



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

COURT (CHAMBER)

CASE OF RIBITSCH v. AUSTRIA

(Application no. 18896/91)

JUDGMENT

STRASBOURG

4 December 1995

In the case of Ribitsch v. Austria ¹,

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 Rules of Court A ², as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. MATSCHER,

Mr J. DE MEYER,

Mr I. FOIGHEL,

Mr J.M. MORENILLA,

Sir John FREELAND,

Mr B. REPIK,

Mr P. JAMBREK,

Mr P. KURIS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 27 June and 21 November 1995,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18896/91) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by Mr Ronald Ribitsch, an Austrian national, on 5 August 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria 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 its obligations under Article 3 (art. 3) of the Convention.

¹ The case is numbered 42/1994/489/571. 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.

² Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 (art. 43) of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr I. Foighel, Mr J.M. Morenilla, Sir John Freeland, Mr B. Repik, Mr P. Jambrek and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr J. De Meyer, substitute judge, replaced Mr Thór Vilhjálmsson, who was unable to take part in the further consideration of the case (Rule 22 paras. 1 and 2 and Rule 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence on 17 October 1994 and 6 March 1995, the Registrar received the Government's memorial on 28 February 1995 and the applicant's memorial on 14 March 1995. On 24 March the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing. On 21 April he produced certain documents requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 June 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr W. OKRESEK, Head of the International Affairs

Division, Constitutional Department,

Federal Chancellery,

Agent,

Mr W. SZYMANSKI, Head of the Legal Service,

Federal Ministry of the Interior,

Mr J. ROHRBÖCK, Adviser, Federal Ministry

of the Interior,

Advisers;

(b) for the Commission

Mr H.G. SCHERMERS,

Delegate;

(c) for the applicant

Mr H. POCHIESER, Rechtsanwalt,

Counsel.

The Court heard addresses by Mr Schermers, Mr Pochieser and Mr Okresek, and their replies to its question.

On 3 July 1995 the Registrar received the Government's written reply to the applicant's claims under Article 50 (art. 50); the applicant's observations relating thereto were received on 27 July.

AS TO THE FACTS

6. Mr Ronald Ribitsch, an Austrian national born in 1958, lives with his wife in Vienna.

I. BACKGROUND TO THE CASE

7. At the material time the Security Branch of the Vienna Federal Police Authority (Sicherheitsbüro der Bundespolizeidirektion) included three units assigned to investigating drug offences. One of these, led by Chief Inspector Pöttinger, had particular responsibility for cases involving fatalities.

8. On 21 May 1988, following the deaths of two people from heroin overdoses, the girlfriend of one of the deceased went to the headquarters of Mr Pöttinger's unit and made a statement alleging that her boyfriend had told her that he intended to obtain drugs from the applicant.

Acting on this information several of the unit's officers questioned the applicant on the same day and searched his home, although they had no warrant. The search revealed nothing and the applicant and his wife were authorised to leave for Turkey on holiday that very day.

9. On 22 May 1988 one of the deceased was recognised as a rock singer who was very well known in Austria. This led to pressure from the media to find the dealer who had sold the heroin that had caused the deaths. Mr Pöttinger's unit conducted numerous inquiries between 22 and 31 May 1988.

10. On the latter date another Security Branch unit, led by Chief Inspector Gross, and including at the material time Police Officers Markl, Trnka and Fröhlich, received an anonymous telephone call accusing Mr Ribitsch of selling heroin to one of the deceased.

At about 12.30 p.m. a number of officers belonging to this unit arrested the applicant and his wife for drug trafficking and searched their home, although they had neither a search warrant nor an arrest warrant. The search revealed 0.5 g of hashish.

II. THE APPLICANT'S DETENTION IN POLICE CUSTODY

11. Mr Ribitsch and his wife were held in police custody at the headquarters of the Security Branch of the Vienna Federal Police Authority from about 12.30 p.m. on 31 May 1988 to about 9.30 a.m. on 2 June 1988.

12. There are two conflicting versions of what occurred during the period of police custody.

According to the applicant, the officers questioning him grossly insulted him and then assaulted him repeatedly in order to wring a confession from him. He received punches to the head (Kopfnuß), kidneys and right arm and kicks to the upper leg and kidneys. He was pulled to the ground by the hair and his head was banged against the floor. Ninety per cent of his injuries were inflicted by blows from Police Officer Markl. When released he had bruises on his right arm and one thigh and was suffering from a cervical syndrome, vomiting, diarrhoea and a violent headache.

A different version was given by Mr Markl in a report that was dated 1 June 1988 but purported to give an account of events which, according to the report itself, had occurred on 1 June from about 3.20 p.m. onwards, on 2 June at about 8 a.m. and on 2 June at about 9.30 a.m. The report stated that in the afternoon of 1 June the applicant was taken from police headquarters to an acoustic research institute so that his voice could be compared with that of a person who had made an anonymous phone call to the Vienna emergency services. As he was getting out of the police car, and while he had handcuffs on his wrists, Mr Ribitsch had slipped and his right arm had banged into the rear door. Mr Markl, who had opened the door for him, managed to grab hold of his left arm, but was not able to prevent him from falling. However, his fall had largely been broken and he had landed "gently" on his behind. It was only the next morning, when being questioned, that the applicant informed the police of his injury, although he refused medical attention.

13. On being released from police custody the applicant informed several members of his family, a psychologist and a journalist of the ill-treatment he had allegedly suffered. On the latter's advice he went to Meidling Hospital in the afternoon of 2 June, where he was examined from 5.35 p.m. onwards, and to his general practitioner the following day. The hospital report recorded bruises measuring 2 to 3 cm in the middle of the outside of the right arm, and an appended neurological report recorded bruises on the outside and inside of the right arm. No other injury to his limbs was found. An X-ray showed no broken bones. The doctor's report stated that the applicant had several bruises on his right arm and symptoms characteristic of a cervical syndrome, that he was suffering from vomiting and a violent headache and that he had a temperature of 37.5 °C. A photographer took a photograph of Mr Ribitsch's injuries.

III. THE CRIMINAL PROCEEDINGS BROUGHT AGAINST THE POLICE OFFICERS IN THE VIENNA DISTRICT CRIMINAL COURT

14. On 7 June 1988, following a programme on Austrian radio about the methods allegedly used by the police when they questioned Mr and Mrs Ribitsch, the Vienna Federal Police Authority began an inquiry into the officers concerned and sent the results to the public prosecutor's department on 25 October 1988.

On 22 November the applicant lodged a civil party claim for damages under Article 47 of the Code of Criminal Procedure (Strafprozeßordnung).

A. The preliminary inquiries

15. On 26 June 1989 the judge of the Vienna District Criminal Court (Strafbezirksgericht) conducted the preliminary inquiries (Vorermittlungen) and heard Mr and Mrs Ribitsch as witnesses and Police Officers Trnka, Gross, Fröhlich and Markl as accused (Beschuldigte).

