COUNCIL OF EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

of APPLICATION No. 788/60
lodged by the Government of the
Federal Republic of Austria
against the Government of the Republic of Italy

The European Commission of Human Rights, sitting in private on Wednesday, 11th January 1961, with Mr. C.H.M. WALDOCK presiding and in the presence of:

MM. C. Th. EUSTATHIADES, Vice-President
P. FABER
A. SUSTERHENN
S. PETREN
Mrs. G. JANSSEN-PEVTSCHIN
MM. M. SØRENSEN
N. ERIM
F. ERMACORA
F. CASTBERG
G. SPERDUTI
Mr. A.B. McNULTY, Secretary of the Commission;

Giovanni/Johann Huber: 13 years and 4 months for murder;

Paolo/Paul Unterkircher: 10 years for murder.

The other accused, including Luigi/Alois Bergmeister, were either acquitted or discharged for lack of evidence.

Following an appeal by certain of the accused and by the Public Prosecutor, the Trent Court of Appeal, again consisting of two professional magistrates and six jurymen - four Italian-speaking and two German-speaking - pronounced on 27th March 1958 the following sentences:

Luigi/Alois Ebner: imprisonment for life (with one year of day-time solitary confinement) for murder, insulting behaviour to officials and affront to the nation;

Floriano/Florian Weissteiner, Isidoro/Isidor Unterkircher and Giorgio/Georg Knollseisen: 17 years and 10 months imprisonment on the same counts;

Bernardo/Bernhard Ebner: 17 years and 2 months imprisonment on the same counts;

Paolo/Paul Unterkircher: 12 years imprisonment on the same counts;

Giovanni/Johann Huber: 1 year and 2 months imprisonment for insulting behaviour to officials and affront to the nation.

In the case of the latter the Court dismissed the charge of murder for lack of evidence and, noting that he had served his term of imprisonment while awaiting trial, ordered his immediate release.

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At the hearing of 10th March 1958, the defence had asked the Court to visit the place where the body was found, as the Bolzano/Bozen Court had done, and to take the evidence of Giovanna/Johanna Ebner, who had crossed the bridge shortly after the discovery of Falqui's body, and of Dr. Koflor, local doctor of the neighbouring village of Vandojes, who had certified the death. The Court of Trent agreed to visit the scene of the incident, and did so on 13th March 1958, but refused to take the evidence of Giovanna/Johanna Ebner and Dr. Kofler, on the grounds that the circumstances to which this evidence related (position of the body, in the case of the former, and the nature of Falqui's injuries, in the case of the latter) were irrelevant ("inconferenti"). The Court also decided in response to the suggestion of the plaintiff in the civil action and the prosecution that the visit to the scene of the incident should take place in the presence of the witnesses, Lombardo and Calvia, aforementioned.

Following the further appeal of the accused, the Court of Cassation, on 16th January 1960, delivered a judgment:

- striking out, by virtue of an amnesty, the offences of insulting behaviour to officials and affront to the nation charged against Bernardo/Bernhard Ebner, Isidoro/Isidor Unterkircher, Floriano/Florian Weissteiner, Giorgio/Georg Knollseisen, Paolo/Paul Unterkircher and Giovanni/Johann Huber;
- stating that the Court of Trent had deliberated "ultra petita" by disallowing the extenuating circumstances in respect of Luigi/Alois Ebner which the Bolzano/Bozen Court had allowed;
- quashing the judgment absolutely on these two points;

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- substituting the following sentences for those pronounced by the Court of Appeal:

  25 years, 5 months and 10 days imprisonment for Luigi/Alois Ebner;

  16 years imprisonment for Bernardo/Bernhard Ebner, Isidoro/Isidor Unterkircher, Floriano/Florian Weissteiner and Giorgio/Georg Knollseisen;

  10 years and 8 months imprisonment for Paolo/Paul Unterkircher;

- dismissing the remainder of the appeal.

The Commission notes that the three above-mentioned judgments concern not only the events of the night of 15th/16th August 1956, but also a minor incident which took place on 29th June 1956 between some of the youths in the case and workmen building a hydro-electric dam in the Fundres/Pfunders vicinity. In view of the fact, however, that Application No. 788/60 is not concerned with this incident or the proceedings in connection with it, it is unnecessary to go further into this matter.

THE COMPLAINTS OF THE APPLICANT GOVERNMENT

Whereas the Applicant, the Austrian Government, claims that the Respondent (Italian) Government, was guilty, in connection with the above facts, of a breach of the undertakings given by the Italian Republic under Articles 6, paragraphs (1), (2) and (3) (d) and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms; whereas these complaints are set out in greater detail below;

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THE PROCEEDINGS BEFORE THE COMMISSION

Whereas the first stage of the proceedings, as laid down in the Convention and the Rules of Procedure, consists in the examination by the Commission of the admissibility of the Application, without regard to the merits of the case; whereas the order of these proceedings has been as follows:

By order of 12th July 1960, made in accordance with Rule 44 of the Rules of Procedure, the President of the Commission instructed the Secretary-General of the Council of Europe to communicate Application No. 788/60 to the Italian Government and to invite that Government to submit to the Commission their written observations on the admissibility of the said Application.

The written observations of the Italian Government reached the Secretariat on 31st August 1960. In accordance with the orders of the President of 31st August, 28th October and 18th November 1960, the Austrian Government replied to these observations on 26th October 1960 and on 3rd December 1960 the Italian Government submitted their supplementary written observations (Rule 46 (1) and (2) of the Rules of Procedure).

On 17th December 1960, the Commission, in plenary sitting, decided:

- to give the case priority (Rule 38 (1) of the Rules of Procedure), in response to a request by the Austrian Government to which the Italian Government raised no objection;
- to invite the representatives of the parties to appear before the Commission on Saturday, 7th January 1961, to make oral submissions regarding the admissibility of the Application and in particular on the three specific points raised by the Commission (Rule 46 (1) in fine of the Rules of Procedure).

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The hearing in the presence of the parties took place on the mornings of 7th and 9th January 1961. The following appeared before the Commission (Rule 36 (1) of the Rules of Procedure):

for the Austrian Government:

Mr. Hans REICHMANN (Austrian Permanent Representative to the Council of Europe), Agent,

assisted by

Mr. Rudolf KIRCHSCHLAGER (Legal Adviser to the Austrian Ministry for Foreign Affairs)

and

Mr. Armand MERGEN (Professor of the Mainz Faculty of Law),

Counsel.

for the Italian Government:

Mr. Riccardo MONACO (Legal Adviser to the Italian Ministry for Foreign Affairs); Agent,

assisted by

Mr. Giacomo DELITALA (Professor of the Milan Faculty of Law),

Mr. Giorgio BOMBASSEI DE VETTOR (Italian Permanent Representative to the Council of Europe),

Mr. Ettore MASELLI (Magistrate attached to the Italian Ministry of Justice),

Mr. Luigi LAURIOLA (Assistant to the Italian Permanent Representative to the Council of Europe)

and

Mr. Marco VIANELLO-CHIODO (Attaché, Italian Ministry for Foreign Affairs),

Counsel.

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At the above-mentioned hearing on 9th January 1961, the Italian Government, Respondent, presented the following written conclusions:

"The Italian Government, following the hearings on the admissibility of Application No. 788/60 by the Austrian Government, which were held at Strasbourg on 7th and 9th January 1961, and referring to the written and oral submissions made in the course of the proceedings, presents the following written conclusions:

"May it please the European Commission of Human Rights:

" - to declare the Application inadmissible ratione temporis on the ground that the Federal Republic of Austria, which acceded to the Convention

...s lodged against that judgment as such;

" - to declare, pursuant to Article 27, paragraph 3 of the Convention, that the Application is inadmissible on the ground of non-exhaustion of domestic remedies within the meaning of Article 26 of the Convention; first because the accused did not request that the case be brought before another court (rimessione ad procedimento) and, second, because the accused on final appeal did not avail themselves of a remedy open to them, not having expressly claimed that the Trento Assize Court of Appeal had infringed Articles 6 and 14 of the Convention, now - more especially with regard to the alleged violation of Article 14 and Article 6, paragraph 2 of the Convention - that there had been an infringement of Articles 3 and 27 paragraph 2 of the Constitution of the Italian Republic;

- to reject the Application accordingly."

