

In the Stocké case*,

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

Mr R. Ryssdal, President,
Mr J. Cremona,
Mr F. Gölcüklü,
Mr F. Matscher,
Sir Vincent Evans,
Mr C. Russo,
Mr R. Bernhardt,
Mr J. De Meyer,
Mr S.K. Martens,

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

Having deliberated in private on 25 October 1990 and 18 February 1991,

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

Notes by the Registrar

* The case is numbered 28/1989/188/248. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

*** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11755/85) against the Federal Republic of Germany lodged with the Commission under Article 25 (art. 25) by a national of that State, Mr Walter Stocké.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of some of its obligations under Article 5 § 1 and Article 6 § 1 (art. 5-1, art. 6-1) of the Convention.

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

who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 27 January 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr F. Gölcüklü, Mr F. Matscher, Mr J. Pinheiro Farinha, Sir Vincent Evans, Mr N. Valticos and Mr S.K. Martens (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently Mr C. Russo and Mr J. De Meyer, substitute judges, replaced Mr Pinheiro Farinha and Mr Valticos, who were unable to take part in the further consideration of the case (Rule 22 § 1 and 24 § 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Deputy Registrar, consulted the Agent of the German Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 § 1).

In accordance with the order made in consequence, the Registrar received the Government's and the applicant's memorials on 15 June and the applicant's claims under Article 50 (art. 50) of the Convention on 6 July.

In a letter of 2 August 1990 the Secretary to the Commission informed the Registrar that the Delegate would be submitting his observations at the hearing.

On 9 August the Commission supplied various documents that the Registrar had requested on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 25 May 1990 that the oral proceedings should open on 23 October (Rule 38). On 9 July he gave the Government's representatives and the applicant leave to address the Court in German (Rule 27 §§ 2 and 3).

6. In his memorial of 15 June and his observations of 4 July on the application of Article 50 (art. 50) the applicant requested that evidence should be heard from five witnesses. On 29 August 1990 the Court decided to ask the Agent of the Government and the Delegate of the Commission to give their views in writing on the applicant's request.

In his observations of 5 September the Delegate of the Commission expressed the opinion that the Commission had gathered all the evidence necessary to carry out its task. The Agent of the Government, in his observations of 10 September, raised objections to the measure requested by Mr Stocké.

On 27 September 1990, after deliberating in private, the Court refused to make the requested further inquiries into the facts, as matters stood.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Meyer-Ladewig, Ministerialdirigent,
Federal Ministry of Justice,

Agent,

Mr H. Gauf, Generalstaatsanwalt
at the Zweibrücken Court of Appeal,
Mr G. Uhink, Amtsrat,
Federal Ministry of Justice,

Advisers;

(b) for the Commission

Mr A. Weitzel,

Delegate;

(c) for the applicant

Mr T. Vogler, Professor of Criminal Law,
University of Giessen,

Counsel.

The Court heard addresses by Mr Meyer-Ladewig for the Government, Mr Weitzel for the Commission and Mr Vogler for the applicant, as well as their replies to its questions. The Government produced documents at the hearing.

AS TO THE FACTS

8. Mr Walter Stocké, a German citizen born in 1926, was the owner of a building firm which went bankrupt in 1975.

9. From 26 March to 9 July 1976 he was held in custody under a warrant (Haftbefehl) issued by the Ludwigshafen District Court (Amtsgericht), as he was suspected of tax offences. In November 1977 the court ordered that he should be redetained as he had not complied with the conditions of his provisional release. In order to avoid arrest, Mr Stocké fled to Switzerland and then to Strasbourg in France. In November 1977 an international request for the location of his whereabouts was issued.

10. In 1978 Mr Köster, a police informer in Rhineland-Palatinate, offered Mr Hoff, a police officer, his assistance in finding Mr Stocké and asked to meet the public prosecutor dealing with the case; he claimed to be able to contact the applicant through one of the latter's former colleagues, Mr Werner. Mr Hoff informed another police officer, Mr Rittmeier, who was leading the investigation concerning Mr Stocké, and his own superior, Mr Reuber, the head of the general inquiries section of the Rhineland-Palatinate police.

A. The meeting at the Kaiserslautern public prosecutor's office

11. The meeting, which lasted for about half an hour, took place in the office of Mr Wilhelm, a public prosecutor who was head of the business crime section of the Kaiserslautern public prosecutor's office, in the spring of 1978. Earlier, Mr Wilhelm had sought information from Mr Stepper, a prosecutor at the Frankenthal public prosecutor's office, about Mr Köster, who was himself the subject of criminal proceedings.