In its report the Commission gave the following account of the statements they made:

"23. The applicant stated that on 31 May 1988 he had been arrested by four police officers, inter alia Markl and Trnka. Following the taking of photographs and fingerprints, the questioning had started in the afternoon and evening. At the first questioning five police officers had been present, who had interrogated him in turns. The applicant also indicated that the police officers, with the exception of Police Officer Fröhlich, were drinking wine. In the course of the questioning, their superior Mr Gross had started to pull his handle-bar moustache and to go around the room with him, and then also slapped him in the face. As he still had not confessed, Police Officer Markl had begun to hit him. He knew about this officer's identity as he had seen him signing the record. Police Officer Fröhlich had been sitting at the typewriter. He had been the only officer behaving correctly. Police Officer Markl had continued to hit him in the course of the ensuing interrogations. Markl had been the one hitting him most of the time, though, while he had been lying on the floor, others had also kicked him. On the second day, even a legally qualified person had been present for a short time and had seen that he had been beaten. Police Officer Markl further had attempted to provoke him to hit back. 90% of his injuries had been caused by Markl. The haematoma on his right upper arm had been caused by Markl's punches. Markl had further kicked him and caused a haematoma on his right or left lower leg; the print of the shoe had later been seen on his trousers. Police Officer Markl had also grasped his hair and had thrown him to the floor. Upon questioning, the applicant stated that there had been no accident when he was taken by car to have his voice compared.

24. Police Officer Trnka stated that he had been working with, inter alia, the Police Officers Markl and Fröhlich. He could not remember whether he had been present upon the applicant's arrest. He had conducted the questioning of the applicant's wife. The applicant had been questioned in another room, he had sometimes been there to put questions to the applicant. He had learnt about the injuries sustained by the applicant in the media. He himself had not beaten or kicked the applicant, nor seen

that his colleagues had done so. The police officers had not drunk alcohol in the course of the interrogations. Moreover, though working hard, they had always taken a break at least between midnight and 7 a.m.

25. Police Officer Gross explained that he had been leading the particular work unit since 1983, Police Officer Markl had been in this unit for two years, Police Officer Fröhlich for one year and Police Officer Trnka for five years. He had been present at times at the interrogations of both the applicant and his wife. He had not touched the applicant or pulled his moustache, though he remembered that the applicant had a peculiar moustache. At the relevant time, they had worked overtime, but there had not been any particular pressure upon them. He had been informed at that time that the applicant had stumbled in the course of getting out of a police car, Police Officer Markl or Fröhlich had informed him of this. He had not known about any injuries. He had instructed his colleagues to draft a report on the incident. There had been no alcohol in the room where the interrogations had taken place.

26. According to Police Officer Fröhlich, who had joined the work unit in April 1988, Police Officer Markl had conducted the questioning of the applicant in the presence of always two or three colleagues. Upon questioning, he confirmed that a legally qualified person, namely a superior, had been present for a short time at one of the interrogations. No alcohol had been drunk in the course of the questioning. They had worked overtime, but there had been no particular pressure. Fröhlich, stating that he had been present at most of the questioning, denied that the applicant had been bodily assaulted. Fröhlich continued that on 1 June 1988 he had, together with Police Officer Markl, taken the applicant to have his voice compared. Fröhlich had driven and Markl had been at the rear with the applicant who had been handcuffed with his hands in front of his body. The applicant had probably stepped out of the rear left door. Fröhlich indicated that he had not seen the applicant stumble, but heard something like it. When he had turned around, he had seen Markl already holding the applicant. The applicant had said that he was not hurt. The next day the applicant had mentioned the bruise on his upper arm. One of them had informed Police Officer Gross about the bruise, and Gross had advised them to draft a report on the incident.

27. Police Officer Markl stated that he had joined the work unit of Police Officer Gross in May 1988. He had at the time interrogated the applicant, but he had certainly not been alone: in order to avoid unfounded allegations, other colleagues had been present for at least part of the time. Markl denied having used violence against the applicant, and supposed that the applicant and his wife, for unknown reasons, wanted to take revenge on them. As to the course of the interrogations, Markl specified that at the beginning the applicant had denied any involvement in the offences at issue; only in the further course of questioning had he given the decisive hint as to the identity of the actual culprit. As regards the injuries sustained by the applicant, Markl confirmed his statements in his report of 1 June 1988. During the drive, he had been sitting next to the applicant, who had been handcuffed with his hands in front of his body, in the rear of the police car. Markl continued that he had opened the door on the applicant's side from the outside. The applicant had stumbled while getting out and fallen, knocking his right arm against the doorframe. Markl had only been able to stop him falling. The applicant had said that he was all right. Only the next day had he mentioned a bruise on his right upper arm. Markl could not remember any other injuries or a footprint on the applicant's trousers. Markl clarified that he had written the report concerning the accident on 2 June, but had put the date of the incident. Markl further confirmed that a superior, possibly presented as a legally qualified person, had shortly been present at one of the interrogations. Markl also indicated that

he worked normally 60 to 70 hours overtime per month; at the relevant time he had possibly done 80 to 90 hours overtime. Moreover, they had not consumed any kind of alcohol during their work."

B. The trial

16. On 13 October 1989 the trial of Police Officers Trnka, Gross and Markl on charges of assault occasioning bodily harm opened in the Vienna District Criminal Court, composed of a single judge. During the trial the judge examined the accused and several witnesses, namely Mr and Mrs Ribitsch, Police Officer Fröhlich, Mr Pretzner, the head of the three units of the Security Branch of the Vienna Federal Police Authority, and all those who had seen the applicant's injuries or been informed by him of the ill-treatment he had undergone. These included Dr Scheidlbauer, the general practitioner, Dr Tripp, the psychologist, Mr Buchacher, the journalist, and Mr Lehner, the photographer.

In its report the Commission gave the following account of their statements:

"30. Police Officer Markl referred to his earlier statements. Upon questioning, he explained that due to information given to him, the investigations concerning the case in question had been transferred from another work unit at the Vienna Federal Police Authority. Following their arrest, the applicant and his wife had been brought to the Police Authority. Questioned about the further development of matters regarding the applicant, Police Officer Markl stated that the applicant's identity had been established and he had been questioned about the offences concerned. Markl confirmed that Police Officer Fröhlich had been present in the course of the interrogation. However, he could not remember whether Police Officers Gross and Trnka had been also there. The applicant had claimed to be innocent, and even claimed that he had nothing to do with drugs and in particular opium. He had complained that the police was again creating difficulties. Moreover, the applicant had repeatedly indicated that he would cause troubles and ridicule them. Police Officer Markl then described the events when the applicant had been taken out of the building of the Police Authority: The applicant had been handcuffed with his hands in front of his body, he had been sitting in the rear of the police car. Upon arrival, Markl had opened the door where the child lock had been in position as a precautionary measure. When getting out of the car, the applicant had lost his balance, had fallen and hit his right arm against the door frame. He had shown his injury, a round bruise, but had not wanted to see a doctor. Upon further questioning by the public prosecutor, Markl stated that, upon the arrest, a piece of hashish had been found upon the applicant, nothing upon his wife. However, police informers had told them that the applicant had been dealing with heroin and had been selling washing powder to drug addicts. This information had not been recorded as the informers were not prepared to make a statement for the record. Upon further questioning, Markl indicated that, having first denied any relationship to one of the victims, the applicant and his wife had later admitted a close relationship.

