

COUNCIL OF EUROPE

EUROPEAN COMMISSION
OF HUMAN RIGHTS

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APPLICATION No. 6066/73

Yossef Ezra LEVY

AGAINST

FEDERAL REPUBLIC OF GERMANY

REPORT OF THE COMMISSION

(Adopted on 9 July 1975)

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INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The applicant is an Israeli citizen, born in 1937. On 1 December 1970 he was remanded in custody being suspected of having killed a night-club girl. He was refused bail and in August 1971 was charged with murder by the Public Prosecutor in Frankfurt. A Mrs. P. was also charged with murder by the Public Prosecutor in Frankfurt. Various witnesses were then heard, including witnesses in Vienna, and the preliminary judicial investigation was closed in July 1972.

In October 1972, the Regional Court ordered a psychiatric examination of the applicant in regard to his criminal responsibility and a preliminary examination was carried out in November 1972.

In January 1973, the Regional Court ordered the opening of the trial proceedings and the continuation of his detention on remand. On 10 May 1973, when the trial opened, applicant's counsel objected to the applicant being examined by a psychiatrist during the trial and also requested that, before standing trial, he be given a full examination as an in-patient in a hospital. Following the applicant's request for an "ethnological" expert opinion, the trial was adjourned until 21 May 1973 when the defence without success challenged the judges and representative of the Public Prosecutor, but succeeded in having the interpreter changed. The Presiding Judge then decided that the applicant was no longer fit to stand trial and in August 1973 he was admitted to the Westphalia Mental Hospital for a full psychiatric examination.

On 11 December 1973 he was convicted of homicide by the Regional Court (Schwurgericht) in Frankfurt/Main and sentenced to 15 years' imprisonment. Both the applicant and the Public Prosecutor lodged appeals on points of law (Revision) with the Federal Court (Bundesgerichtshof).

The applicant had been detained on remand since 1 December 1970 and now complains that the competent German authorities failed to bring him to trial within a reasonable time or to release him pending trial. He alleges a violation of Art. 5 (3) of the Convention.

2. The present application was introduced before the Commission on 28 February 1973 and registered on 16 March 1973.

On 7 April 1973 the application was examined in accordance with Rule 45 (1) of the Commission's Rules of Procedure (old version), by a group of three members of the Commission

and, in accordance with Rule 45 (2) (old version) communicated to the respondent Government. The Government submitted observations on 14 June 1973 and the applicant replied thereto on 9 July 1973.

The Commission considered the application on 20 July 1973. Noting that the respondent Government wished to make oral explanations on the question of admissibility, the Commission, with a view to expediting the proceedings before it, decided to hold an oral hearing which should as far as possible also cover the merits of the case. The Commission, however, pointed out that it might still declare the application inadmissible after the hearing. Furthermore, the Commission instructed its Secretary to ask the parties in the meanwhile to supply further information on the delays which might have been caused by the proposed psychiatric examination of the applicant and, in particular, on the circumstances leading to the adjournment of the trial on 21 May 1973.

The Government's additional information was submitted on 13 September 1973 and the applicant's comments in reply were received on 10 October 1973.

The hearing was held on 17 December 1973.

After having deliberated, the Commission on the same day declared the application admissible and decided first to invite the Federal Government to complete in writing their observations on the merits of the case and then to invite the applicant to submit his observations in reply.

The Commission also rejected the Government's objection that the application was inadmissible as an abuse of the right of petition within the meaning of Art. 27 (2) in fine of the Convention.

The Government submitted their observations on 25 March 1974. However, the applicant's lawyer, Mr. Geis, in spite of several reminders, failed to submit any observations in reply. On 17 July 1974 the Commission, therefore, decided to continue with its proceedings in this case.

The applicant has been represented before the Commission by Rechtsanwalt Egon J. Geis, a lawyer practising in Frankfurt.

The respondent Government have been represented by Ministerialdirigent Dr. E. Bülow as Agent, and by Regierungsdirektor Dr. H. Kirschner, Staatsanwältin A. Saal and Staatssekretär Dr. Werner as advisors.

3. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and is now transmitted to the Committee of Ministers in accordance with para. (2) of that

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Article. It was adopted on 9 July 1975, the final vote having been taken on 29 May 1975, the following members of the Commission then being present (1):

J. E. S. FAWCETT, President.
G. SPERDUTI, Vice-President
F. ERMACORA
L. KELLBERG
B. DAVER
K. MANGAN
C. NØRGAARD
C.H.F. POLAK
J. FROWEIN
G. JORUNDSSON
R. J. DUPUY
S. TRECHSEL

A schedule setting out the history of the proceedings before the Commission is attached as Appendix I.

A friendly settlement of the case has not been reached (2) and the purpose of the Commission in the present report, as provided in para. (1) of Art. 31, is accordingly to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

The full text of the oral and written pleadings of the parties, together with further documents handed in as exhibits, are held in the archives of the Commission and are available if required.

- (1) Since MM. WELTER, BUSUTTIL and CUSTERS were not present when the final vote on a breach of the Convention was taken the Commission took a special decision on 9 July 1975 in accordance with Rule 52 (3) of its Rules of Procedure to permit these members to express a separate concurring opinion in the Commission's Report. While in agreement with the conclusion of the Commission M. WELTER follows the separate opinion of Mr. TRECHSEL (see p. 20).
- (2) An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document - see Appendix IV.

A. ESTABLISHMENT OF THE FACTS

4. The Commission expresses its opinion in the present case primarily in the light of the principles established by the European Court of Human Rights in the "Wemhoff" (1), "Neumeister"(2) "Stögmüller"(3), "Matznetter"(4) and "Ringelisen"(5) Cases.

5. Consequently, the Commission first established on what grounds the German Courts based their decisions relating to the applicant's arrest and his continued detention on remand, and then in what manner the judicial authorities conducted the proceedings against him, taking into account the applicant's own conduct.

a) As to the grounds of detention given by the German courts,

6. On 1 December 1970 the applicant was remanded in custody in pursuance of a warrant of arrest issued on the same day by the Frankfurt District Court (Amtsgericht). The reasons for his detention were the following:

1. Serious suspicion of having committed, together with Mrs. P., a crime of homicide;
2. Danger of absconding as the applicant had been staying in the Federal Republic without a residence permit and had no family ties there;
3. Danger of suppression of evidence, the applicant having tried to induce a witness to make false statements; it was accordingly expected that the applicant would bring pressure to bear upon the witnesses for the prosecution.

The grounds for the applicant's continued detention were examined on 19 January and 18 May 1971 by the District Court and subsequently at intervals of three months by the Frankfurt Court of Appeal (Oberlandesgericht). A request for release on bail was refused by the District Court on 27 July 1971.

On 13 November 1972 the Court of Appeal, after a further examination of the grounds of detention, decided that the detention on remand should continue. Referring to the measures taken in the investigation of the case, the Court found that the proceedings had been sufficiently expedited and that the importance of the case and the particular difficulties of the investigation justified the applicant's continued detention.

1.	Eur. Court. H.R.	"Wemhoff" Case,	Judgment	27 June 1968
2.	"	"	"	27 June 1968
3.	"	"	"	10 November 1969
4.	"	"	"	10 November 1969
5.	"	"	"	16 July 1971.

On 2 January 1973, the applicant lodged a constitutional appeal (Verfassungsbeschwerde) against this decision. On 25 January 1973, the Federal Constitutional Court (Bundesverfassungsgericht) decided not to accept this appeal on the ground that it did not offer any reasonable prospect of success.

b) As to the manner in which the judicial authorities conducted the case

7. In this regard the Commission established what actions have been taken by the judicial authorities during the following periods:

- the investigation proceedings as from 1 December 1970
- the preliminary judicial investigation
- the opening of the main proceedings
- the preparation of the trial
- the first trial
- the second trial.