The Austrian Government, Applicant, likewise submitted on 9th January 1961 the following conclusions:

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"On the invitation of the Commission and with reference to the written and oral submissions presented, the Austrian Government has the honour to put forward the following conclusions for the Commission's attention:

I. Violation of Human Rights throughout the proceedings against the Pfunders accused

"The Austrian Government lodged its application on the basis of the following provisions of the Human Rights Convention:

1. Violation of the rights safeguarded by Article 6, paragraph 3(d) of the Convention in that the testimony of the witnesses Johanna EBNER and Dr. KOFLER was rejected as not pertinent to a matter which the courts declared to be essential and relevant in respect of the witnesses called by the prosecution and irrelevant in respect of the above witnesses called by the defence in connection with the same points.

(Section III of the Application).

3. Violation of the rights safeguarded by Article 6, paragraph 1, of the Convention as a result of:

(a) the composition of the Court - four out of the six jurors were of Italian ethnic origin and were ipso facto particularly liable to be swayed by the Italian press campaign, the political tension, the vehement arguments of the Public Prosecutor and of the plaintiff (Section III/3 of the Application);

(b) the violation of the right set forth in Article 6, paragraphs 2 and 3(d). Paragraph 1 of that Article, by its general implications, summarises the succeeding paragraphs.

4. Violation of the rights safeguarded by Article 14, in that the violations of human rights set forth above undoubtedly resulted from the fact that the young men of Pfunders were of a different ethnic and linguistic (national) origin from the majority of citizens of the Italian Republic (Application, Section III/3).

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II. Competence of the European Commission of Human Rights

"The Commission is competent for the following reasons:

1. "The facts set forth in (I) above and contained in the Application lodged by the Austrian Government constitute a breach of the Convention for which the Austrian Government believes it can hold the Italian Republic responsible (Article 24).

2. "From the time of deposit of its instrument of ratification, Italy was under a duty to guarantee to all persons coming within its jurisdiction the rights and freedoms defined in Section I of the Convention.

"Austria has been a High Contracting Party since the moment of its own ratification of the Convention and is entitled to lodge an Application against another High Contracting Party even in respect of events which occurred prior to that ratification. The possibility of a condition of reciprocity, which is expressly provided for in Article 46, paragraph 2, of the Convention or Article 36 of the Statute of the International Court, is not mentioned in Article 24 of the Convention.

"As a secondary count, it may properly be submitted that the trial of the Pfunders young men should be regarded as a whole. It follows that the date of the judgment rendered by the Court of Cassation (1960) should be considered as the date of the final decision of the domestic courts.

III. Exhaustion of domestic remedies

1. So far as concerns Applications lodged by States with the object, not of affording diplomatic protection to nationals of the Applicant's State but of claiming a breach of the Convention by another High Contracting Party, the rule concerning the exhaustion of domestic remedies is applicable only to the extent that a final decision has been rendered by the domestic courts.

2. Secondarily, we submit the following:

   (a) In their appeal to the Court of Cassation (cf. Appendix C and our written observations) the accused adduced in substance, basing themselves on Article 24 of the Italian

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Constitution, the reasons and evidence underlying the Austrian Application. There was no need to quote expressis verbis the Articles of the Convention which had been violated, since in substance the Italian Constitution coincides with Articles 6 and 14 of the Convention, invoked by the Austrian Government.

(b) It was not possible in law for counsel defending the Pfunders young men to challenge the jury on the basis of Article 55 and Articles 61 et seqq of the Italian Code of Criminal Procedure. Indeed, no such challenge could be expected of them. A request to have the case transferred to another court would have been ineffectual, or, in the unlikely event of its being agreed to, would have resulted in a jury of even less favourable ethnic composition.

"For these reasons,

"May it please the Commission:

1. to accept the Application lodged by the Federal Republic of Austria and entered in the Register under File No. 788/60, and to declare it admissible;

2. to act upon the Application by proceeding in accordance with Articles 28, 29 and 30 of the Convention."

At the close of the hearing, the Commission deliberated in private on 9th (afternoon), 10th and 11th (morning) January 1961 on the admissibility of the Application. The result of these deliberations is set out in the present decision.

AS TO THE LAW

Whereas the Commission, at this stage in the proceedings, is called upon to decide various points arising as to the admissibility of Application No. 788/60;

Whereas the Italian Government has formally submitted two preliminary objections, one relating to the Commission's competence ratione temporis and the other to the exhaustion of internal remedies;

I. COMPETENCE RATIONE TEMPORIS

Whereas, in its supplementary written observations of 3rd December 1960, the Italian Government stated that it reserved the right to submit at the hearing a preliminary objection concerning the Applicant Government's competence to refer to the Commission facts prior to its ratification of the Convention;

Whereas, at the said hearing the Agent of the Respondent Government recalled that Italy had deposited its instrument of ratification on 26th October 1955 and Austria on 3rd September 1958 and that the Bolzano Assize Court, the Trent Court of Appeal and the Court of Cassation had rendered their decisions on 16th July 1957, 27th March 1958 and 16th January 1960 respectively; whereas he claimed that the fact of a State becoming a party to a multilateral Convention, only affects for the time being the other States which have already become parties to the Convention at that time; that the Italian Government, accordingly, on 26th October 1955, had given an undertaking only in respect of those States which were already Contracting Parties, to the exclusion of Austria; that Italy and Austria had not

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assumed mutual obligations in respect of one another until 3rd September 1958; that he had deduced therefrom, in his conclusions of 9th January 1961, that the Commission was not competent ratione temporis to examine the Application, since only the judgment of the Court of Cassation was subsequent to 3rd September 1958 and the Applicant Government, had lodged no complaint against that judgment as such;

Whereas the principal argument of the representatives of the Austrian Government at the hearing in the presence of the parties and in their final conclusions was that the question of competence ratione temporis was not the same for the Applicant State as for the Respondent State; that, although the latter, in the jurisprudence of the Commission, was bound only from the date of deposit of the instrument of ratification, the undertaking given on that date took effect immediately and absolutely; that the said undertaking did not take effect in respect of other States but in respect of all persons within the said State's jurisdiction, in accordance with Article 1 of the Convention; that it was accordingly a general legal obligation which had effect irrespective of which other States had or had not ratified the Convention; that the Commission was competent, ratione temporis, to examine a complaint lodged by an individual by virtue of Article 25 of the Convention provided that the State against which the complaint was lodged was a Contracting Party at the time of the lodging of the Application; that similarly a Contracting State was entitled, as soon as it had deposited the instrument of ratification, to make application to the Commission in respect of another Contracting Party, even in relation to facts which had occurred prior to the deposit of the instrument; that indeed Article 24 of the Convention, unlike Article 36 of the Statute of the International Court of Justice and Article 46, Paragraph 2 of the Convention, made no provision

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for reciprocity as between the Applicant and Respondent States; whereas the Austrian Government claimed, as an accessory argument, that the trial of the Fundres/Pfunders youths should be regarded as a whole and it followed, therefore, that the judgment rendered by the Court of Cassation, which was subsequent to 3rd September 1958, should be considered as the final decision of the domestic courts, whatever the dates of the judgments pronounced by the Court of first instance and the Court of Appeal;

Whereas, furthermore, the Austrian Government expressed the opinion, at the hearing on 7th January 1961, that to present, at this stage, an objection of incompetence ratione temporis would be in conflict with Rule 44 of the Commission's Rules of Procedure; whereas, this was disputed by the Italian Government;

Whereas, however, it is no longer necessary to interpret the relevant provisions of the Rules of Procedure, since the Austrian Government did not insist, at the hearing on 9th January 1961 or in its final submissions of the same date, on this procedural objection and, moreover, availed itself fully of its right to reply to the Italian arguments on this point; whereas, furthermore, it is the duty of the Commission to pronounce, even ex officio, on its competence ratione temporis;