31. Police Officer Trnka first made some more general remarks about the organisation and distribution of work between the three units dealing with drug offences. He remembered that he had been present at the arrest of the applicant and his wife and that he had interrogated the applicant's wife. Though he had not assisted

in the questioning of the applicant in the adjoining office, he had occasionally come to put questions to the applicant. They had mainly inquired about discrepancies in the spouses' statements about their alibi. He had learnt about the injury sustained by the applicant only after his release.

32. Police Officer Gross, the head of the work unit concerned, also explained that following information obtained by Police Officer Markl on the particular case, it had been transferred from another work unit which had initially conducted the investigations. He had seen the applicant for the first time during the interrogation in the afternoon. Together with Police Officer Trnka he had questioned the applicant's wife, but also the applicant in order to verify their alibi, as there had been discrepancies in their statements. As regards the applicant's injury, he remembered that either Police Officer Markl or Police Officer Fröhlich had informed him about the incident in the course of the escorted visit. He had instructed them to draft a report. Being asked in detail about the applicant's allegations of ill-treatment, Gross stated that it appeared practically impossible to pull the applicant around by his moustache without leaving injuries to his face.

33. The applicant, heard as a witness, stated that, following his arrest in the late morning, he had first been questioned in the late afternoon by Police Officers Markl and Fröhlich, in particular about his alibi. Violence had been used, Gross had pulled him around the room by his moustache, and he had been slightly hit on his head. In the afternoon of the second day, he had again been interrogated, and because he had refused to admit that he had given drugs to the two persons who had subsequently died, he had been beaten every half-hour. He had also been kicked while lying on the floor, and had therefore not seen the persons who had kicked him. Police Officer Markl had hit him on the upper arm and kicked him. On one occasion, a legally qualified person had been present who had not stopped the beatings. Police officers from another group had also been present; there had been continual changes. In between, he had been escorted to have his voice compared. Questioned about the escorted visit, the applicant denied that he had stumbled while getting out of the car. He also confirmed that Police Officer Fröhlich had not hurt him.

34. The applicant continued that he had been released on 2 June 1988 at the same time as his wife; they had gone home where he had met his brother and a psychologist, Dr Tripp, with whom he was acquainted. He had only later noticed that a footprint on his trousers was consistent with an injury to his leg. After having taken a shower and changed clothes, he had met the journalist Buchacher. Subsequently he had gone to the hospital. Two fingers of his right hand had been numb. On the next day he had got a stiff neck, he had vomited. The applicant stated that he had not eaten for two days and that he had a nervous stomach. He further stated that he had health problems due to the fact that Markl had pulled him by the hair off a chair and on to the floor.

35. The applicant's wife stated that she had been questioned by Police Officer Trnka, subsequently cross-examined by four persons and later by Police Officers Markl and Fröhlich. She had been released at the same time as her husband who had told her immediately that he had been hit and beaten and pulled by his moustache and hair. She had seen the bruises mentioned by him, and also the shoe-print on his trousers. Her husband had said that Police Officer Markl had caused the injuries. Her husband had complained about pain in the neck, headache, and later a feeling of numbness in his right hand.

36. Police Officer Fröhlich was next heard as a witness. He stated that following a tip-off about who had given the deceased the drugs the case had been transferred to their work unit. Because of the rivalry existing between the units, information of such kind would not be passed on. Upon his arrest, the applicant had said that he would cause difficulties. However, during his interrogation, the applicant had been quite calm. Fröhlich denied having seen that the applicant had been hit. As regards the escorted drive, Fröhlich indicated that he had parked the police car rather close to another car. Police Officer Markl had opened the door for the applicant. According to Fröhlich, there had been a noise and, turning around, he had seen that Markl was holding the applicant. Fröhlich confirmed that Police Officer Gross had advised them to draft a report on the incident.

37. The applicant's doctor, Dr Scheidlbauer, confirmed that he had examined the applicant who had been undressed. The applicant had several haematomas, the largest on his right upper arm. Scheidlbauer had the impression that the applicant had either bumped against something or had been hit. Scheidlbauer excluded that a fall against a doorframe could have caused these haematomas. The applicant had not indicated that he had been hit by the police. Scheidlbauer had not ascertained injuries to the legs, but there were other bruises and the applicant had complained about vomiting and headache. The applicant had not had a concussion but, as a consequence of a cervical syndrome, had been unable to turn his head. Upon questioning, Scheidlbauer stated that such a cervical syndrome could have several causes, *inter alia*, a cold or the fact that somebody had been several times pulled by his hair. However, the cause could not be objectively established.

38. The psychologist Tripp, who had seen the applicant after his release, confirmed that the applicant had told him about his arrest and detention and about having been hit and maltreated by the police, in particular one police officer. Tripp further said that he had not looked for any injuries. He also stated that he had not for a moment had the impression that the applicant had made up his story.

39. The court next heard Mr Pretzner, the head of the section - with three work units - at the Vienna Federal Police Authority which had been responsible for the investigations in the opium poisoning cases. Pretzner first explained the organisation and distribution of work between the units and, in this context, excluded rivalry between the units. Moreover, Pretzner stated that he had been present at the questioning of the applicant by Police Officers Markl and Fröhlich for about ten minutes. Pretzner remembered that he had advised the applicant that a confession could result in the court passing a more lenient sentence. Being confronted with the applicant's allegations, Pretzner denied that the applicant had been tortured or beaten; rather, the atmosphere had been friendly.

40. The applicant's sister-in-law, Mrs Hoke, described the state of the applicant and his wife following the release from detention. Mrs Hoke confirmed in particular that she had seen the bruise on his right upper arm and that the applicant had told her that he had been pulled around by his hair, thrown to the floor, punched and that two or three police officers had been present most of the time, the most brutal one having been the Police Officer Markl. She could not remember having seen a shoe-print on the applicant's trousers.

41. [The applicant's brother] I. Ribitsch stated that when they had met at the applicant's apartment the applicant had told him that he had been subjected to physical violence while in detention, namely that he had been beaten, kicked and pulled by the

hair to the ground. I. Ribitsch had seen several bruises on the applicant's body, and a shoe-print on the applicant's trousers. The applicant had also told him that he had problems with his stomach and had vomited.

42. The applicant's sister-in-law, Mrs Hoke, and his brother I. Ribitsch were subsequently questioned about whether the applicant had mentioned an accident in the course of an escorted visit. Mrs Hoke stated that the applicant had mentioned that one of the police officers had told him that this was the cause of his injuries. I. Ribitsch had not heard about this.

43. The reporter Buchacher had been informed by the applicant's sister-in-law, Mrs Hoke, about the applicant's allegations of ill-treatment in the course of his police detention. Buchacher had thereupon arranged by phone a meeting with the applicant. Buchacher had been shown several injuries, haematomas on the applicant's right arm, the largest on the outside, one or two smaller on the inside. Buchacher had photographed them the next day for the purposes of a story in a magazine. Upon questioning, Buchacher indicated that the applicant had told him that his voice had been compared, but not that he had fallen out of the police car.