The meeting was attended by Mr Henrich, the prosecutor in charge of the investigation concerning Mr Stocké; Mr Reuber and Mr Rittmeier, representing the police; and Mr Köster. Mr Köster repeated his earlier proposal (see paragraph 10 above). He mentioned a building project in Spain which might interest the applicant, and a plan to have Mr Stocké deported from Luxembourg. According to Mr Wilhelm, Mr Köster wanted to know at the outset whether his services would be rewarded. The prosecutor told him that his department did not have funds to reward individuals for their help in tracking down criminals but that his assistance might be taken into account as an extenuating circumstance at his own trial; Mr Wilhelm emphasised, however, that any action had to be lawful and designed either to discover the applicant's

whereabouts abroad, for the purpose of extradition proceedings, or to induce him to return to the Federal Republic of Germany of his own accord (see paragraph 97 of the Commission's report).

B. The attempt to have the applicant deported from Luxembourg

12. At a meeting in a Frankfurt hotel Mr Köster introduced Mr Hoff to Mr Werner as someone interested in investing in the building project in Spain (see paragraph 11 above). It was decided, however, that the three would meet again in Luxembourg, as Mr Hoff wished to continue the discussions with Mr Stocké himself present.

13. The criminal investigation department enquired of the Luxembourg police whether the latter could arrest the applicant on the ground that he had committed criminal offences in the Grand Duchy and deport him to the Federal Republic of Germany. At police headquarters in Luxembourg Mr Hoff, who had gone there for the purpose, was informed that, as the law then stood, the applicant could demand to be taken to the French border; without an international arrest warrant, however, no action could be taken against Mr Stocké at all.

Mr Hoff decided at that point not to go to the meeting that had been arranged (see paragraph 12 above); he contacted the applicant and pretended that he had had a road accident in the Federal Republic of Germany. He suggested a meeting in Trier, but the proposal was rejected.

14. Mr Reuber informed the Kaiserslautern public prosecutor's office that the "Luxembourg plan" had failed.

C. The applicant's arrest at Saarbrücken Airport

15. On Mr Köster's initiative, the negotiations were to be resumed in a Strasbourg hotel on 7 November 1978 (see paragraph 12 above).

16. In the meantime, the Kaiserslautern public prosecutor's office had renewed the international request for the location of Mr Stocké's whereabouts (see paragraph 9 above) for the purpose of seeking his extradition from France.

17. On the morning of 7 November 1978 Mr Köster telephoned Mr K. Ebeling, an officer in the Schifferstadt police, to ask him to warn two other police officers, Mr Klemp and Mr Höffel, of Mr Stocké's probable arrival at Saarbrücken Airport towards the end of the afternoon. The head of the Ludwigshafen police then ordered the three policemen to go to Saarbrücken and seek the help of the local police.

The three policemen, assisted by members of the Saarbrücken police task-force, waited for the applicant at the airport.

18. On the same day Mr Köster, accompanied by Mr Werner, met Mr Stocké in Strasbourg as planned (see paragraph 15 above). He told him that the other interested parties had not been able to come but were waiting for them in Luxembourg and that he had chartered a plane to take them there. Before take-off Mr Köster secretly asked Mr Marzina, one of the two pilots, to touch down at Saarbrücken. At 7.50 p.m. the plane landed at Saarbrücken-Ensheim Airport. The pilots had previously reported icing of the engine and alerted air-traffic control at the airport, but they did not seek any technical assistance after they had landed.

19. The applicant was immediately arrested and taken into

custody; the warrant for his arrest issued in 1976 was still valid (see paragraph 9 above).

On the next day, 8 November 1978, Mr Reuber informed Mr Wilhelm, the prosecutor, of these events. Mr Köster received DEM 500 from the Ludwigshafen police and on 16 March 1979 a further DEM 2,500 by way of reimbursement of his expenses, in particular the cost of chartering the plane.

D. The applicant's complaints of false imprisonment

20. On 15 May 1979 Mr Stocké lodged a criminal complaint against Mr Köster and a person or persons unknown alleging false imprisonment.