Decision of the Commission

Whereas, under Article 66 of the Convention, the Republic of Italy became a Party to the Convention on 26th October 1955, and the Republic of Austria nearly three years later, on 3rd September 1958; whereas the incidents at Pfunders and all the ensuing proceedings in the Italian courts, which are the subject of the complaints of the Austrian Government, took place after Italy had become bound by the provisions of the Conventions; whereas, on the other hand, the proceedings in the

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Assize Court at Bolzano/Bozen and those in the Court of Appeal of Trent took place before the date when Austria herself became bound by the provisions of the Convention and acquired the right under Article 24 to refer an alleged breach of the Convention to the Commission; and whereas only the final appeal before the Court of Cassation at Rome took place after that date;

Whereas, accordingly, it has first to be considered whether, under Article 24, the Austrian Government is entitled to refer to the Commission an alleged breach of the Convention with respect to those proceedings which took place before Austria herself possessed any rights or obligations vis a vis Italy under the Convention;

Whereas Article 24 empowers "any High Contracting Party" to refer to the Commission "any alleged breach of the provisions of the Convention by another High Contracting Party"; and whereas neither Article 24 nor any other Article of the Convention in terms provides that a High Contracting Party's power to refer alleged breaches of the Convention to the Commission is to be limited to breaches alleged with regard to matters which have arisen after the ratification of the Convention by that Party; whereas, moreover, in the Mavrommatis Palestine Concessions Case (Series A, No. 2, p.35) the Permanent Court of International Justice has said "that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that 'any dispute whatsoever .... which may arise' shall be submitted to the Court. The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction"; whereas it follows that the mere fact that Austria only acquired the right to refer alleged breaches of the Convention to the Commission at a later date does not by itself suffice to debar her from filing a ./.

complaint with respect to the proceedings before the Assize Court at Bolzano and the Appeal Court at Trento;

Whereas, however, the point remains as to whether Austria may nevertheless be debarred from filing a complaint with respect to the proceedings in the first two courts by reason of the facts (a) that Italy at that date had obligations under the Convention only vis a vis the other existing signatories and not vis à vis Austria or (b) that Austria herself, not being a Party at that date, was not bound by the obligations of the Convention so that Italy cannot now have a reciprocal right to complain to the Commission concerning matters arising within the jurisdiction of Austria at the period when the proceedings before the Assize Court and the Court of Appeal were taking place;

Whereas in the Preamble to the Convention the High Contracting Parties, having referred to the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948 -

(a) recited that "the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms";

(b) reaffirmed their "profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend";

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(c) stated their resolve, "as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration";

and whereas it clearly appears from these pronouncements that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law;

Whereas to achieve this purpose the High Contracting Parties, by the express terms of Article 1 of the Convention, undertake to secure the rights and freedoms defined in Section 1 of the Convention to everyone within their jurisdiction without any exception; whereas, furthermore, Article 14 in terms provides that

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Whereas, therefore, in becoming a Party to the Convention, a State undertakes, vis à vis the other High Contracting Parties, to secure the rights and freedoms defined in Section 1 to every person within its jurisdiction, regardless of his or her nationality or status; whereas, in short, it undertakes to

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secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the Convention and to stateless persons, as the Commission itself has expressly recognised in previous decisions; whereas it follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves;

Whereas the objective character of the engagements undertaken by the High Contracting Parties similarly appears in the machinery provided in the Convention to guarantee their observance; whereas this machinery, as was emphasised in the travaux préparatoires of the Convention and as is expressly stated in the third passage from the Preamble which has already been quoted, is founded upon the concept of a collective guarantee by the High Contracting Parties of the rights and freedoms set forth in the Convention; whereas to this end Article 19 provided that to ensure the observance of the engagements undertaken by the High Contracting Parties there should be set up (a) a European Commission of Human Rights and (b) a European Court of Human Rights; and whereas Article 24 provides that "any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party"; whereas by this Article, therefore, the High Contracting Parties have empowered any one of their number to bring before the Commission any alleged breach of the Convention, regardless of whether the victims of the alleged breach are nationals of the applicant State or ./.

whether the alleged breach otherwise particularly affects the interests of the applicant State; whereas it follows that a High Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe;

Whereas it is further to be observed that, subject to the exhaustion of the domestic remedies, all the High Contracting Parties other than Austria were entitled, under Article 24, to refer to the Commission at that date any alleged breach of the Convention with respect to the proceedings in the Assize Court at Bolzano/Bozen and the Appeal Court of Trent; and whereas it is more consistent with the system of collective guarantee envisaged in the Preamble to the Convention that Austria, after becoming a Party, should have the same powers under Article 24 as the other High Contracting Parties;

Whereas, accordingly, having regard to the objective character of the obligations and rights established in the Convention, to the unqualified terms in which the right to refer alleged breaches of the Convention to the Commission is formulated in Article 24, and to the system of collective guarantee of which that Article is an expression, the Commission is of the opinion that the fact that at the dates of the proceedings in the Assize Court and the Court of Appeal Italy had no obligations towards Austria under the Convention does not debar Austria from now alleging a breach of the Convention with respect to those proceedings;

Whereas it must be admitted that under this interpretation of Article 24 Austria has the right to file a complaint against Italy with regard to matters arising before Austria became a

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Party to the Convention on 3rd September 1958; whereas Italy does not have the right reciprocally to file a complaint against Austria in respect of occurrences before that date; whereas, however, this absence of reciprocity in regard to the element of time springs solely from the fact that before 3rd September 1958 Austria was not subject to the régime of the Convention and not from any differential treatment of the High Contracting Parties in Article 24 itself; and whereas, if the High Contracting Parties had wished to make the right to file a complaint under Article 24 subject to a condition of reciprocity in regard to the element of time, it was open to them to insert an express condition to that effect in Article 24, but they did not do so; whereas, accordingly, the Commission is of the opinion that the fact that under Article 24 Italy does not have a reciprocal right to file a complaint against Austria in respect of matters arising before 3rd September 1958 is no ground for denying to Austria the right to file a complaint against Italy with regard to the proceedings in the Assize Court at Bolzano and the Court of Appeal at Trent;

Whereas it follows that, in the opinion of the Commission, Austria was entitled in her Application of 11th July 1960 to refer to the Commission alleged breaches of the Convention with regard to the proceedings in the Assize Court at Bolzano/Bozen and the Court of Appeal of Trent, which took place before she became a Party to the Convention on 3rd September 1958, as well as with regard to the proceedings in the Court of Cassation which took place after that date; whereas it therefore becomes unnecessary to consider whether the fact that the decision of the Court of Cassation at Rome was rendered after 3rd September 1958 would in any event be sufficient to entitle the Austrian Government to file an Application with regard to the earlier proceedings in the Assize Court and Court of Appeal.

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Whereas, accordingly, the Commission has jurisdiction ratione temporis with respect to the several breaches of the Convention alleged in Application No. 788/60 and the Italian Government's objection to the Commission's jurisdiction ratione temporis with reference to the proceedings in the Assize Court at Bolzano/Bozen and Court of Appeal of Trent must be rejected;

II. THE EXHAUSTION OF DOMESTIC REMEDIES

Whereas application may be made to the Commission, in accordance with Article 26 of the Convention, only after the exhaustion of domestic remedies, as this is generally understood according to the generally recognised principles of international law; whereas Article 27 paragraph (3) states that the Commission shall reject any application found inadmissible under the terms of Article 26;

Whereas the Respondent Government claimed that the application was inadmissible on the ground of failure to exhaust domestic remedies;

Whereas the Austrian Government objected that the Rule regarding the exhaustion of domestic remedies did not apply to applications lodged by States in accordance with Article 24 of the Convention;

A. APPLICABILITY OF THE RULE

Submissions of the parties

Whereas the Italian Government argued in the first place that, according to universally recognised international jurisprudence and theory, an international authority might not examine an appeal if it were possible to prove the existence, in the domestic legal system of the State with jurisdiction over the individual who claimed to have a grievance, of a domestic remedy which was at once accessible and likely to be effective and adequate; whereas it cited, inter alia, the Resolution adopted at Granada in 1956 by the International Law Institute, the arbitral decision rendered on 6th March 1956 in the Ambatielos case and the judgment rendered by the International Court of Justice on 21st March 1959 in the Interhandel case;