44. Buchacher then turned to read from the notes which he had made in the course of the conversation with the applicant at the time according to which the applicant had given the following account: the head of the group had pulled him by the beard and hit him on the head with the flat of his hand; during the first interrogations he had been insulted, but not yet been hit. Following the escorted visit to the Acoustics Research Institute, the police officers had shaken him by the feet and hands and beaten him for about twenty minutes. There had been bottles of wine in the office and the police officers had been smelling of alcohol. Police Officer Fröhlich had behaved correctly and not hit him, Police Officer Markl had hit him the most. They had also threatened to place his children at a children's home. Only at the last interrogation in the morning before his release, all police officers, including Markl, had been friendly and polite.

45. Buchacher also indicated that he had seen a footprint on the applicant's trousers which appeared to have been dragged over the floor. Buchacher continued that he had verified that the shoe-print coincided with a haematoma on the applicant's leg below his knee. Upon questioning, Buchacher stated that he did not have the impression that the applicant had been acting.

46. The photographer Lehner, a colleague of the journalist Buchacher, confirmed that he had photographed the injuries suffered by the applicant, namely a severe bruising on his right upper arm. He also remembered injuries to the applicant's legs. He had not taken photographs of the smaller injuries as they would not have been visible."

C. The judgment

17. At the end of the trial the District Criminal Court found Police Officer Markl guilty of assault occasioning bodily harm, within the meaning of Article 83 para. 1 of the Criminal Code (Strafgesetzbuch), and sentenced him to two months' imprisonment, suspended, and three years' probation.

It also ordered him to pay Mr Ribitsch the sum of 1,000 Austrian schillings (ATS). The other two police officers, Mr Trnka and Mr Gross, were acquitted.

In its judgment of 13 October 1989 the court gave a brief account of the criminal investigation, referring to the pressure the officers in Mr Gross's unit had been under to find the guilty person and the many hours of overtime they had put in on that account. It then described the ill-treatment suffered by the applicant while in police custody and excluded the possibility that his injuries could have been caused accidentally. The court based its judgment on the evidence given by Mr Ribitsch, who had made an excellent impression in the witness box, and by the witnesses, particularly the journalist who had seen the applicant on the day when he was released from police custody and had taken notes. It went on to say:

"In summary, the court therefore notes that the injuries sustained by Ronald Ribitsch were seen by several people who were not in any way involved in the events giving rise to the case. These injuries consisted of several bruises - not a slight abrasion or a small bruise - on the upper right arm. The claim that a cervical syndrome was sustained is credible, given the description of how it occurred, namely by the head being pulled violently backwards by the hair. It is a fact recognised by the courts (*gerichtsbekannt*) that it is impossible to prove the existence of a cervical syndrome by objective means, even using X-rays. To have consulted a medical expert for this purpose would therefore merely have led to a delay in the proceedings. A haematoma about as big as an egg, many other bruises and a cervical syndrome constitute bodily harm. This is not a question for an expert; it is a matter for the court, which it has duly determined in accordance with the consistent case-law.

It is not only the testimony that has so far been heard which is persuasive of Ronald Ribitsch's credibility but also his excellent memory of the persons concerned. In this connection, the court would refer to the identity parade on 26 June 1989, that is more than one year after the offence (file, item 10). At this identity parade, consisting of a total of nine persons, Ronald Ribitsch did not hesitate for one moment in recognising those involved in the police interviews, and in particular the accused Markl.

Ranged against this evidence is the line of defence established by the accused, which can only be described as disquieting. Both he and his defence lawyer, as well as his superior officer, Mr Pretzner, attempted at the trial (file, page 114 in item 25) to make Ronald Ribitsch out to be a despicable, work-shy individual. Apart from the fact that an officer of the Security Branch does not have the right to beat someone up in order to induce him to make a confession, simply because he is unemployed, what is noteworthy here is the obviously misguided attitude of the accused to his legal obligations. In his efforts to portray the witness Ribitsch as a depraved individual, he suddenly claimed at the trial that the two anonymous callers had been Wilhelm Puschl and Ursula Hennemann. He had, he stated, in the meantime learned from them that 'Ribitsch [was] a despicable creature (*eine miese Kröte*) because he [sold] washing powder to the poorest of the poor, the drug addicts' (file, page 128 in item 25). When the court asked him whether he had reported this, he was forced to reply that he had not. He subsequently went on to entangle himself in more and more contradictions concerning the statements made by these two witnesses (file, page 129 in item 25). If the accused's claim were really true this would mean that an officer of the Security Branch, who had good reason to suspect someone of, at the very least, deliberately

inflicting grievous bodily harm by selling washing powder he passed off as heroin, did not consider it necessary in any way at all to perform his duty under Article 84 of the Code of Criminal Procedure. The conclusion must be drawn that the accused Markl would prefer to allow criminal acts to be committed with potentially fatal consequences than to run the risk of having people say that he now wants to pin something on Ribitsch - which he is obviously afraid of (see page 129).

With regard to the application for a forensic doctor to be appointed with a view to showing that the injuries and the haematoma could also have been caused by a fall against the edge of the car door and that the other bruises on the inside of the upper right arm were caused when the former suspect's arm was grabbed, the court notes as follows: The accused Markl himself states in his (wrongly dated) report (file, page 419) that when Ronald Ribitsch was taken away for the voice comparison to be made he evidently missed his footing getting out of the car, which caused him to lose his balance and his right arm to bang into the edge of the car door, which had remained open. He, Markl, who had been standing right next to him, had managed to grab his upper left arm but had not been able to prevent him from falling. However, due to his intervention the fall had been rendered much less serious, and Ribitsch had only fallen gently on to his behind. Markl therefore himself states that he grabbed Ribitsch by the left arm, so that he cannot have inflicted a bruise on the inside of the right arm by catching him in this way. However, this version of events in the report is also contradicted by the witness Fröhlich (file, page 103 in item 25). This witness stated that there had been a big problem finding a place to park. He had had to park very close to another vehicle, so that he had had a great deal of trouble getting out of his own. It is 'very strange' (*lebensfremd*) that, although the driver of the vehicle had great difficulty getting out of it on his side, and although, because of the tight squeeze, the suspect at the time (Mr Ribitsch) must obviously also have had trouble getting out - Markl stated that Ronald Ribitsch sat directly behind the driver - there was yet sufficient room for Ribitsch to fall against the edge of the door and then on to his bottom. If one considers Ronald Ribitsch's size, that is impossible. Furthermore, the witness Scheidlbauer, who is a general practitioner, made a statement as an expert witness that was both credible and 'easy to understand' (*nachvollziehbar*), namely that whilst the largest bruise had been on the upper right arm it had not been the only one there. He continued by drawing attention to a phenomenon that the courts have recognised in many previous cases, namely that a person who falls against a hard edge normally has a graze or a skin wound, whereas when a person falls against or is struck by something without sharp edges, whether it is something with a large surface area or a fist, it is not the surface that is affected but the soft tissues underneath the skin (file, page 107). Similarly, a cervical syndrome could be the result of Ribitsch's head being violently shaken.

In law, both the objective and the subjective elements of the offence have been made out and Josef Markl is therefore guilty of the offence of assault occasioning bodily harm as defined in Article 83 para. 1 of the Criminal Code. The conditions laid down in Article 42 of the Criminal Code are not satisfied since this kind of behaviour cannot be classified as a trivial offence. Moreover, the specific, and above all general, requirements of deterrence militate against the application of this rule. Josef Markl was unable to prevent himself from committing the acts in issue in the instant case, even though he must have known that similar proceedings (where the facts were more serious) had already been brought against one of his superior officers, Mr Gross.

