issue a second call for candidates in order to reconcile the two aims of the law, namely, qualifications and gender balance, neither of which may preclude the other. On that basis, there would appear to be no legal impediment to reopening applications. Lastly, the Committee finds that a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men and women in consultative bodies; the means applied and its modalities, as described above; and one of the principal aims of the law, which is to establish a High Council made up of qualified individuals. Consequently, the Committee finds that paragraph 3 of article 295 bis-1 of the Act of 22 December 1998 meets the requirements of objective and reasonable justification.

9.6 In the light of the foregoing, the Committee finds that article 295 bis-1, paragraph 3, does not violate the author's rights under the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

9.7 As regards the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant arising from the application of the Act of 22 December 1998, and in particular article 295 bis-1, paragraph 3, the Committee takes note of the author's arguments claiming, in the first place, that the appointment of the Dutch-speaking non-justices, the group to which Mr. Jacobs belonged, was conducted without regard to an established procedure, without interviews, profiling or comparison of qualifications, being based rather on nepotism and political affiliation. The Committee has also examined the State party's arguments, which explain in detail the procedure for appointing the non-justices. The Committee notes that the Senate established and put into effect a special appointments procedure, viz.: first, a list of recommended candidates was drawn up after consideration and comparison of all applications on the basis of the relevant files and curricula vitae; secondly, each senator was given the choice of voting, in a secret ballot, either for the recommended list, or for a list of all the candidates. The Committee finds that this appointments procedure was objective and reasonable for the reasons made clear in the State party's explanations: before the recommended list was drawn up and the Senate made the appointments, each candidate's curriculum vitae and files were examined and their qualifications compared; the choice of a procedure based on files and curricula vitae rather than on interviews was prompted by the number of applications and the constraints of the parliamentary timetable, and there was no legal provision specifying a particular method of evaluation, such as interviews (para. 6.17); the choice of the recommended list method had to do with the large number of criteria and the overlap between them, and was a practice already established in the Senate and Chamber of Representatives; lastly, it was possible for the senators to make the appointments using two methods of voting, which guaranteed them freedom of choice. Furthermore, the Committee finds that the author's complaints that the appointment of candidates was made on the basis of nepotism and political considerations have not been sufficiently substantiated.

9.8 With regard to the complaint of discrimination between categories within the group of non-

justices arising from the introduction of the gender requirement, the Committee finds that the author has not sufficiently substantiated this part of the communication and, in particular, has produced no evidence to show that any female candidates were appointed despite being less well qualified than male candidates.

9.9 With regard to the complaint of discrimination between applicants in connection with the Senate's second call for applications, and to the claim that the second call was illegal, the Committee notes that this call was issued because of the insufficient numbers of applications from women, i.e., two applications from women for the Dutch-speaking college - which the author concedes - whereas under article 295 bis-1, paragraph 3, each group of non-justices on the High Council of Justice must comprise at least four members of each sex. The Committee finds, therefore, that the second call was justified to allow the Council to be constituted and, furthermore, that there was no impediment to such action either in law or in parliamentary practice, particularly as the applications submitted in response to the first call remained valid.

9.10 As to the complaint of discrimination arising from the listing of non-justice alternates in alphabetical order, the Committee notes that article 295 bis-2, paragraph 4, of the Judicial Code gives the Senate the right to draw up the list of alternates but for them, unlike the justices, does not prescribe any particular method of ranking. Consequently it finds that, as shown by the State party's detailed argument, (a) the alphabetical order chosen by the Senate does not imply an order of succession; and (b) any succession in the event of a vacancy will require the appointments procedure to be conducted afresh. The author's complaints do not disclose a violation.

9.11 The Committee therefore finds that the application of the Act of 22 December 1998, and in particular of article 295 bis-1, paragraph 3, does not violate the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any article of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

*** The text of a concurring individual opinion signed by Committee member, Mrs. Ruth Wedgwood is appended to the present document.

APPENDIX

Individual opinion of Committee member, Mrs. Ruth Wedgwood (concurring)

The Committee has concluded that the norms of non-discriminatory access to public service and political office embodied in Article 25 of the Covenant do not preclude Belgium from requiring the inclusion of at least four members of each gender on its High Council of Justice. The Council

is a body of some significant powers, recommending candidates for appointment as judges and prosecutors, as well as issuing opinions and investigating complaints concerning the operation of the judicial branch. However, it is pertinent to note that the membership of the Council of Justice is highly structured by many other criteria as well, under the Belgium Judicial Code. The Council is comprised of two separate "colleges" for French-speaking and Dutch-speaking members. Within each college of 22 members, half are directly elected by sitting judges and prosecutors. The other "non-justice" members are chosen by the Belgium Senate, and the slate must include a minimum number of experienced lawyers, college or university teachers, and other professionals, with "no fewer than four members of each sex" included among the eleven members of these "non-justice" groups. This electoral rule may benefit men as well as women, although it was rather clearly intended to assure the participation of women on this "advisory" body. It is important to note that the constitution or laws of some States Parties to the Covenant may disdain or forbid any use of set-asides or minimum numbers for participation in governmental bodies, and nothing in the instant decision interferes with that national choice. The Committee only decides that Belgium is free to choose a different method in seeking to assure the fair participation of women as well as men in the processes of government.