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Whereas the Respondent Government expressed the view that in order to determine the intention of the rule regarding the exhaustion of domestic remedies, as laid down in Article 26 of the European Convention, it was necessary to refer to current international case law and theory, since Article 26 referred specifically to the generally recognised principles of international law in this matter;

Whereas in the view of the said Government, the rule of local redress nevertheless occupies a considerably more important place in the European Convention than in international law in general and since Articles 26 and 27 paragraph (3) made no distinction in this respect, it would apply in principle to individual applications and applications by Contracting States alike; further, with regard to the latter, its applicability would not be confined to complaints made by States in the exercise of their right to afford diplomatic protection, on behalf of their nationals whom they claimed to have been injured by other States; whereas Article 1 of the Convention recognises "everyone" (irrespective of nationality) as entitled to the rights and freedoms set out in Chapter I; whereas Article 26, accordingly, extended the rule to nationals and stateless persons, so that it was applicable in this case although the youths of Fundres/Pfunders did not have Austrian nationality; whereas moreover, the Commission had declared admissible one part of Application No. 299/57 of the Greek Government although it was made on behalf of nationals of the Respondent State, the United Kingdom of Great Britain and Northern Ireland; whereas it was true that the applicability of the rule might be disputed if a State accuses another of a breach of the Convention unconnected with any individual, this was not the case in the present instance, since the Austrian Government had intervened

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to remedy a violation of the Convention which they claimed had been committed to the prejudice of persons within the jurisdiction of Italy and having access to all domestic remedies; whereas, when it provided that a State might arraign another State directly before an international instance when the action complained of affects a person enjoying special international protection, the Granada Resolution was concerned with certain persons only such as Heads of State and Ambassadors, and not, as the Austrian Government claimed (see below), the population as a whole, which enjoyed the protection of the European Convention;

Whereas the Austrian Government replied that for the purposes of Articles 26 and 27 paragraph (3) of the Convention, applications by States were quite different from individual applications; that individuals, non-governmental organisations and groups of individuals, could not apply to the Commission, under the terms of Article 25, unless they claimed to be victims of a violation of their rights and freedoms, which they could not legitimately do until they had exhausted all domestic remedies; that, on the other hand, Article 24 authorised any Contracting State, without having suffered any prejudice whatever and before any individual had been injured, to refer to the Commission any alleged breach of the provisions of the Convention by another High Contracting Party, such as a State might commit simply by introducing a law or issuing a decree; that, unlike individuals, States were not entitled to institute proceedings in the Courts of other States for alleged breaches of the Convention; that, with the possible exception of complaints lodged in the exercise of the right to afford diplomatic protection, the exhaustion of domestic remedies would accordingly not be a condition of admissibility for

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applications by States, these being based on the concepts of collective guarantee and the public interest; that the precedents referred to by the Italian Government were relevant only in respect of proceedings instituted by a State on behalf of one of its own nationals; that the same was true of the Granada Resolution; that, furthermore, this Resolution stated that the rule was not applicable when the action complained of affected a person enjoying special international protection; that persons living in the territory of Contracting States were in fact enjoying the "special international protection" of the European Convention;

Decision of the Commission

Whereas in general international law the right to exercise diplomatic protection and to present a claim before an international tribunal is a right which, subject to a few special exceptions, is limited to cases of an alleged injury to a State's own nationals abroad within the jurisdiction of another State and in violation of international law (Panevezys-Saldutiskis Railway Co. Case, Series A/B 76, p. 16; Nottebohm Case, I.C.J. Reports 1955, p.4); whereas, similarly, the rule of the exhaustion of domestic remedies as a condition precedent to the exercise of diplomatic protection and the presentation of an international claim is in general international law limited to claims made by a State in respect of an injury alleged to have been done to one of its nationals; and whereas the rule requiring the exhaustion of domestic remedies as a condition of the exercise of diplomatic protection and of the presentation of an international claim is founded upon the principle that the respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual (Interhandel Case, I.C.J. Reports, 1959, page 27; Decision of the Commission on the Admissibility of Application No. 343/57);

Whereas, in the European Convention, the High Contracting Parties have established a system of the international protection of human rights and fundamental freedoms for all persons within their respective jurisdictions independently of any bond of nationality; whereas it follows that the system of international protection provided in the Convention extends to the nationals of the State which is alleged to have violated the law of the Convention and to stateless persons, as well as to the nationals of other States; and whereas it is manifest that the principle upon which the domestic remedies rule is founded and the considerations which led to its introduction in general international law apply not less but a fortiori to a system of international protection which extends to a State's own nationals as well as to foreigners; whereas, moreover, the mere fact that the system of international protection in the Convention is founded upon the concept of a collective guarantee of the rights and freedoms contained in the Convention, does not in any way weaken the force of the principle on which the domestic remedies rule is founded or the considerations which led to its introduction;

Whereas Article 26 of the Convention, in providing that "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law", does not, in express terms, make any distinction between matters referred to the Commission by a High Contracting Party under Article 24 and matters referred to it by an individual, non-governmental organisation, or group of individuals under Article 25; whereas furthermore Article 27, which sets out certain grounds upon which the Commission is required to

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reject applications referred to it, expressly limits the grounds set out in paragraphs 1 and 2 to petitions under Article 25, but does not so limit paragraph 3, which requires the Commission to reject an application when the domestic remedies have not been exhausted; whereas the contrast in this respect between paragraph 3 and the other two paragraphs of Article 27 clearly shows, in the opinion of the Commission, that it was not the intention of the contracting States that the rule of exhaustion of domestic remedies should not apply to applications brought by States; whereas, also, the Commission is unable to find in the words "according to the generally recognised rules of international law" any indication that the High Contracting Parties intended to limit the operation of this rule to matters submitted to the Commission by an individual, non-governmental organisation, or group of individuals; whereas, if it is true that under the generally recognised rules of international law the domestic remedies rule has no application to international claims presented in respect of non-nationals of the claimant State, it is equally true that it has no application to claims presented to international tribunals by individuals; whereas in both types of case the reason is simply that the claims themselves are inadmissible under general international law, irrespective of the exhaustion of domestic remedies; and whereas it follows that if the insertion of the words "according to the generally recognised rules of international law" were to be taken as indicating an intention to exclude the operation of the domestic remedies rule in the case of applications brought by States under Article 24, it would equally be necessary to interpret them as excluding its operation in the case of applications brought by an individual, non-governmental organisation, or group of individuals under Article 25; whereas, however, it is beyond question, as the Austrian Government itself recognises, that the domestic remedies rule laid down in Article 26 of the Convention operates in the case

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of applications brought under Article 25; whereas, accordingly, the Austrian Government's contention that the words "according to the generally recognised rules of international law" exclude the operation of the domestic remedies rule in cases brought before the Commission under Article 24 must be rejected;

Whereas, moreover, the Commission found on 12th October 1957 that the said rule is valid in principle for both types of case, since it rejected a part of Application No. 299/57 by the Greek Government on the ground that domestic remedies had not been exhausted; whereas, its finding on 2nd June 1956, that the rule did not apply to Application No. 176/56, by the same Government, was based on the sole ground that this Application concerned the compatibility with the Convention of legislative measures and administrative practices, regardless of any individual or specific injury; whereas, this is manifestly not true of Application No. 788/60 by the Austrian Government;

Finds that the domestic remedies rule laid down in Article 26 of the Convention is applicable in the present case;

B. - ON THE OBSERVANCE OF THE RULE

Arguments of the Parties

Whereas the Italian Government points out in its written observations of 30th August 1960 that, according to the Arbitral Award delivered on 6th March 1956 in the Ambatielos case, domestic remedies "include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals" and "it is the whole system of legal protection, as provided by municipal law, which must have been put to the test"; that admittedly

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the Arbitral Tribunal, which heard the Salem case on 8th June 1932, had decided that "as a rule it is sufficient if the claimant has brought his suit up to the highest instance of the national judiciary" (Reports of International Arbitral Awards, United Nations, Vol. II, p. 1189); but that this was an award delivered some time ago and somewhat outdated and that reference should rather be made to more recent expositions of the domestic remedies rule; whereas in this connection the Italian Government has recalled that in accordance with the precedents followed by the Commission and in particular the decisions relating to the admissibility of Applications Nos. 263/57, 309/57, 327/57 and 342/57, an applicant, in order to satisfy the relevant provisions of Article 26 of the Convention, must not only submit his case to the various courts to which reference is required by this Article but he must also rely before the higher court, in default of impossibility or some bar and to the extent to which that depends within reason on himself, on the rights which he alleges to have been violated by the lower court; whereas when the Austrian Government having objected in its counter-memorial of 26th October 1960 that these precedents were inoperative in the present case because the Application was concerned with criminal proceedings and that criminal courts are under a duty to ascertain the truth independently of the complaints and evidence submitted by the defence, the Italian Government replied in its supplementary written observations of 3rd December 1960 that the four decisions of the Commission cited above dealt with domestic proceedings in criminal and not civil cases.