21. The public prosecutor's office at Zweibrücken opened an investigation concerning "Köster and Others" and instituted disciplinary proceedings against Mr Schnarr, the director of the Kaiserslautern public prosecutor's office, the prosecutors Wilhelm and Henrich and the policemen involved in the applicant's arrest. In official statements made in September 1979 the three prosecutors each said that they had only learned of the arrest on 8 November 1978. In a memorandum of June 1979 Mr Adam, the head of the special task force at Saarbrücken police station, had revealed that Mr Henrich had given instructions concerning the police measures to be taken in Saarland.

On 24 September 1979, however, the public prosecutor's office, taking the view that Mr Stocké had been arrested under a warrant issued in accordance with Article 112 of the Code of Criminal Procedure, decided to end the investigation. It considered that the facts complained of by the applicant did not amount to false imprisonment within the meaning of Article 239 of the German Criminal Code. The disciplinary proceedings against the three prosecutors were discontinued at the same time.

22. On 7 October 1979 the applicant again lodged a complaint against a person or persons unknown, alleging kidnapping; he accused the public prosecutor's office and Mr Köster of collusion.

In October and November 1979 Mr Schnarr, Mr Wilhelm and Mr Henrich repeated their previous statements (see paragraph 21 above). Mr Lesmeister, Mr Antes and Mr Biesel, police officers who had taken part in the arrest, said that the Ludwigshafen police had asked for their assistance during the morning of 7 November (see paragraph 17 above) and that Mr Klemp had said he was acting with the consent of the appropriate public prosecutor's office.

23. On 5 February 1980 the Zweibrücken Court of Appeal (Oberlandesgericht), to which Mr Stocké had appealed against the decision of 24 September 1979 (see paragraph 21 above), ordered that the investigation should be resumed. In August 1980 Mr Klemp, Mr Höffel and Mr K. Ebeling refused to give evidence on the grounds that they were likely to incriminate themselves (Article 55 of the Code of Criminal Procedure); Mr Höffel also relied on his duty of discretion, as the questions put related to specific aspects of police strategy.

24. On 15 November 1980 the applicant lodged a complaint against Mr Reuber, Mr Klemp, Mr Höffel and Mr K. Ebeling alleging false imprisonment. In February and March 1981 they refused to give evidence.

25. On 23 September 1981 the director of the Zweibrücken public prosecutor's office rejected a fresh complaint by the applicant

against certain prosecutors and policemen involved in his return from France.

26. On 10 November 1982 the public prosecutor's office charged the two pilots, Mr Marzina and Mr M. Ebeling, and Mr Klemp, Mr Höffel and Mr K. Ebeling with aiding and abetting false imprisonment.

On 26 July 1983, however, the Frankenthal Regional Court (Landgericht) decided not to proceed to trial, on the ground that there were insufficient reasons for suspecting the accused. The public prosecutor's office and Mr Stocké lodged appeals, which the Zweibrücken Court of Appeal dismissed on 6 April 1984.

27. The court held that the two pilots had to be exonerated, as their assertions that they had known nothing of Mr Köster's plan could not be refuted. In particular, Mr Marzina had been charged on the basis of statements made by Mr Kummer (himself a police informer), who claimed that he had been present when Mr Köster asked the two pilots to simulate a forced landing at Saarbrücken. Those statements lacked credibility, however, both for objective reasons - apparent contradictions and errors - and for subjective reasons - resentment of Mr Köster and the police officers who were sparing no effort to help him out. Furthermore, Mr Marzina's evidence that the landing was necessary because of a technical fault could not be challenged; Mr Werner had himself heard the engine spluttering. Be that as it might, the pilot would have agreed to land at Saarbrücken in any case, as Mr Köster, who was one of his regular customers, had asked him to do so; nor could Mr Marzina have suspected Mr Köster's ulterior motives. Lastly, the applicant had made no objection when the pilot told him they were going to fly over a small part of German territory.

As for the three policemen, the Court of Appeal noted that their mere knowledge of the applicant's arrival and the action they had taken to arrest him did not constitute any offence; their complicity with Mr Köster would have been made out only if they had known of and concurred in the applicant's being flown to Saarbrücken against his will. The court again drew attention to the fact that Mr Kummer's accusations against the policemen were vague and contradictory; and it gave no credence to the statements of other witnesses, on the ground that they were based on what the witnesses had subsequently heard from Mr Köster, who boasted excessively of his collaboration with the police. Lastly, the fact that Mr Köster, Mr Werner, Mr Klemp, Mr Höffel and Mr Marzina had celebrated Mr Stocké's arrest with champagne was not sufficient to establish that the police officers had been told of it in advance.