[Signed] Ruth Wedgwood

Notes

1. Article 151 of the Constitution instituting the High Council of Justice provides in paragraph 2:

"One High Council of Justice exists for all of Belgium. In the exercise of its attributes the High Council of Justice shall respect the independence referred to in paragraph 1.

It shall consist of a French-speaking college and a Dutch-speaking college. Each college shall have an equal number of members and shall be composed equally of judges and officials of the public prosecutor's office directly elected by their peers under the conditions and according to the form determined by law, and of other members nominated by the Senate by a two-thirds majority of those voting, under the conditions established by law.

"Within each college there shall be a nomination and appointments committee and an advisory and investigative committee, on which representation shall be equally distributed as provided in the previous paragraph [...]."

Paragraph 3:

"The High Council of Justice shall exercise its authority in the following areas:

1. Presentation of candidates for appointment as judges [...] or members of the prosecutor's office;
2. Presentation of candidates for designation to the duties [...] of *chef de corps* in the public prosecutor's office;
3. Access to the position of judge or member of the public prosecutor's office;
4. Training of judges and members of the public prosecutor's office;
5. Establishment of general profiles for the designations referred to in 2;
6. Issuance of opinions and proposals concerning the general operation and organization of the judicial branch;

7. General supervision and promotion of the use of internal monitoring methods;
8. To the exclusion of all disciplinary and criminal tribunals:
 - acceptance and follow-up of complaints concerning the operation of the judicial branch;
 - initiation of inquiries into the operation of the judicial branch [...]."

2. The author does not provide reference to the document he cites for this purpose.

3. According to the Special Act of 6 January 1989, adopted pursuant to article 142 of the Constitution, the Court of Arbitration rules on:

1. The conflicts described in article 141;
2. The violation through a law, a decree or a rule as described in article 134, of articles 10 (principle of equality), 11 (principle of non discrimination) or 24;
3. The violation through a law, a decree or a rule as described in article 134, of articles of the Constitution determined by law. Cases may be brought before the Court by any authority designated by law, any person with a legitimate interest or, for a preliminary ruling, by any court.
4. Court of Arbitration, 23 May 1990, *R.W.* 1990-1991, 75.

5. *Bozano v. France* ruling of 18 December 1986, series A, nr. 111, p. 18.

6. The Council of State found that the initial text of the Act provided that each college of the High Council, which should be composed of 11 justices and 11 non-justices, should have no fewer than eight members of each sex. In appointing the 11 non-justices, the Senate was therefore required to ensure some degree of balance between men and women, the consequence of which might have been a gender imbalance among non-justices. The Council of State noted in this regard: "No reasonable justification seems possible for an imbalance (...)." The bill was adapted in response to these observations by the Council of State. During the travaux préparatoires, the following statement was made: "As regards the balance between men and women within the High Council, the Prime Minister stressed that in the first analysis it was important to respect the votes cast. In accordance with the present solution, it devolved on the Senate to ensure gender balance in the appointment of non-justices, and on that basis to ensure that the required quorum (no fewer than eight members of each sex) was attained.

This obligation of correction on the part of the Senate could be done away with [...]. [As regards the candidates for justice positions] the Prime Minister proposed that [...] each voter should cast three votes, at least one of which would be for a candidate for the seat and at least one for a candidate of the public prosecutor's office; he would prohibit voting for three candidates of the same sex.

A similar solution would ensure a sufficient number of elected candidates of each sex (between one and two thirds [for candidates for justice positions])" (Parl. Doc. 1997-98, 1677/8).

7. Article 295 bis-2, paragraph 4, of the Judicial Code.

8. General comment N°28, on article 3 of the Covenant (sixty-eighth session, 2000), para. 29.

9. "Since the High Council also serves as an advisory body, each college shall comprise eight members of each sex." Bill of 15 July 1998, Discussion, p. 44, Belgian Chamber of Representatives. See also paragraph 6.3 of the present communication.

10. "A study of the actual situation reveals that, in the majority of the advisory bodies, the membership includes a very small number of women." Preamble to the Bill, p. 1, 27 March 1990, Chamber of Representatives, parliamentary documents; "A survey of the national consultative bodies shows that the proportion of women is no more than 10 per cent." Introduction to the Bill by the Secretary of State for Social Emancipation, p. 1, 3 July 1990, Belgian Senate.