Whereas the Respondent Government has said that in order to ascertain whether the defence of the young men of Fundres/Pfunders neglected to avail itself of an essential and sufficient remedy one must start with a working hypothesis: one must provisionally assume that the alleged violation actually occurred; whereas it cited on this point the Arbitral

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Awards rendered on 9th May 1934 in the case of the Finnish vessels (International Arbitrary Awards, UN, Volume III, p. 1504) and on 6th March 1956 in the Ambatielos case ("... The only possible test is to assume the truth of the facts on which the claimant State bases its claim");

Whereas the Respondent Government further emphasises that since the date of ratification by Italy (26th October 1955), the Convention constitutes an integral part of the Italian legal system, because Article 2 of Law No. 848 of 4th August 1955 makes it compulsory to observe the Convention and to cause it to be observed as "the law of the land"; that as a result the provisions of the Convention are to be invoked before Italian courts in the same way as the Constitution, the Codes and any other municipal law, ignorance of the law and, consequently, of the Convention being no valid excuse; that this would be all the more so since - contrary to the allegations of the Austrian Government - the principle according to which it is the duty of the criminal courts to discover the truth, if necessary ex officio, does not apply to the Court of Cassation but solely to the trial judges;

Whereas on this last point the Commission invited the Parties, by letter dated 17th December 1960 and at the opening of the hearing of 7th January 1961, to furnish information or explanations with regard to the following two questions:

(a) "Do the clauses of Article 6, paragraphs (1), (2) and (3)(d) and of Article 14 of the Convention, invoked by the Austrian Government, coincide with the corresponding provisions in Italian legislation (constitution, laws, etc.) or do they go further or, on the contrary, do they not go so far as these provisions?"

(b) "Does the principle 'Jura novit curia' automatically give the Italian criminal court the right or the duty of ensuring ex officio that the regulations and provisions mentioned above are respected? If this is so is there any distinction to be made here between the Court of Cassation and the Court of First Instance and the Court of Appeal?

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Whereas in reply to the first question the Italian Government expressed the opinion at the hearing of 7th January that Article 6, paragraphs (1), (2) and (3)(d) and Article 14 of the Convention have their counterpart in specific provisions of the Italian Constitution (Articles 3, 22, 24, 25, 27, 101, 102, 104, 108 and 111), the Penal Code (Articles 1, 40, 42, 57 and 85) and the Code of Criminal Procedure (Articles 185, 238 bis, 239, 240, 249, 256, 269, 378, 420 and 479); whereas it pointed out nevertheless that this opinion rested upon a particular interpretation of the Convention; whereas it added at the hearing of 9th January that the Austrian Government appeared to attribute to Articles 6 and 14 a different and wider meaning, which would be an additional reason for verifying whether counsel for the young men of Fundres/Pfunders had or had not cited them before the Italian courts; whereas it asserted that the question of the exhaustion of domestic remedies could not be joined to the substance of the case, so that the Commission in order to decide the matter would have to abide by the criteria accepted by international case-law (the Finnish vessels case and the Ambatielos case): that is to say, provisionally accept the Austrian interpretation, or else decide itself already at this stage of the proceedings on the exact intention of Articles 6 and 14;

Whereas in reply to the second question quoted above, the Respondent Government stated at the hearing of 7th January that the decisions of the Appeal Court and the Court of Cassation follow under the Italian system, as distinct from the judgments of the courts of first instance, the "principio dispositivo" according to which the parties themselves by choosing their grounds of appeal set limits to the power of the Appeal Court or Court of Cassation to take cognisance of a case; that Articles 152 and 185 of the Code of Criminal Procedure introduce exceptions to this principle

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by providing that the judge shall at every stage of the proceedings draw attention ex officio to certain grounds which would absolve the accused from any penalty as also to certain cases of absolute nullity; and that the conditions for the application of these two Articles did not obtain in this particular case;

Whereas at the opening of the hearing of 9th January, the Commission put the following question to the parties:

> "When a defendant submits a certain argument before the Court of Cassation in sufficient detail but without expressly invoking in its support the relevant provisions of Italian municipal law, including the Convention, does the Court nevertheless have the right or the duty to ensure that the said provisions are complied with, or shall it declare the appeal inadmissible in pursuance of Article 201 of the Code of Criminal Procedure?";

Whereas the Italian Government replied at the same hearing that Article 201 of the Code of Criminal Procedure, by requiring that the pleas should be set out in detail on pain of inadmissibility, lays down a general rule applicable to every remedy, including appeal to the Court of Cassation; that to this general rule is added the special rule in Article 524 of the said Code, which enumerates the judicial errors forming grounds for appeal to the Court of Cassation, namely the non-observance or faulty application of the criminal law or other statutory provisions of which account must be taken in the application of the criminal law, any act by the judge in excess of his jurisdiction and failure to observe the provisions of the Code of Criminal Procedure established under pain of nullity, inadmissibility or invalidity; that as a consequence the party concerned is under the absolute obligation to submit his pleas, stating not only the provisions of the criminal law of which he alleges the non-observance or faulty application, but also the other relevant legal provisions, for example, the Convention, otherwise it would be sufficient to refer to the whole of the Code of Criminal Procedure or the

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whole of the Constitution, etc., in order to make it practically impossible for a judge of the Court of Cassation to perform his duties; -and that subject to Articles 152 and 185 of the Code of Criminal Procedure already quoted, the Italian Court of Cassation would not have the right to examine any plea specified as to fact but not as to law;

Whereas in consideration of the above the Italian Government came to the conclusion that the young men of Fundres/ Pfunders had not exhausted domestic remedies with respect to any of the complaints advanced by the Austrian Government;

Whereas the Italian Government has observed as regards the refusal of the Trent Court to hear the evidence of Giovanna Ebner and Dr. Kofler that the third submission in the appeal to the Court of Cassation was limited to putting forward arguments of fact and to a lesser extent the rights of the defence; whereas it appeared to admit that the said submission had thus raised implicitly and in substance the complaint based on an alleged violation of Article 24 of the Italian Constitution and that the Court of Cassation should have decided this point; whereas it nevertheless blamed the convicted persons for not having expressly availed themselves of Article 6, paragraph (3)(d) of the Convention, a prescription of law upon the observance of which the Court of Cassation was competent to pronounce;

Whereas the Italian Government notes furthermore that the appeal made no mention of Article 6, paragraph (2), and Article 14 of the Convention nor even of Articles 27 (2) and (3) of the Italian Constitution, in accordance with which "an accused person is not deemed guilty until sentenced" and "all citizens have equal social rank and are equal before the law without distinction of sex, race, language, religion, political opinion, or social and personal conditions ....";

Whereas, finally, with respect to the alleged partiality of the judges of the Assize Court, the Italian Government has expressed the opinion that the application for appeal to the