In sentencing the accused, the court considers the fact that the accused has no previous convictions to be a mitigating circumstance. On the other hand, his

particularly brutal conduct constitutes an aggravating circumstance. Given a possible maximum sentence of nine months, the sentence imposed of two months is reasonable in view of the offender's personality and the degree of culpability. For general reasons of deterrence - more and more accusations directed against the brutal policemen (prügelnde Polizisten) of the Security Branch have been made in recent years - a fine would not have been sufficient.

In view of the length of prison sentence imposed, it must, however, be assumed that the threat of its execution will be sufficient to deter Josef Markl and others from committing criminal acts. For this reason, the court has been able to impose a suspended sentence."

IV. POLICE OFFICER MARKL'S APPEAL TO THE VIENNA REGIONAL CRIMINAL COURT

18. Mr Markl appealed against the judgment to the Vienna Regional Criminal Court (Landesgericht für Strafsachen).

A. The expert opinion

19. By an interlocutory decision of 2 March 1990 the court ordered an expert opinion to be produced by the University of Vienna Institute of Forensic Medicine concerning the probability of there being a causal connection between Mr Ribitsch's injuries and the accident which had allegedly occurred when he was taken out under police escort, and the credibility from the medical point of view of the applicant's statements regarding the ill-treatment he had undergone.

20. After interviewing both Mr Ribitsch and Mr Markl and organising a reconstruction of the applicant's alleged fall against the rear door of the police car, the expert from the Institute of Forensic Medicine summarised his findings as follows:

"Therefore, judging by Meidling Accident Hospital's medical records, Ronald Ribitsch had a group of bruises on the outside of his upper right arm covering an area of 2 by 3 cm. Moreover, the findings of the neurological examination also contain a description of bruising to the inside of the right arm. Thus, the only injuries established by doctors were the bruises on the outside and inside of the upper right arm described above. These bruises must be regarded as minor and are to be interpreted as the result of dull blows to these parts of the body (lokale stumpfe Gewalteinwirkung). They are not likely to result in more than 24 days' sickness or unfitness for work.

Whether there was further bruising in the area of one armpit and below the right knee must be left to the judge's assessment of the evidence, as no medical findings were available to form the basis for an opinion on this question. The decisive factor is the credibility of the witness evidence. Even if one assumes that these haematomas existed it would make no difference to the assessment of the consequences of the injuries described above.

The general practitioner Dr Fritz Scheidlbauer diagnosed a cervical syndrome and pointed to vomiting, headaches and a raised body temperature. However, the neurological examination conducted at Meidling Hospital did not reveal any evidence of a head injury or a displaced cervical vertebra. These symptoms can be interpreted in this case as non-specific complaints, resulting, for example, from a general infection (Allgemeininfekt) (Ronald Ribitsch stated that he was suffering from diarrhoea). On the other hand, from the point of view of forensic medicine, no connection can be proved with any trauma that may have been suffered.

The results of the test carried out with the car - no big differences are to be expected with a VW Golf - showed that the bruising to the outside of the upper right arm was roughly consistent as far as its position was concerned with the bruise on the outside of the upper arm described in the outpatient records and visible in the photograph. From the medical point of view these injuries must be described as non-specific injuries, and they only support the conclusion that this area of the body was violently struck by a blunt 'instrument', without it being possible to conclude from the nature of the damage what kind of instrument it was. The possibility cannot therefore be excluded that the injury was caused by a bump against the car door.

Even if one proceeds upon the assumption that the injuries described by the witnesses existed, the general diagnosis must, on the whole, be described as non-specific, so that no certain conclusion can be drawn from the medical point of view as to whether there was maltreatment, although blows to the upper arm and, perhaps, a kick in the knee area cannot be excluded. However, serious ill-treatment lasting several hours cannot in any case be deduced from the overall pattern of the injuries.

However, the version submitted by Josef Markl, namely that Ronald Ribitsch fell against the car door can explain only one of several injuries that may have been sustained."

B. The hearing

21. At the hearing on 14 September 1990 the expert's report and a statement by the "police detention centre" to the effect that the prison doctor had seen Mr Ribitsch at 8 a.m. on 1 June 1988 and had declared him fit for detention were read out. The court then heard Police Officer Markl, Mr Ribitsch and the expert from the Institute of Forensic Medicine.

In its report, the Commission gave the following account of Mr Markl's and the applicant's declarations:

"60. Police Officer Markl was again questioned on the accusations against him, brought both by the applicant and his wife. Markl expressed the view that the applicant's wife had suffered from the fact of her detention as such and had, together with her husband, concentrated upon Markl against whom to bring their accusations. Markl remembered that upon his arrest the applicant had threatened to cause difficulties. At a later stage, when his superior Pretzner had been present, there had, as usual, been a rather calm atmosphere. At the questioning on 2 June 1988, the applicant had shown him the bruising on his right upper arm, but had not wanted to see a physician. Markl also repeated his version of the incident upon the applicant's escorted visit.

61. The applicant was questioned about his professional training and his past occupations, his financial situation, furthermore about his contacts with drugs. Questioned about the alleged escalation of the interrogation, the applicant stated that the police officers had wished to find a culprit by any means. As regards the first questioning on 31 May 1988, he stated that Police Officer Gross had disliked one of his answers and, therefore, pulled him by his moustache out of the chair and later put him down again. As he had not resisted, his moustache had not been torn off. Police Officer Markl had already hit him at that stage, however not in the face; throughout the beating Markl had attempted to avoid marks as far as possible. The applicant further stated that he had not suffered any accidental incident upon his escorted visit, and he insisted that at the time he had been driven in a two-door car, whereas the reconstruction had been done with a four-door car. The applicant was subsequently questioned in detail about the course of the maltreatment to which he had allegedly been subjected. He repeated his earlier statements that Markl had mainly beaten and kicked him and pulled him by the hair, though, when lying on the floor, he had the impression of being kicked by more than one person. Questioned about the varying statements in the course of the proceedings as to the shoe-print, the applicant insisted that the haematoma had been on his lower leg underneath his knee, as had the shoe-print on his trousers. He could not say with certainty that Markl had kicked him, causing this particular haematoma. The applicant also said that he had chosen counsel to represent him in this matter only after having gathered information. The reporter of the public broadcast had coincidentally been present in a pub where he had told friends about the incidents."

C. The judgment

22. At the end of the trial the Regional Criminal Court quashed the District Court's judgment of 13 October 1989 and acquitted Mr Markl. Pursuant to Article 366 para. 1 of the Code of Criminal Procedure, it referred the applicant to the civil courts in respect of his claim for damages.

In its judgment of 14 September 1990 the court set out its reasons as follows:

"However, the defence lawyer's written appeal against conviction and his oral pleadings at the hearing on 2 March 1990 cause attention to be focused on the question whether on its own, and in context, the evidence incriminating the accused provides a sufficient degree of reliability to support a verdict of guilty, since it must be borne in mind that the civil party Ronald Ribitsch has been involved, from time to time at any rate, in the drug scene.