In this connection, particular reference is made to the Schedule showing the course of the investigation in the criminal proceedings (cf. Appendix III).

aa) Investigation proceedings as from 1 December 1970

8. On 7 February 1970, Miss G., a night club girl in Frankfurt, was killed. Her body was found in a wood near Heidelberg on 7 May 1970. The applicant, when questioned as a witness by the police in Frankfurt on 18 and 30 November 1970, incriminated his fiancée, Mrs. P. He also alleged that Miss G. had emigrated to the U.S.A. earlier in 1970. During the interrogation on 30 November 1970 he was incriminated by Mrs. Tu. who stated before a judge in Fürstfeldbruck that she had witnessed the crime. The applicant was immediately taken into provisional arrest and, on 1 December 1970 remanded in custody.

When brought before the Frankfurt District Court (Amtsgericht) he refused to make any statements on the matter.

9. On 8 December 1970 another witness, Mr. H., when questioned by a judge in Frankfurt, reported that he had witnessed part of the crime. Mrs. P., who had fled to the U.S.A. on 17 November 1970 was arrested on 22 December 1970 on her return to Frankfurt. She incriminated the applicant during interrogations on 22, 23 and 29 December 1970 and 25 January and 25 February 1971.

On 15 and 18 March 1971 respectively, a report was made by the Criminal Office of the Land Hessen and by the Federal Criminal Office concerning the examination of the traces, in particular blood stains, found in the flat occupied by the applicant and Miss G. and on the vehicle in which the corpse was transported. These reports reached the criminal police in Frankfurt in the course of March and April 1971 and had then to be evaluated and compared with the result of the investigation.

10. The Office of the Public Prosecutor in Frankfurt closed the investigations on 15 July 1971 and asked the applicant whether he wished to make any oral submissions (Schlussgehör). The applicant refused this offer and, on 16 August 1971, the Public Prosecutor indicted him for murder and Mrs. P., the co-accused, for aiding and abetting. Subsequently, the indictment, which referred to 26 witnesses and three experts, was translated into Hebrew and served on the applicant on 16 September 1971. His request for an extension of the one-week time-limit for the submission of observations on the indictment was granted and the time-limit was extended to 30 September 1971.

bb) The preliminary judicial investigation (1)

11. On 1 October 1971 the applicant applied for a preliminary judicial investigation (gerichtliche Voruntersuchung) which was ordered by the Frankfurt Regional Court (Landgericht) on 29 October and opened by the investigating judge on 9 November 1971. No request for particular evidence to be taken was made by the applicant nor did he make any statements regarding the crime when interrogated by the investigating judge on 15 December 1971.

On 1 December 1971, however, the investigating judge recorded that "according to a communication from Rechtsanwalt Geis, the question of a psychiatric examination shall be approached as soon as possible. Mr. Geis wishes to make proposals". On 3 December 1971 the judge enquired about the whereabouts of Mrs. Tu. A few days later he was informed that she had moved to Vienna.

In the case of the co-accused, Mrs. P., a preliminary judicial investigation was ordered at her request on 28 December 1971 and opened by the investigating judge on 31 December 1971.

On 21 December 1971 the investigating judge heard a witness, Mrs. Th. Mrs. P. was interrogated on 25 January 1972. The applicant, when interrogated on 27 January 1972, again refused to make any statements as to the crime.

(1) Cf. also the annexed Schedule (Appendix III)

On 25 February 1972 the investigating judge prepared, together with the Office of the Public Prosecutor, rogatory letters asking the Vienna Regional Court (Landesgericht) to hear the two first-hand witnesses, Mrs. Tu. and Mr. H. These letters were sent off by the judge on 7 March 1972 and, according to the usual procedure, forwarded by the Ministry of Justice of Hessen. By letter of 27 March 1972 the judge in Vienna replied that the hearings could not be held until the second half of May.

On 20 March 1972 the investigating judge, in the presence of the defence, questioned a witness, Mr. Ho., on the spot where the body had been found. A further witness was heard on 24 May 1972. On 30 May 1972 the judge in Vienna questioned Mrs. Tu. Mr. H., who could not be found on that day, was heard on 10 July 1972. The investigating judge attended both hearings. On 18 July 1972 he closed the preliminary judicial investigation.

cc) The opening of the main proceedings

12. On 31 August 1972 the Public Prosecutor repeated his request that the main proceedings be opened (Eröffnung des Hauptverfahrens). By letter of 1 September 1972 the presiding judge of the competent Criminal Chamber of the Frankfurt Regional Court asked the applicant whether he objected to the opening of the main proceedings or wished to apply for any further evidence to be taken prior to the opening. No reply was received from the applicant.