28. In the meantime the proceedings against Mr Köster had been suspended, as he had absconded. He was arrested in Austria in April 1982 and extradited to the Federal Republic of Germany on other charges and not on that of false imprisonment, as the Austrian authorities considered that Mr Stocké had been arrested under a valid warrant and that his detention was accordingly not unlawful in Austrian law.

29. In two letters sent to Mr Klemp (the police officer) and Mr Wilhelm (the prosecutor) in April and November 1982 respectively Mr Köster sought their help, mentioning the services he had rendered as a police informer, especially in the applicant's case. He stated that the operation involving Mr Stocké had been mounted by the Kaiserslautern public prosecutor's office and the Rhineland-Palatinate police, the latter having even indicated the appropriate time to act. In his first letter he denied having asked the pilots to touch down at Saarbrücken

and having informed the authorities, but he retracted that denial in the second letter.

30. Mr Köster was released in July 1983 on condition that he did not leave the country, but he fled abroad. He returned to Germany in October 1987, unbeknown to the police, and was arrested in February 1988 for uttering counterfeit currency. On 14 November 1988 the Frankenthal Regional Court sentenced him to four years and six months' imprisonment for forgery, and on 16 March 1989 to eight years for fraud; the two sentences were aggregated and a total sentence (Gesamtstrafe) of nine years was imposed.

E. Proceedings against the applicant

1. The proceedings in the Kaiserslautern Regional Court

31. The trial began in the Kaiserslautern Regional Court on 25 October 1979.

32. On 17 March 1981 the court ordered that Mr Stocké's detention should be continued. He appealed against this order to the Zweibrücken Court of Appeal, which dismissed his appeal on 16 April 1981. He then applied to the Federal Constitutional Court (Bundesverfassungsgericht), but on 26 August 1981 a panel of three of that court's judges decided not to entertain the appeal, because the applicant had insufficient prospects of success.

33. On 4 February 1982 the Regional Court found Mr Stocké guilty of fraud in two cases (and of incitement to commit fraudulent conversion in one of them) and of tax evasion and failure to keep proper accounts in three others; the applicant was sentenced to six years' imprisonment.

In its judgment, which ran to 399 pages, the court said that it had not been established that the Kaiserslautern public prosecutor's office had supported the alleged kidnapping of Mr Stocké or had known of it in advance; the official statements on the matter by the prosecutors concerned were categorical and could not be called in question. It was therefore unnecessary to seek other relevant evidence as neither the kidnapping nor the alleged resulting breach of the Franco-German extradition treaty could be a bar to the proceedings against the applicant. Mr Stocké's arrest on German territory under a valid, lawful warrant was not unlawful and was not contrary to international law even if the police authorities had got wind of this "private kidnapping" (private Entführung). Even on the assumption that Mr Köster had acted at the instance of the police and with their help, Mr Stocké was subject to the jurisdiction of the German courts. Nor could he rely on a breach of the Franco-German extradition treaty, which created rights and obligations only between the Contracting States; a violation of it could only affect those two States' mutual relations and could not avail the individual concerned.

The court added that Article 25 of the Basic Law (primacy of the general rules of international law over federal laws) was likewise no bar to the current proceedings. It was for the aggrieved State to assert its right to ask for the return of the person kidnapped. The French Government, however, had not done so; on the contrary, by a letter of 30 October 1980 the Strasbourg public prosecutor's office had informed the Principal Public Prosecutor at Kaiserslautern that it had dropped the proceedings initiated on the applicant's complaint alleging false imprisonment, as no offence had been committed on French territory. Its investigations had shown that the applicant had

boarded the aircraft of his own free will.

2. The proceedings in the Federal Court of Justice (Bundesgerichtshof)

34. Mr Stocké lodged an appeal on points of law (Revision) with the Federal Court of Justice.

35. When interviewed by the Mannheim police on 25 July 1984 at the Federal Court's request, Mr Kummer (see paragraph 27 above) described his conversations with Mr Köster, during which the latter had told him of his meetings with the policemen in order to devise a plan to bring the applicant back to the Federal Republic of Germany by a trick; in particular, Mr Stepper (a public prosecutor) had approved the plan and Mr Köster had celebrated its successful implementation with the policemen concerned in a Mannheim hotel.