The position confronting the appeal court as regards evidence (*Beweislage*) is as follows: while it is true that the statements made by all the witnesses informed by the civil party Ronald Ribitsch tallied perfectly with his own version of events, which always remained the same, the objective accuracy of this version stands or falls solely on the reliability of the evidence given by Ronald Ribitsch. Moreover, like the court of first instance, the appeal court has no doubt as to the subjective accuracy of the statements made by the witnesses Dr Scheidlbauer, Dr Tripp, Elisabeth Hoke, Robert Buchacher and Peter Lehner, and can therefore base its decision on the record of their testimony, in accordance with Article 473 para. 2 of the Code of Criminal Procedure. Nevertheless, it considers it necessary to inquire into Ronald Ribitsch's credibility, to weigh up his story against that of the accused and to supplement the evidence adduced

in the proceedings at first instance by consulting an expert from the Institute of Forensic Medicine."

With regard to the applicant's credibility, the Regional Court pointed out that on 6 October 1988 the District Criminal Court had found him guilty of drug offences and ordered him to pay a fine. Moreover, he had been unemployed for several years and lived off his wife's income and social security benefits. These resources were not, however, sufficient to cover his expenses as a drug user who was the father of two minor children at the material time, or his other personal expenses. The court then summarised the versions given by Mr Ribitsch on the one hand and Mr Markl on the other of the events which had occurred while the applicant was in police custody, and went on to say:

"Neither Ronald Ribitsch's account nor the testimony of his wife Anita in the file have been able to satisfy the appeal court conclusively that there was a situation which could logically explain why the police interviews degenerated into criminal behaviour. Moreover, seeing that only four police officers were present and asked questions during the interviews, and were busy for part of the time interviewing Anita Ribitsch, that Police Officers Gerhard Trnka and Helmut Gross, who were subsequently acquitted, were cleared of blame by Ronald Ribitsch himself (vol. II, pages 95 and 96) and that neither Ronald Ribitsch nor his wife Anita accused Police Officer Mario Fröhlich, who treated them correctly, of any offence (Ronald Ribitsch to Buchacher, vol II, pages 122 and 123; Anita Ribitsch, vol. I, page 47), the appeal court considers that it remains a completely open question which other Security Branch officers might have been Josef Markl's accomplices (Mit- oder Nebentäter). The view of the evidence taken by the court of first instance, to the effect that public pressure to solve the crime, which was reflected in the numerous hours of overtime (confirmed by the Chief of Police, Dr Bögl, in vol. I, pages 37 and 43), constituted sufficient motivation, does not appear to the appeal court to be capable of bearing scrutiny (tragfähig), since one cannot simply assume that a police officer, and one moreover who had good reason to be aware of the heightened vigilance of the media, would let himself be drawn into criminal acts in a way that defies all logic.

Ronald Ribitsch's version of events, according to which, 'between 3 p.m. and 10.45 p.m. on 1 June 1988 he was questioned for periods of about three-quarters of an hour, each time by three police officers, after which two more officers banged his head against the floor and kicked him for a quarter of an hour' (vol. I, page 27) leads one to expect a large number of injuries, especially to prominent parts of the face. Similarly, Ribitsch's claim (loc. cit.) that he was hit on the body in such a way 'that this did not leave many marks but was nevertheless very painful' would suggest that the officers had gone about their task in a methodical way, but this cannot be reconciled with Ronald Ribitsch's account, according to which the officers, in their efforts to force him to confess, had lost all control over their actions. This version of events does not tally with Mr Ribitsch's assertion that it was possible for him to distinguish between the officers questioning him and those who were maltreating him, given that, according to other statements made by Ribitsch, Josef Markl participated both in the interrogation and in the ill-treatment."

The court then turned to the question of the injuries noted on the applicant's person.

(i) It referred to Mr Markl's statements to the effect that Mr Ribitsch had lost his balance when he bumped into the car's rear door and had slid to the ground before he, Markl, could grab hold of his left arm and break his fall. According to the forensic medical report, it was not impossible for the bruises on the outside of the applicant's right arm to have been caused by this fall, even though the general practitioner questioned by the court of first instance on this subject had stated that this was rather unlikely. Lastly, the expert from the Institute of Forensic Medicine, who had organised the reconstruction of the events, had stated that the more violent Mr Ribitsch's collision (Anprall) with the car door had been, the more likely it was to have caused the injuries, but that the more it resembled a mere slip to the ground (Abgleiten), the more improbable was the version of the events given by the accused.

(ii) The court added that only one of the witnesses, namely the journalist, had noted the existence of a bruise on the inside of the right arm, which in any case was not by itself proof of ill-treatment. Moreover, Mr Markl had stated in that connection that he could not be sure he had not also grabbed Mr Ribitsch's right arm to stop him falling.

(iii) As for the applicant's other symptoms, namely the cervical syndrome, stiffness of the fingers and diarrhoea, the court pointed out that, according to the report from the Institute of Forensic Medicine, these might also have been signs of a general infection.

The court refused the applicant's lawyer's request that further evidence be taken, such as re-examination of the witnesses, production of the recording made by Austrian radio, reconstruction of the events with a two-door VW Golf and a psycho-neurological report; it also refused the prosecution's request for production of the Security Branch log-books so that it could be checked whether a two-door or four-door car had been used. It concluded in these terms:

"Finally, if one considers the fact that the civil party Ronald Ribitsch did not see fit to report the offence, that he has been unable in the course of these proceedings to state why he did not do so, that, for incomprehensible reasons, he chose the course of making a public accusation on Austrian radio and that during the proceedings he became entangled in contradictions concerning the alibi to be proven by the witness Stranner, then there are considerable doubts as to the reliability (verlässliche Tragfähigkeit) of his evidence.

The appeal court is therefore unable to reach a conclusive decision either to reject the accused's evidence or to accept even in part the evidence adduced by the civil party Ronald Ribitsch with the certainty which alone may be made the basis of a verdict of guilty in criminal proceedings.

..."

V. THE APPLICANT'S APPLICATION TO THE CONSTITUTIONAL COURT

23. Mr Ribitsch then applied to the Constitutional Court, which gave judgment on 26 November 1990. It held that the applicant's arrest, his detention in police custody and the searches carried out at his home had been unlawful and had infringed his right to liberty of person and respect for his home. The police had not been in possession of either an arrest warrant or a search warrant and had not been able to establish the risk of collusion or immediate danger. It ruled that it had no jurisdiction to rule on the question of the insults allegedly uttered by the police to the applicant. As for the ill-treatment he had allegedly undergone, it noted that the three defendants had been acquitted by the lower courts and concluded:

"In the light of this outcome of the criminal proceedings (during which a large body of evidence was presented), the Constitutional Court considers that it is not in a position (außer Stande) to uphold the applicant's allegations and to consider the claims of ill-treatment made in the application to this court to have been proved beyond doubt. In summary, in the proceedings before the Constitutional Court it was no longer possible, in the circumstances, to clarify the relevant facts any further, nor, consequently, to furnish proof of the alleged human rights violation.

On this point also, therefore - in the absence of a valid object - the application must be declared inadmissible (unzulässig)."

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Ribitsch applied to the Commission on 5 August 1991. Relying on Articles 3 and 6 para. 1 (art. 3, art. 6-1) of the Convention and Article 13 in conjunction with Article 3 (art. 13+3), he complained that he had undergone inhuman and degrading treatment during his detention in police custody, that he had been prevented from effectively prosecuting his action for damages on account of his status as civil party in the criminal proceedings and that he had not had an effective remedy in the Constitutional Court.