On 17 October 1972 the Criminal Chamber ex officio decided that the applicant's criminal responsibility be examined by a psychiatrist. No reasons were given. Reserving the nomination of an expert, the Court requested Professor Gerchow, the Director of the Institute for Forensic Medicine at the University of Frankfurt, to report in the meanwhile whether the applicant's admission to a mental hospital was required for the preparation of the expert opinion. Furthermore, the Court authorised Professor Gerchow to entrust another qualified member of his Institute with the drafting of the report.

Professor Gerchow examined the applicant in prison on 7 November 1972. On this occasion the applicant for the first time alleged a skull injury caused by a hand-grenade in the Sinai campaign in 1956. On 13 November 1972 the Court of Appeal suggested that, if Professor Gerchow was not able to produce the final expert opinion within a reasonable period of time, some other expert should be instructed to do so. By letter of 4 January 1973 Professor Gerchow informed the Court that it had not been possible to ascertain any mental or physical disturbances and that, in order to prepare the expert opinion, an examination of the applicant as an out-patient appeared sufficient.

By a decision of 18 January 1973 the criminal Chamber opened the main proceedings before the Court of Assizes (Schwurgericht). The Court further ordered the continuation of the applicant's detention pending trial.

dd) The preparation of the trial

13. In early February 1973 the President of the Court of Assizes fixed, with the approval of the defence, the trial to begin in May 1973. By letter of 5 February 1973 he asked Professor Gerchow whether he could carry out the necessary out-patient examination and submit a written expert opinion before the trial started. Professor Gerchow replied on 14 February 1973 that, for various reasons, this was not possible. In a further letter dated 10 April 1973, he informed the Court that he would be unable to attend a large part of the trial sittings.

ee) The first trial

14. On 10 May 1973, the first day of the trial, the applicant objected to his psychiatric examination being carried out during the trial and applied for a thorough examination beforehand. In this connection, he alleged again that he had suffered a skull injury during the Sinai campaign in 1956. A medical expert called by the defence, Professor Derwort stated that so far no radiological, neurological and psychiatric findings were available to determine the question whether or not this injury had affected the applicant's criminal responsibility at the time of the act. He added that an in-patient examination during the current trial, namely during the ten days' interval between two sittings (maximum interval allowed by German procedural law for a continuing trial), would not affect the applicant's fitness for trial. A pneumo-encephalogram could be carried out at the beginning of an interval; possible side-effects would in any event disappear days before the next sitting of the court.

The applicant objected to this procedure which he considered unfair, detrimental to his capacity to defend himself properly, and doubtful from a medical point of view. He was, however, prepared to undergo an examination at once and then to present himself for trial.

Applicant's counsel then applied for an expert ethnological opinion which, according to Professor Derwort could help identifying neurotic factors in the genesis of the act. This application was granted and the trial therefore adjourned until 21 May 1973.

15. At the following hearing on 21 May 1973 the defence without success challenged the judges consecutively on the ground that the Court, on 14 May 1973, had appointed official defence counsels in view of the scope of the proceedings. A request to replace the representative of the prosecution on account of bias was similarly refused. The defence succeeded however, in having a substitute interpreter replaced whose performance was found to be inadequate. According to the record submitted by the Government, this hearing started at 10.00 hours and was concluded at 21.30 hours. There were three

long adjournments during which the Court deliberated in camera on the challenge by the defence, so that in fact the hearing lasted for about 65 minutes. After the third adjournment, the Court decided that the applicant was no longer fit to stand trial by reason of a head injury (1). The trial was accordingly adjourned sine die.

In July 1973 the Public Prosecutor was informed by Interpol Jerusalem that the applicant had not been wounded during the Sinai campaign in 1956.