36. On 2 August 1984 the Federal Court dismissed the appeal and upheld the judgment of the Kaiserslautern Regional Court, whose reasoning it for the most part endorsed. It emphasised that the defendant, a German citizen, came under the jurisdiction of the German courts and did not belong to a category of persons who could assert any ground of personal immunity.

3. The proceedings in the Federal Constitutional Court

37. On 17 July 1985 the Federal Constitutional Court, sitting as a panel of three judges, declined to entertain Mr Stocké's appeal against the judgments of 4 February 1982 and 2 August 1984 (see paragraphs 33 and 36 above), on the ground that it had no prospects of succeeding.

The court held that there was no rule of international law to prevent a State's courts from prosecuting a person brought before them in breach of the territorial sovereignty of another State or of an extradition treaty. It was apparent from American, Israeli, French and British case-law that in such an event a court did not decline jurisdiction unless the other State had protested and sought the return of the person concerned. The fact that there were a few decisions in which courts had ordered that the proceedings should be stayed was not sufficient to establish a real practice to that effect.

The court added, among other things, that when he was living in France the applicant was not safe from prosecution in the Federal Republic of Germany; the fact that he was charged mainly with tax offences did not preclude his extradition.

38. Mr Stocké served the remaining part of two-thirds of his sentence between 10 June and 6 December 1985 and was conditionally released in respect of the rest.

F. The prosecution of Mr Köster for false imprisonment

39. On 9 December 1986 the Principal Public Prosecutor at Zweibrücken asked Mr Stepper to submit his observations on his part in the proceedings which had led to Mr Stocké's arrest and on Mr Kummer's evidence (see paragraph 35 above).

40. In an official statement on 7 August 1987 Mr Wilhelm, answering allegations in Mr Köster's second letter (see paragraph 29 above), described the discussions which had taken place in his office in 1978 (see paragraph 11 above); he claimed to have told Mr Köster that the public prosecutor's office could not give him any instructions as to the plan to have the applicant deported from Luxembourg and he said that it had been

left entirely to Mr Köster to decide whether he wanted to induce Mr Stocké to return to the Federal Republic of Germany.

41. On 23 March 1988 the Frankenthal public prosecutor's office charged Mr Köster with false imprisonment and informed Mr Stocké of this. On 2 April 1989 the Frankenthal Regional Court dismissed the prosecution's application to commit the applicant for trial on that charge; it referred to the Zweibrücken Court of Appeal's judgment of 6 April 1984 (see paragraph 27 above) and ruled that the evidence from the investigation could not support a finding that Mr Köster was guilty.

42. On an appeal by the prosecution and the applicant, who had joined the criminal proceedings as a civil party seeking damages, the Zweibrücken Court of Appeal set aside that decision on 15 November 1989 and committed Mr Köster for trial by the Third Criminal Division of the Frankenthal Regional Court, in accordance with the indictment. It held that there was sufficient circumstantial evidence to warrant concluding that Mr Köster had committed the offence with which he was charged. The court added that a provisional assessment of the evidence that had been gathered suggested that a conviction would be secured; many of the twenty or so witnesses had testified that Mr Köster had contrived the landing at Saarbrücken. As for the policemen involved, it noted that their refusal to give evidence was no longer justified as any proceedings for aiding and abetting false imprisonment were now time-barred (Article 78 of the Criminal Code).

43. In a letter of 18 July 1990 the Frankenthal public prosecutor's office applied to the presiding judge of the Third Criminal Division for a ruling that the proceedings were time-barred; but for that, it added, Mr Köster would undoubtedly have been convicted. The Frankenthal Regional Court granted the application in a decision of 28 August 1990, which, on an appeal by the applicant, was upheld by the Zweibrücken Court of Appeal on 26 October 1990.

PROCEEDINGS BEFORE THE COMMISSION

44. In his application of 20 September 1985 to the Commission (no. 11755/85), Mr Stocké relied on Article 5 § 1 (art. 5-1) of the Convention, alleging that the circumstances of his arrest made it and his detention both on remand and after conviction unlawful. He also asserted that those circumstances had deprived him of a fair trial as guaranteed by Article 6 § 1 (art. 6-1).