25. On 20 October 1993 the Commission declared admissible the complaint under Article 3 (art. 3) and the remainder of the application (no. 18896/91) inadmissible.

In its report of 4 July 1994 (Article 31) (art. 31), it expressed the opinion (by ten votes to six) that there had been a breach of Article 3 (art. 3). The

full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

26. In their memorial the Government asked the Court to hold

"that the applicant's rights under Article 3 (art. 3) of the Convention were not infringed by the officers of the Vienna Federal Police Authority".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 (art. 3) OF THE CONVENTION

27. Mr Ribitsch claimed that while in police custody at the Security Branch of the Vienna Federal Police Authority he had undergone ill-treatment incompatible with Article 3 (art. 3) of the Convention, which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

28. The Government contested this allegation. The Commission considered it well-founded.

29. The applicant asserted that the injuries he had on his release from police custody, particularly the bruises on the inside and outside of his right arm, had been seen by a number of witnesses, including a journalist, a psychologist and doctors (see paragraphs 13 and 16 above). These injuries had only one cause, namely the ill-treatment inflicted by the police officers who questioned him, who, after grossly insulting him, had assaulted him repeatedly in order to induce him to make a confession (see paragraphs 12, 15 and 16 above).

30. The Government did not dispute that Mr Ribitsch's injuries were sustained while he was in police custody, but pointed out that it had not been possible during the domestic criminal proceedings to establish culpable conduct on the part of the policemen. In that connection they

³ Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 336 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

referred to the conclusions of the Vienna Regional Criminal Court, which had conducted its own assessment of the evidence, in particular by ordering a forensic medical report, and had thoroughly scrutinised Mr Ribitsch's statements and his credibility. They submitted that, for a violation of the Convention to be found, it was necessary for ill-treatment to be proved "beyond reasonable doubt".

31. The Commission expressed the view that a State was morally responsible for any person in detention, since he was entirely in the hands of the police. In the event of injuries being sustained during police custody, it was for the Government to produce evidence establishing facts which cast doubt on the account of events given by the victim, particularly if this account was supported by medical certificates. In the instant case, the explanations put forward by the Government were not sufficient to cast a reasonable doubt on the applicant's allegations concerning the ill-treatment he had allegedly undergone while in police custody.

32. The Court reiterates that, under the Convention system, the establishment and verification of the facts is primarily a matter for the Commission (Article 28 para. 1 and Article 31) (art. 28-1, art. 31). It is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it (see, among other authorities, the *Klaas v. Germany* judgment of 22 September 1993, Series A no. 269, p. 17, para. 29). The Court further points out that in principle it is not its task to substitute its own assessment of the facts for that of the domestic courts, but that it is not bound by the domestic courts' findings any more than it is by those of the Commission.

Its scrutiny must be particularly thorough where the Commission has reached conclusions at variance with those of the courts concerned. Its vigilance must be heightened when dealing with rights such as those set forth in Article 3 (art. 3) of the Convention, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and, under Article 15 para. 2 (art. 15-2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 65, para. 163).

33. In the instant case the Court notes the following facts:

(1) The existence of injuries to Mr Ribitsch's person was established as early as 2 June 1988 in a report by Meidling Hospital and noted on 3 June 1988 by a general practitioner, Dr Scheidlbauer, and a number of other witnesses. During the proceedings at first instance Dr Scheidlbauer stated that he considered it rather unlikely that a fall against a car door had caused those injuries; during the appeal proceedings the expert in forensic medicine appointed by the Regional Criminal Court stated that such a fall could

explain "only one of several injuries that may have been sustained". It is not disputed that the applicant had a number of bruises on the inside and the outside of his right arm (see paragraphs 13, 16, 17 and 20 above).

(2) The explanations given by Police Officer Markl contain discrepancies. His report, incorrectly dated 1 June 1988, had allegedly been drawn up on the advice of his superior officer, Mr Gross, although the latter asserted that he had not known about any injuries (see paragraphs 15 and 17 above). Mr Markl's statements as to when the applicant first showed him the injuries on his right arm are contradictory. Lastly, he took no action on the allegations by witnesses that Mr Ribitsch had been selling washing powder which he had passed off as heroin (see paragraph 17 above).

(3) Police Officer Fröhlich, the driver of the car, said that he had not seen Mr Ribitsch fall (see paragraph 15 above).

(4) The Vienna District Criminal Court, after conducting a detailed analysis of the evidence and conduct of Police Officer Markl, found him guilty of assault occasioning bodily harm. It considered Mr Ribitsch's version of events credible, basing its assessment in particular on the consistent nature of the witness evidence and on the general practitioner's statements. On the other hand, it described as "disquieting" the line of defence adopted by Mr Markl, whose statements seemed contradictory and confused (see paragraph 17 above).

(5) The Vienna Regional Criminal Court, on the other hand, acquitted Mr Markl, concluding that it was "unable to reach a conclusive decision either to reject the accused's evidence or to accept even in part the evidence adduced by the civil party Ronald Ribitsch with the certainty which alone may be made the basis of a verdict of guilty in criminal proceedings". In stating its reasons, the Regional Criminal Court cast doubt on the applicant's credibility, notably on the basis of considerations unrelated to the course of events while he was in police custody. These included his conviction for a drug offence in October 1988, the fact that he was unemployed, the fact that he was living beyond his means and the fact that he "chose the course of making a public accusation on Austrian radio" rather than lodging a complaint. In justifying its departure from the view of the evidence taken by the court of first instance, the Regional Criminal Court also included the observation that "one cannot simply assume that a police officer, and one moreover who had good reason to be aware of the heightened vigilance of the media, would let himself be drawn into criminal acts in a way that defies all logic" (see paragraph 22 above).

(6) The Constitutional Court did not examine the merits of Mr Ribitsch's complaint of ill-treatment. It noted the unlawfulness of the searches and the arrest of the applicant and his wife (see paragraph 23 above).

34. It is not disputed that Mr Ribitsch's injuries were sustained during his detention in police custody, which was in any case unlawful, while he

was entirely under the control of police officers. Police Officer Markl's acquittal in the criminal proceedings by a court bound by the principle of presumption of innocence does not absolve Austria from its responsibility under the Convention. The Government were accordingly under an obligation to provide a plausible explanation of how the applicant's injuries were caused. But the Government did no more than refer to the outcome of the domestic criminal proceedings, where the high standard of proof necessary to secure a criminal conviction was not found to have been satisfied. It is also clear that, in that context, significant weight was given to the explanation that the injuries were caused by a fall against a car door. Like the Commission, the Court finds this explanation unconvincing; it considers that, even if Mr Ribitsch had fallen while he was being moved under escort, this could only have provided a very incomplete, and therefore insufficient, explanation of the injuries concerned.

On the basis of all the material placed before it, the Court concludes that the Government have not satisfactorily established that the applicant's injuries were caused otherwise than - entirely, mainly, or partly - by the treatment he underwent while in police custody.