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Court of Cassation contained no arguments comparable with those put forward by the Austrian Government and stated that Counsel for the defence had not referred either to Article 6, paragraph (1), of the Convention nor Article 2 ("The Republic acknowledges and guarantees the inviolable rights of man ...") nor again to Article 24, paragraph (2) ("The right to defence is inviolable in every state and at every stage of the judicial process") of the Italian Constitution; that the first plea in the appeal denied the legality of the replacement of a member of the jury of the Trent Court, who fell sick, by a "substitute juryman", but that this was a subject of complaint entirely apart from the accusations of partiality formulated in the Application;

Whereas in reply to a question put by the Commission, the Italian Government maintained at the hearing of 9th January, as a subsidiary point, that the accused had not even made in substance before the Court of Cassation the pleas in support of which the Application refers to Articles 6 and 14 of the Convention;

Whereas the Commission invited the parties by letter of 17th December 1960 and at the opening of the hearing on 7th January 1961, to furnish information or explanations with regard to the following question:

> "Did the accused in the Fundres/Pfunders case have the possibility according to Italian law of challenging the composition of the jury, criticised by the Austrian Government on pages 6 and 18 of the Introductory Application?; if so, what remedies were open to them and did they exercise the remedies?";

Whereas the Italian Government replied that if, in spite of the guarantees offered by Law No. 287 of 10th April 1951, concerning the organisation of the assize courts, and in particular the constitution of the jury, the accused in the Fundres/Pfunders case believed that they had grounds for challenging the impartiality of their judges in the court of

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first instance and in the Court of Appeal, they should have made an application for change of venue on grounds of legitimate suspicion, which they neglected to do; and that under Article 55 of the Italian Code of Criminal Procedure,

> "In every state and at every stage of the judicial process the Court may on serious grounds of public policy or legitimate suspicion or at the request of the Public Prosecutor in the Court of Appeal or Court of Cassation, remit a case under examination or a case awaiting judgment to another judge in another court.
>
> The accused may make an application for this purpose solely on grounds of legitimate suspicion. Other private parties do not have this right.";

and that the application must be made by the accused to the Public Prosecutor and the latter was bound to transmit it to the Court of Cassation which in its turn must examine the application and decide; moreover, a situation of fact and not merely an existing rule of law might in the Italian system justify the transfer on grounds of legitimate suspicion; that legitimate suspicion therefore amounted to a concrete notion; that the Court of Cassation of Italy had decided on several occasions both on an application made by the defendants and on an application by the Public Prosecutor, to remove a case from the assize courts normally competent ratione loci, on the ground that within the area of jurisdiction of this Court feelings prevailed which were of a nature to hinder a completely impartial trial; that questions likely to disturb public peace and order in a given area might be referred to the Courts of other parts of the Italian Republic; that the application for change of venue on grounds of legitimate suspicion therefore had the character of an essential and effective remedy; that it was at least incumbent upon the Austrian Government according to the principles of international law generally recognised in the matter to show that it would have been ineffective in this particular case; that the Austrian Government had not shown this by stating that the removal of

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the case from the Bolzano/Bozen and Trent Courts would have led to the case being entrusted to juries composed entirely of Italians, so that it would have been inadvisable for the defence to invoke Article 55 of the Code of Criminal Procedure; that this affirmation went far beyond any plausible possibility since it amounted to an allegation that in no place in Italy was there a judge capable of administering justice;

Whereas the Austrian Government has on its side recalled as a subsidiary matter - that is to say on the assumption that Article 26 of the Convention holds good in the same manner for applications brought by a State and applications brought by an individual - that according to the Arbitral Award delivered on 8th June 1932 in the Salem case, the rule of the exhaustion of domestic remedies should be interpreted in accordance with the circumstances of each case and "as a rule it is sufficient if the claimant has brought his suit up to the highest instance of the national judiciary"; that, moreover, the four decisions of the Commission cited by the Italian Government referred to civil proceedings, whilst the present Application concerned criminal proceedings; that the criminal proceedings were governed by the principle according to which it was the duty of the Court to ascertain the true facts independently of the complaints or submissions made by the defence;

Whereas the Applicant Government has agreed with the Italian Government that the stipulations of the Italian Constitution coincide with those of the Convention and that the latter forms an integral part of Italian municipal law; whereas the Applicant Government does not agree, on the other hand, that the defence was at fault for not invoking the provisions of the Convention, and affirms that in fact, the Italian authorities, including the courts, had the duty of applying them, even ex officio; whereas the Austrian Government had questioned whether Italian law, and in particular Article 524 of the Code of Criminal Procedure, made the

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fulfilment of this duty compulsory; and if Italian law did not do so it would be contrary to the Convention, Italy having made no reservation in that matter;

Whereas in the view of the Austrian Government it is sufficient that the complaints in respect of which the Application alleges a violation of Articles 6 and 14 of the Convention should be referred in substance to the Italian Courts, which was in fact the case; whereas the Austrian Government points out that in the grounds of appeal to the Court of Cassation objection is raised to the "statements incontrovertibly established" and the "pure assertions without a shadow of evidence in support" contained in the decision of the Trent Court; the first ground in the said appeal, the conditions under which a juryman of that Court who had fallen ill had been replaced; the third, the failure to hear Giovanna/Johanna Ebner and Dr. Kofler on the visit to the scene of the occurrence on 20th March 1958; the seventh, the "subjective appreciations", "suppositions" and "conjectures" of the appeal judges; the eighth, the "bald statements unsupported by evidence" which they are said to have made; the first supplementary ground, finally, the "insufficiency" of the grounds on which the decision of 27th March 1958 favoured the notion of voluntary homicide rather than that of "preterintentional" homicide; whereas the Austrian Government indicated moreover that Counsel for the young men of Fundres/Pfunders had, in addition to a series of provisions of the Penal Code, of the Code of Criminal Procedure and of the Act of 10th April 1951, explicitly cited from the Italian Constitution, Articles 24, paragraph 2 (second ground in the appeal) and 27, paragraph 1 (seventh ground);

Whereas the Austrian Government has asserted, on the other hand, that an application for change of venue on grounds of legitimate suspicion would not have improved the situation of the accused and would probably not have been effective within the meaning of the generally recognised principles of

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international law; according to the Austrian Government the fact that four jurymen out of six belonged to the "Italian ethnic group" would hardly have been accepted as a legitimate ground for suspicion, since the accused themselves also possessed Italian nationality and the Italian Code of Criminal Procedure dated from times before the question of the Upper Adige minority arose; moreover, an application founded on Article 55 of the said Code could not but have made the Assize Courts unfavourable, especially in the atmosphere prevailing at Bolzano/Bozen and Trent and would, therefore, have been a serious mistake by the defence; if the Court of Cassation had, contrary to all expectation, accepted such an application, the case would have been heard by a jury which did not comprise a single German-speaker and therefore of an "ethnic composition even more unfavourable";

Decision of the Commission

Concerning the complaint set forth in paragraph I (3) (a) of the written conclusions of the Austrian Government:

Whereas by this complaint the Austrian Government allege a violation of Article 6, paragraph (1) of the Convention by reason of the composition of the Assize Courts of Bolzano and of Trent; whereas they point out that four out of six jurors were of "Italian ethnic origin" and were "particularly liable to be swayed by the Italian press campaign, the political tension, the vehement arguments of the Public Prosecutor and of the plaintiff";

Whereas according to the generally recognised rules of international law to which Article 26 of the Convention refers, it is incumbent on the Respondent Government, if they raise the objection of non-exhaustion, to prove the existence, in their municipal legal system, of remedies which have not been exercised (decision of the Commission on the admissibility of Application No. 299/57 of the Greek Government against the British Government and the arbitral award made on 6th March 1956 in the Ambatielos case);

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Whereas the Italian Government have shown that according to Article 55 (2) of the Code of Criminal Procedure an accused may in any event apply for a change of venue on the ground of legitimate suspicion and that the persons concerned in this case did not do so either on first instance or on appeal;