45. After examining a mass of evidence relating to the events complained of, which had been obtained both during the national proceedings and during those before the Commission, the Commission declared the application admissible on 9 July 1989. In its report of 12 October 1989 (made under Article 31) (art. 31) it expressed the opinion by twelve votes to one that there had been no breach of Articles 5 § 1 and 6 § 1 (art. 5-1, art. 6-1). The full text of the Commission's opinion is reproduced as an annex to this judgment*.

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 199 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

46. At the hearing on 23 October 1990 the Government asked the

Court to hold that the Federal Republic of Germany had not violated the Convention in the instant case.

AS TO THE LAW

47. Mr Stocké claimed to be the victim of collusion between the German authorities and Mr Köster for the purpose of bringing him back to the Federal Republic of Germany against his will with a view to arresting him. The collusion allegedly resulted in violations of Articles 5 § 1 and 6 § 1 (art. 5-1, art. 6-1), which provide:

Article 5 (art. 5)

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

... ."

Article 6 (art. 6)

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

According to the applicant, the prosecuting authorities considered that it was too uncertain whether an extradition request to France would succeed and had preferred to make use of a police informer to do "the dirty work abroad".

While conceding that the extent of the prosecuting authorities' involvement in the preparations for Mr Köster's enterprise was not wholly clear, the applicant alleged that the authorities were acquainted in minute detail with the plan to kidnap him in Strasbourg; the failed attempt to have him expelled from Luxembourg on trumped-up charges (see paragraph 13 above) showed, moreover, that the prosecution authorities and Mr Köster had cooperated for unlawful purposes. After the telephone call on 7 November 1978 (see paragraph 17 above) the prosecuting authorities knew that Mr Köster was again trying to keep his promises in the hope that the sentence he himself faced would be reduced (see paragraph 11 above). Notwithstanding the failure of the Luxembourg plan and doubts about the lawfulness of Mr Köster's methods, the prosecuting authorities had instructed the police (see paragraph 17 above) to arrest the applicant and they thus endorsed the kidnapping. The reimbursement of Mr Köster's expenses (see paragraph 19 above) was evidence of this, especially as the cost of chartering the plane had been calculated in advance in order to ascertain whether it was within the limits of what could be reimbursed.

Mr Stocké also complained of the way in which the proceedings against Mr Köster were conducted (see paragraphs

20-30 above). As the authorities were anxious to ensure that their "hatchet man" did not have to give explanations, for fear that he might implicate those for whom he had been acting, they had raised innumerable obstacles. They had attempted to deprive the applicant of any influence on the proceedings by letting the processing of his application to join the proceedings as a civil party seeking damages drag on for months and endeavoured to restrict his right to inspect the file by unlawfully retaining in their possession a number of documents. Furthermore, the Minister of Justice of Rhineland-Palatinate had decided not to discontinue the proceedings only after a strong protest from Mr Stocké. Lastly, by their procrastination the German authorities had allowed the proceedings to become time-barred (see paragraphs 41-43 above), thus rewarding the kidnapper for his assistance.

48. The Government denied these allegations. Not only had the authorities not been warned of Mr Köster's intentions but they had done their best to clarify the situation.

To begin with, no plan to kidnap Mr Stocké had been drawn up at the meeting in the office of Mr Wilhelm, a public prosecutor, in the autumn of 1978 (see paragraph 11 above). The authorities wanted to obtain information that would help them to trace Mr Stocké, who had absconded. Although they had agreed to the proposal to have him expelled from Luxembourg, they had had to abandon this idea when they became aware of the legal obstacles (see paragraph 13 above). Furthermore, the prosecuting authorities had not learned of the arrest complained of until the following day (see paragraph 19 above). Lastly, Mr Köster had been reimbursed for his expenses but had not received any remuneration.

Admittedly, a number of factors might suggest that the prosecuting authorities and certain police officers had acted in collusion with Mr Köster, but the prosecution had made meticulous inquiries; they had brought charges against three policemen and both pilots and had appealed against the Frankenthal Regional Court's decision of 26 July 1983 not to commit them for trial (see paragraph 26 above). The Zweibrücken Court of Appeal had thoroughly examined the evidence before it, including the statements of the principal witnesses, and had concluded that there were not sufficient grounds for suspecting the accused pilots and policemen of having committed the offence in question (see paragraph 27 above).