35. Mr Ribitsch maintained that the ill-treatment he suffered while in police custody constituted inhuman and degrading treatment. The blows he received and the insults and threats uttered against him and his wife, who was detained at the same time, had caused him intense physical and mental suffering. Moreover, a number of witnesses had confirmed that the applicant had sustained physical injuries and was suffering from considerable psychological trauma (see paragraph 16 above).

36. Taking into account the applicant's particular vulnerability while he was unlawfully held in police custody, the Commission declared itself fully satisfied that he had been subjected to physical violence which amounted to inhuman and degrading treatment.

37. The Government did not dispute that the applicant's injuries, assuming that it had been proved that they were deliberately inflicted on him while he was in police custody, reached a level of severity sufficient to bring them within the scope of Article 3 (art. 3).

38. The Court emphasises that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (art. 3) of the Convention. It reiterates that the requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals (see the *Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, p. 42, para. 115).

39. In the instant case the injuries suffered by Mr Ribitsch show that he underwent ill-treatment which amounted to both inhuman and degrading treatment.

40. Accordingly, there has been a breach of Article 3 (art. 3).

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

41. Article 50 (art. 50) of the Convention provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

42. Under this provision (art. 50) the applicant requested compensation for non-pecuniary damage and reimbursement of his costs and expenses.

A. Non-pecuniary damage

43. Mr Ribitsch maintained that he had suffered non-pecuniary damage on which he set the figure of ATS 250,000.

44. The Government did not make any observation on the question.

45. The Delegate of the Commission argued that a relatively high sum should be awarded in order to encourage people in the same position as Mr Ribitsch to bring court proceedings.

46. The Court considers that the applicant suffered undeniable non-pecuniary damage. Taking the various relevant factors into account, and making its assessment on an equitable basis, as required by Article 50 (art. 50), it awards him ATS 100,000.

B. Costs and expenses

47. Mr Ribitsch also requested reimbursement of his costs and expenses. For the proceedings in the Austrian courts he claimed ATS 78,780. For the proceedings before the Convention institutions he requested ATS 385,375, after deducting ATS 20,185 in respect of the legal aid he had received before the Commission.

48. The Government argued that, with reference to the Austrian Bar's guidelines on fees, most of the amounts claimed were excessive.

49. The Delegate of the Commission did not express any view on the question.

50. Making its assessment on an equitable basis and in the light of the criteria it applies in this matter, the Court awards the applicant ATS 200,000, from which should be deducted the sum of

18,576 French francs already paid by the Council of Europe in respect of legal aid.

FOR THESE REASONS, THE COURT

1. Holds by six votes to three that there has been a breach of Article 3 (art. 3) of the Convention;
2. Holds by six votes to three that the respondent State is to pay the applicant, within three months, 100,000 (one hundred thousand) Austrian schillings for non-pecuniary damage;
3. Holds unanimously that the respondent State is to pay the applicant, within three months, 200,000 (two hundred thousand) Austrian schillings in respect of costs and expenses, less 18,576 (eighteen thousand five hundred and seventy-six) French francs to be converted into Austrian schillings at the rate of exchange applicable on the date of delivery of the present judgment;
4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 December 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the joint dissenting opinion of Mr Ryssdal, Mr Matscher and Mr Jambrek is annexed to this judgment.

R. R.
H. P.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL,
MATSCHER AND JAMBREK*(Translation)*

1. In the present case we are unable to agree with the majority of the Chamber, in particular because we attach a different weight to the facts.

In May 1988, following the deaths of two people from heroin overdoses, the special unit of the Vienna Federal Police Authority conducted inquiries among people on the drug scene with the aim of discovering who had supplied the drug to the deceased. In the course of these inquiries it questioned, among others, Mr Ribitsch, who was known to be a drug user and was also suspected of being a dealer. Two informants, one of whom was a close friend of one of the deceased, had identified Mr Ribitsch as the supplier of the fatal dose of heroin.

On 31 May 1988 police officers arrested the applicant and searched his home. These officers having found a quantity of drugs at the premises, Mr Ribitsch was taken into police custody for questioning at the headquarters of the Security Branch of the Vienna Federal Police Authority from noon on 31 May until the morning of 2 June 1988.

Mr Ribitsch subsequently claimed that he had been subjected to ill-treatment while in police custody. He did not lodge a complaint with the competent authorities but informed a number of his friends and relatives, including a journalist. It was only on the journalist's advice that Mr Ribitsch went to a hospital and consulted his general practitioner. A few days later the journalist organised a programme on Austrian radio about the events in question.

Unlike what happened in similar cases brought against other States (see, in particular, the case of *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269), the competent authorities, of their own motion, opened an inquiry into the events in question as soon as they had been informed of them.

The results of the inquiry were sent to the public prosecutor's department, which brought criminal proceedings against three police officers for assault occasioning bodily harm.

In a judgment given by the Vienna District Criminal Court one of the three police officers was found guilty and sentenced to two months' imprisonment, suspended, while the other two were acquitted. The reasons for the District Court's judgment were set out at length. The judge mainly relied on the evidence given by the witnesses - Mr Ribitsch and other persons who can be numbered among his friends and relatives - and on the certificates made out by the hospital staff and the general practitioner, in which an account was given of the injuries to Mr Ribitsch's person and other symptoms the latter had described. The judge refused to allow a

defence application for a forensic medical report on the cause of these injuries.

On an appeal by the police officer convicted by the District Court, the Vienna Regional Criminal Court first of all ordered a forensic medical report from the University of Vienna Institute of Forensic Medicine. The main aim of this report was to establish, as far as possible, the cause of the injuries noted by the doctors and the symptoms the applicant had complained of. Its conclusion was that the injuries and symptoms concerned could be explained in various ways; it was quite possible that they had been due to a cause different from that accepted by the District Court. The Regional Criminal Court, composed of three career judges, carefully evaluated the evidence before it, examining in detail the statements of the applicant and the other witnesses, and acquitted the police officer, on cogent grounds. Moreover, it is the practice of appellate courts in Austria not to overturn the judgment of a lower court unless they have serious doubts whether it is well-founded.

The Constitutional Court dismissed an appeal by the applicant, having observed that it could see no reason to criticise the procedure followed in the Regional Court, its assessment of the evidence or the decision it had reached.

The Constitutional Court could have reviewed the whole of the proceedings in the case and conducted its own assessment of the facts. However, as explained in the previous paragraph, it saw no reason to do so, thus endorsing in substance the Regional Court's judgment on the appeal.

Our conclusion: The respondent Government ordered of their own motion an inquiry which led to close scrutiny of the case by independent courts at three different levels of jurisdiction. It is not the Court's task to substitute its own assessment of the facts for that conducted by the national courts, unless these have proceeded improperly, which was not the position in the instant case.

As there obviously was reasonable doubt as to the applicant's allegations of ill-treatment causing bodily injuries in the course of his detention at the Vienna Federal Police Department, even though it was not possible to provide irrefutable proof that the injuries and symptoms complained of by the applicant after his release from police custody were caused otherwise than by the acts he alleged, we cannot conclude that there has been a breach of Article 3 (art. 3) of the Convention.

2. In view of the ambiguous behaviour of the applicant and taking into account that before the District Court he claimed for damages only ATS 1,000, which were awarded to him, we did not feel able to vote for any further compensation for non-pecuniary damages.