Whereas the rule concerning exhaustion in principle requires, according to the conceptions which prevail in the matter nowadays, that all judicial means offered by municipal legislation should be utilised provided they are likely to prove an effective and adequate means of redressing the grievances set forth, on the international plane, against the Respondent State (decision of the Commission on the admissibility of Application No. 347/57 of Mr. B.S. Nielsen against Denmark); whereas the explanations of the Italian Government concerning the pertinent legislation and practice tend to indicate that an application lodged in pursuance of Article 55 (2) of the Code of Criminal Procedure would have constituted such a remedy in the case in issue; whereas it appears, in particular, from these explanations that according to the case-law of the Court of Cassation of Italy an application of this kind can validly be based on circumstances such as those invoked by the Austrian Government, that the Public Prosecutor is obliged to refer it to the Court of Cassation and that the latter must examine and decide on it; whereas it seems that the request in question would therefore have had considerable prospects of success and that, if the Court of Cassation had accepted it, there would have been a possibility of the trial taking place in an atmosphere different from that which, in the eyes of the Austrian Government, prevailed at Bolzano/Bozen and at Trent;

Whereas, moreover, the exhaustion of a given domestic remedy does not normally cease to be necessary, according to the generally recognised rules of international law, unless the applicant can show that, in these particular

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circumstances, this remedy was unlikely to be effective and adequate in regard to the grievance in question (decision of the Commission on the admissibility of Application No. 299/57 of the Greek Government); whereas, in the view of the Commission, the Austrian Government only put forward in this respect arguments concerning expediency and the tactics which it was or was not in the accused's interests to adopt; whereas it has not been established that an application for a change of venue on the ground of legitimate suspicion would not have constituted, in the case at issue, a remedy likely to be effective and adequate;

Finds, consequently, that all domestic remedies have not been exhausted in this respect, so that a part of the application has to be rejected in accordance with Article 27, paragraph (3) of the Convention;

Concerning the complaint set forth in paragraph I (1) of the written conclusions of the Austrian Government

Whereas by this complaint the Austrian Government allege a violation of Article 6, paragraph (3)(d) of the Convention in that "the testimony of the witnesses Johanna Ebner and Dr. Kofler was rejected as not pertinent to a matter which the courts declared to be essential and relevant in respect of the witnesses called by the prosecution and irrelevant in respect of the above witnesses called by the defence in connection with the same points";

Whereas in the third ground for their appeal in cassation, the committed persons criticised the "plainly contradictory" grounds on which, according to them, the Trent Court declined, on 10th March 1958, to hear Giovanna/Johanna Ebner and Dr. Kofler as witnesses on the occasion of the visit to the scene of the occurrence although it heard Calvia on the same point, namely the position of Falqui's corpse; whereas they asserted that Giovanna/Johanna Ebner had crossed the bridge over the ./.

stream at the time when the body still lay in the stream bed and when another customs officer was trying to lift it; whereas they added that "if only from the simple standpoint of the accused's right to defence ... a judge cannot reject evidence proposed in regard to precise material circumstances of fundamental importance"; whereas they based their argument on Articles 415, 457, 475 (3), 520 and 524 of the Code of Criminal Procedure, but not at all on Article 24 (2) of the Constitution according to which "the right to defence is inviolable ..."; whereas the Italian Government have nevertheless conceded that "one might, if need be, admit that the argument was raised in substance and that the Court of Cassation should have settled it"; that, on the other hand, the third ground for appeal did not mention Article 6, paragraph (3)(d) of the Convention of whose provisions no exact equivalent can be found in any of the five Articles of the Code of Criminal Procedure enumerated above; whereas the Court of Cassation rejected the said ground simply on the principle that the trial judge was free to form his own opinion and exercise his own discretion;

Whereas it rests, in principle, with the municipal legislation of each Contracting State to establish the appropriate courts, to define their powers (Panevezys-Saldutiskis railway case, PCIJ., Series A/B, No. 76, p. 19), and to determine the manner and the time-limits to be observed by parties in resorting to them; whereas Articles 201 and 524 of the Code of Criminal Procedure, as interpreted by the Italian Government, make it incumbent on any person appealing to the Court of Cassation to state his arguments in a specific manner, indicating clearly the legal provisions of which he is availing himself; whereas the Convention has in Italy, since 26th October 1955 the character of ordinary municipal law; whereas its provisions are therefore, it would seem, among those which, according to Articles 201 and 524 of

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the Code of Criminal Procedure, should have been expressly invoked in the appeal to the Court of Cassation;

Whereas, notwithstanding, according to Article 26 of the Convention, it is according to the generally recognised principles of international law that it has to be determined whether or not domestic remedies have been properly exhausted; whereas it is commonly admitted, in this respect, that only the non-utilisation of an "essential" recourse for establishing the merits of a case before the municipal tribunals lead to non-admissibility of the international complaint (arbitral award made on 6th March 1956 in the Ambatielos case); whereas, in addition, the rule of local redress confines itself to imposing the "normal" use of remedies "likely to be effective and adequate" (resolution adopted at Granada in 1956 by the Institute of International Law);

Whereas the third ground for the appeal raised in substance the same problem as the complaint in question, namely the problem of equality between the prosecution, the civil plaintiff and the defence in the matter of the examination of witnesses; whereas Article 6, paragraph (3)(d) of the Convention aims precisely at ensuring such equality, as is apparent from its wording ("... to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him") and from the preparatory work (Doc. CM/WP IV (50) page 15: "The purpose of this paragraph is to place the accused on a footing of equality with the public prosecutor"); whereas if they had expressly referred to it, the young men of Fundres/Pfunders would therefore not have raised any supplementary argument but would simply have put forward one more argument which in practice coincides, by its intention, with those they derived from the Code of Criminal Procedure; whereas consequently, to all appearances, there is no reason for assuming that their appeal would, in this manner, have met with a different and more favourable reception;

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Finds, consequently, that the complaint set forth in paragraph I (1) cannot be declared inadmissible by application of Article 27, paragraph (3) of the Convention;

Concerning the complaint set forth in paragraph I (2) of the written conclusions of the Austrian Government

Whereas by this complaint the Austrian Government allege a violation of Article 6, paragraph (2) of the Convention "in that prior to being sentenced the accused were treated as political murderers and were so designated on the ground that they had committed murder as a result of their anti-Italian feelings";

Whereas in order to determine whether the domestic remedies have been exhausted in this respect, it is necessary to conform to the principles referred to in connection with the preceding complaint;

Whereas Article 27 (2) of the Italian Constitution stipulates that "an accused person is not deemed guilty until sentenced" and therefore presents a clear analogy with Article 6, paragraph (2) of the Convention according to which "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"; whereas the persons concerned confined themselves to mentioning the first paragraph of the said Article 27 ("criminal responsibility is personal") and that in the seventh ground of appeal; whereas this ground, moreover, did not deal with the events of the night of 15th/16th August 1956 but with the incident of 29th June 1956 and consequently cannot be taken into account for the purposes of the current decision; whereas, moreover, the appeal did not contain any reference to Article 6, paragraph (2) of the Convention;

Whereas, however, the statement of facts with which the appeal opened alleged that the Trent Court had not only omitted to deal with certain "matters contained in the file

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(and constituting) a necessary logical basis for the legal assessment of the whole trial" but also of having set forth "Subjective appreciations" and "bald statements unsupported by evidence", in depicting the accused, who had not been convicted up to then, as persons "aflame with hatred for Italy" and "thirsting for vengeance against the Italians"; whereas it pointed out that, according to the case-law of the Court of Cassation, "a judgment whereof the reasons instead of being based on positive facts rest on suppositions and conjectures is null and void"; whereas, in addition, the first supplementary ground for the appeal asserted that the Trent Court had violated Article 475 of the Code of Criminal Procedure, having failed to "sufficiently motivate its findings concerning the argument of the defence that homicide was beyond the intentions of the perpetrators ("preterintenzionalità"); whereas it denied that the Court had "proved beyond question the existence of a homicidal intention in Luigi Ebner"; whereas it pointed out that between the two assumptions considered by the trial judge, that of intentional homicide and that of accidental death, there was room for an intermediate assumption of "preter-intentional" homicide which, in the view of the defence, several factual circumstances tended to corroborate; whereas it expressed the view that the Trent Court should have ruled out "the absence of intention ("preterintenzionalità") ... not implicitly but explicitly", after examining it and giving its reasons;