As to Mr Köster, the German judicial authorities had "neither shielded him nor dealt leniently with him". He was arrested in February 1988 (see paragraph 30 above) and charged with false imprisonment a month later (see paragraph 41 above). The prosecution had immediately appealed against the Frankenthal Regional Court's decision not to proceed to trial (see paragraphs 41-42 above); they had not discontinued the proceedings, although an additional penalty for false imprisonment would not have made much difference to the sentence to be served by Mr Köster, who had already been sentenced to nine years' imprisonment for other offences.

49. The Court notes at the outset that the applicant was induced by a trick to board a plane chartered by Mr Köster (see paragraph 18 above), although he had been warned that they were going to fly over a small part of German territory (see paragraph 27 above). After being arrested by the German police immediately after the plane landed at Saarbrücken (see paragraphs 18-19 above), he lodged a complaint in France (see paragraph 33 above) and in the Federal Republic of Germany, alleging false imprisonment.

50. In a letter of 30 October 1980 the public prosecutor's office in Strasbourg informed the office in Kaiserslautern that it had discontinued the proceedings initiated on the complaint, as no offence had been committed on French soil; the inquiries that had been made had shown that the applicant had boarded the plane of his own free will and not under duress (see paragraph 33 above).

On 6 April 1984 the Zweibrücken Court of Appeal upheld the Frankenthal Regional Court's decision not to commit the two pilots and the three policemen for trial on a charge of aiding and abetting false imprisonment. In particular, it held that their claim not to know anything about Mr Köster's plan had not been disproved (see paragraph 27 above).

51. The Commission examined nine witnesses, three of whom, under the domestic legal system, had relied on the protection of Article 55 of the German Code of Criminal Procedure (see paragraph 23 above). Three members of the Commission, delegated for the purpose, heard evidence on 4 July 1988 from two prosecutors and a policeman concerning the nature and extent of the contacts between the prosecuting authorities and Mr Köster, and on 15 September 1988 from four other policemen and two of the three persons who had already appeared in July 1988. Lastly, on 16 October 1988 two other policemen answered questions about specific aspects of the applicant's assertions. They all denied having known about Mr Köster's plan to bring Mr Stocké back to the Federal Republic of Germany against his will or having agreed to such a plan being carried out; the Commission did not consider their evidence to be inconsistent or unreliable.

Neither the facts found by the Commission nor the circumstances of the case as a whole established that the cooperation that there had unquestionably been between the German prosecuting authorities and Mr Köster had extended to "unlawful activities abroad such as [returning] the applicant against his will from France to the Federal Republic of Germany".

52. On 15 June 1990 Mr Stocké made an application to the Court (see paragraph 6 above), which he reiterated at the public hearing, for five witnesses to be called, four of whom had not been heard by the Commission. In his observations as to whether such evidence should be heard, the Delegate of the Commission expressed the view that the Commission had taken all the evidence necessary to carry out its task. The Agent of the Government objected to the granting of the application.

53. The Court recalls that under the Convention system, the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 § 1 and 31). Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area.

In the light of this, having regard to the conclusions reached by the French and German authorities, after thorough investigations, to the evidence of the numerous witnesses already heard by the Commission as set out in its report in a summary whose accuracy has not been challenged, and to the fact that the Commission deemed it unnecessary to hear further evidence, the Court sees no reason to entertain the applicant's request.

54. Like the Commission, the Court considers that it has not been established that the cooperation between the German authorities and Mr Köster extended to unlawful activities abroad.

Accordingly, it does not deem it necessary to examine, as

the Commission did, whether, if it had been otherwise, the applicant's arrest in the Federal Republic of Germany would have violated the Convention.

55. In conclusion, the Court finds that there has been no violation of Article 5 or Article 6 (art. 5, art. 6).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of Articles 5 and 6 (art. 5, art. 6).

Done in French and in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 March 1991.

Signed: Rolv RYSSDAL
President

Signed: Marc-André Eissen
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of Court, the concurring opinion of Mr Matscher is annexed to this judgment.

Initialled: R.R.

Initialled: M.-A.E.

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

I voted in favour of finding that there had been no violation, on the ground that, notwithstanding doubts about the unfolding of certain events, no violation had been made out.

I also agreed with the Court's decision not to hear further witnesses (or to hear again the witness already heard by the Commission), because in view of the circumstances of the case and, in particular, the time which had elapsed since the events complained of (twelve years!), further inquiries into the facts would not, in my view, have helped to throw any light on the matters remaining in doubt.