Whereas, furthermore, in order to justify the rejection of the first supplementary ground, the Italian Court of Cassation began by recalling that its rôle "is confined to verifying the lawfulness of the decisions brought to its knowledge" and that, consequently, it "cannot undertake a new examination of the assessment made of the evidence given at the trial, in respect of which it can only point out possible logical or legal defects"; whereas it considered that the grounds for

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the Trent Court's decision contained no defect of this kind and that the factors admitted in the judgment sufficed "to establish homicidal intent on the part of Luigi Ebner";

Whereas it follows therefrom that the question of presumed innocence raised by the Austrian Government in paragraph I (2) of their written conclusions was submitted in substance to the Court of Cassation of Italy; whereas if they had expressly invoked Article 27 (2) of the Italian Constitution and Article 6, paragraph (2) of the European Convention, the young men of Fundres/Pfunders would therefore not have submitted any supplementary argument but would simply have put forward one more argument which in practice coincides, by its intention, with those which they effectively presented; whereas, consequently, to all appearances, there is no reason for assuming that their appeal would, in this manner, have met with a different and more favourable reception;

Finds, consequently, that the complaint in question cannot be declared inadmissible by application of Article 27, paragraph (3) of the Convention;

Concerning the complaint set forth in paragraph I (3) (b) of the written conclusions of the Austrian Government

Whereas by this complaint the Austrian Government allege a violation of Article 6, paragraph (1) of the Convention owing to "the violation of the right set forth in Article 6, paragraphs (2) and (3)(d). Paragraph 1 of that Article, by its general implications, summarises the succeeding paragraphs";

Finds that this complaint constitutes a simple corollory to the two preceding complaints so that it cannot, any more than the two latter, be declared inadmissible by application of Article 27, paragraph (3) of the Convention;

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Concerning the complaint set forth in paragraph I (4) of the written conclusions of the Austrian Government

Whereas by this complaint the Austrian Government allege a violation of Article 14 of the Convention "in that the violations of human rights set forth" (in the other complaints) "undoubtedly resulted from the fact that the young men of Pfunders were of a different ethnic and linguistic (national) origin from the majority of citizens of the Italian Republic";

Finds, in the light of the memorials, pleadings and conclusions of the applicant Government, that the said complaint is closely linked to the previous complaints and, therefore, does not call for a separate decision by reference to Articles 26 and 27, paragraph (3) of the Convention;

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III. ON THE OTHER QUESTIONS OF COMPETENCE AND ADMISSIBILITY

Whereas in its written observations of 30th August 1960 (paragraphs 3 - 7) and in its supplementary written observations of 3rd December 1960 (paragraphs 1 - 2) the Italian Government maintained that the Commission was not competent ratione materiae to examine the complaint of the Austrian Government; that the arguments put forward by it on that question even preceded, in these two documents, the arguments that the application should be declared inadmissible on the ground of failure to exhaust domestic remedies; whereas the Respondent Government began by recalling that under Article 24 of the Convention "any High Contracting Party may refer to the Commission ... any alleged breach of the provisions of the Convention by another High Contracting Party"; whereas it agreed that the grounds of inadmissibility mentioned in Article 27, paragraph (2) of the Convention are valid only for applications submitted in accordance with Article 25 by any person, non-governmental organisation or group of individuals; whereas it inferred nevertheless from the said Article 24 that applications made by a State even if "manifestly ill-founded or an abuse of the right of petition", should allege a "breach of the provisions of the Convention" and not the provisions of some other international treaty, in which case the Commission would not be competent; whereas it added that the Commission should not consider its competence in that respect in abstracto, on the basis of a general reference to a provision of the Convention and to the allegation of a general and vague violation thereof, but on the contrary in concreto, on the basis of an allegation of failure to respect the rights specifically laid down in the Convention; whereas it is

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therefore incumbent upon the Commission, without examining the substance of the matter, to ascertain that the complaint of the Applicant State, whether well-founded or not, concerns an act or an omission such as plainly constitutes an infringement of a specific right laid down in the Convention subject to those limits within which the Contracting Parties wished to provide for and guarantee this right; whereas the Italian Government, examining the Application in accordance with the principles thus defined, came to the conclusion that it referred in no way to Human Rights but contained gratuitous or offensive allegations and in fact attempted to convert the Commission into a Court of fourth instance; whereas it invited the Commission, in consequence, to declare its absolute incompetence.

Whereas in its reply of 26th October 1960 to the written observations of the Italian Government (paragraphs 1 and 2), its pleadings of 7th January 1961, and its final submissions of 9th January 1961 (paragraph II-1) the Austrian Government, as its principal position, complained that the Respondent Government had assimilated Application No. 788/60 to an application lodged by an individual and had debated prematurely the facts and the substance of the case; whereas it affirmed that Article 24 of the Convention gave the right to any Contracting Party to bring before the Commission any breach of the provisions of the Convention which such Contracting Party "believed" could be alleged against another Contracting Party; whereas it considered that it had shown amply that it believed with complete justification that such a breach could be alleged against the Italian Government; whereas the Applicant Government had claimed, as a secondary argument, that the Commission was competent to examine, if not all the errors of fact or law committed by the domestic courts, then at least those which constitute or entail a violation of Human Rights, or which at any rate allow such

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a breach to be assumed, which it averred was the case in the present Application; whereas it had affirmed furthermore that it had clearly indicated the provisions which it alleged had not been complied with, namely Article 6, paragraph (3)(d), paragraph (2), and paragraph (1), and Article 14 of the Convention; whereas it had appeared to the Austrian Government illogical on the part of the Italian Government to attempt to obtain a decision of inadmissibility by denying the material character of the facts impugned in the Application; whereas in its view only an examination of the substance would make it possible to decide whether or not the Convention had been observed;

Whereas the Commission has already pronounced and judged in its decisions of 2nd June 1956 and 12th October 1957 with respect to the admissibility of Applications Nos. 176/56 and 299/57 of the Greek Government against the Government of the United Kingdom, that the provisions of Article 27, paragraph (2) of the Convention refer solely to applications submitted under Article 25, and not to applications submitted by Governments; whereas it has deduced, in the second of these decisions, that when it investigates the admissibility of an application made by a State it does not have to investigate whether the Applicant Contracting Party has submitted preliminary evidence with respect to the truth of its allegations, since such an investigation goes to the substance of the case;

Whereas moreover the complaints set forth in the Application are not outside the general scope of the Convention;

Decides that the grounds of incompetence ratione materiae examined above must be set aside, and notes that in any case the Italian Government did not pursue these grounds in its final submissions of 9th January 1961;

Whereas it has not found ex officio any other grounds of incompetence or inadmissibility;

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NOW THEREFORE, all matters respecting the substance of the case being reserved;

AFFIRMS that it is competent to examine the admissibility of the Application;

DECLARES THE APPLICATION INADMISSIBLE in respect of the complaints made in paragraphs I - 3 -(a) of the final submissions of the Austrian Government on the grounds that domestic remedies have not been exhausted;

DECLARES THE APPLICATION ADMISSIBLE AND RETAINS IT in respect of the other complaints, that is to say:

1. in respect of the alleged violation of Article 6, paragraph (3)(d) of the Convention (failure to hear the evidence of Giovanna/Johanna Ebner and of Dr. Kofler, para. I - 1 of the final submissions of the Austrian Government);

2. in respect of the alleged violation of Article 6, paragraph (2) of the Convention (alleged failure to presume innocence, para. I - 2 of the final submissions of the Austrian Government);

3. in respect of the violation of Article 6, paragraph (1) of the Convention arising from the alleged violation of Article 6, paragraphs (2) and (3)(d) (para. I - 3 - (b) of the final submissions of the Austrian Government);

4. in respect of the alleged violation of Article 14 of the Convention (para. I - 4 of the final submissions of the Austrian Government).

Secretary to the Commission

(A.B. McNULTY)

President of the Commission

(Sir Humphrey WALDOCK)