In August 1973 the applicant was admitted to a mental hospital where the psychiatric examination was conducted by Dr. Schneller.

ff) The second trial

16. At the new trial, which started on 25 October 1973, the psychiatrist Dr. Schneller and the ethnological expert submitted their respective opinions. On 11 December 1973 the Court convicted the applicant of homicide and sentenced him to 15 years' imprisonment. Both the applicant and the Public Prosecutor lodged appeals on points of law (Revision) against this judgment with the Federal Court (Bundesgerichtshof).

B. THE SUBMISSIONS OF THE PARTIES

17. The applicant, as stated above, has not submitted any written observations on the merits of the application. However, at the hearing on the admissibility of the application, at which the parties also made submissions on the merits, he has argued that the length of his detention pending trial could not be considered as reasonable within the meaning of Art. 5 (3). In his opinion the competent authorities failed to expedite the proceedings sufficiently.

18. The time for the preparation of the indictment was unnecessarily long since all the relevant evidence was available at the time of his arrest. Almost all witnesses appearing in the indictment had been questioned prior to 1 December 1970 and remained available as they all were residing in or near Frankfurt. The scope and the difficulty of this case were far from being exceptional.

19. The preliminary judicial investigation was expected to provide an opportunity for the defence to examine the main witnesses in the presence of a judge in order to try and find appropriate ways to challenge the prosecution's case. When applying for this investigation, the defence did not know the fact that Mrs. Tu. had in the meanwhile moved to Vienna. Under Austrian law the defence was not allowed to attend the hearing of the witnesses by the Vienna judge.

(1) see para. 39

The applicant considers that too much time elapsed before the opening of this investigation and before the first questioning of a witness (Mrs. Th.) by the investigating judge. The rogatory letters were likewise unnecessarily delayed since the whereabouts of the witnesses in Austria had been known for about three months. The reply and proposals from the Austrian judge were then received exceptionally quickly. The applicant concludes that the preliminary judicial investigation was carried on incompetently. He denies any responsibility for the resultant delays. In his opinion he merely exercised a right guaranteed to him under the procedural law and he had no effective means of influencing the speed of this investigation.

20. With respect to the examination of his criminal responsibility the applicant expresses the opinion that the competent authorities failed to take the necessary steps effectively to implement the Court's decision of 17 October 1972. Both the circumstances of the killing, which took place in the presence of several persons and the severity of the possible sentence called for an examination of the question whether or not the applicant acted in a fit of rage. This aspect was raised by the defence on 1 December 1971, then apparently neglected by the investigating judge and eventually taken into account by the Court in its order of 17 October 1972. An unreasonable amount of time elapsed between the preliminary examination by Professor Gerchow and the submission of his report by letter of 4 January 1973. The President of the Court of Assizes, on being informed on 14 February 1973 by Professor Gerchow that no written opinion could be prepared before the opening of the trial in May 1973, failed to arrange for another expert to examine the applicant as suggested in the Court's order of 17 October 1972. When the trial began on 10 May 1973, no examination had taken place. Applicant's counsel, who had not had any contacts with the applicant during some months before the trial and who was not aware of the correspondence between the Court and Professor Gerchow had believed that, prior to the trial, an examination would be carried out in pursuance of the order of 17 October 1972. The defence did not, therefore, make any proposals nor did the applicant deem it necessary to refer to his skull injury. This became necessary, however, when the defence learned, some days before 10 May 1973, that no expert opinion would be available at the beginning of the trial. In this context the applicant refers to the "chaotic conditions in psychiatric institutes" and the apparent tolerance of this on the part of the courts. With a view to securing a thorough examination prior to any trial, the defence on 7 May 1973 contacted another expert, Professor Derwort, and summoned him to give evidence in connection with the allegations concerning the applicant's skull injury. The question of a possible fit of rage was examined by Dr. Schneller on the basis of various hypothetical findings of fact. This was 21 months after an examination had been suggested by the defence and almost one year after it had been ordered by the Court.

Moreover, he stresses that the workload of specialists in forensic medicine is no justification for an unreasonable period of detention on remand and that he can not be blamed for insisting on his rights to the best possible conditions of defence.

21. With respect to the time between the opening of the main proceedings and the beginning of the trial, the applicant considers that the system according to which courts of assizes are established and seized with cases is unsatisfactory. Only two courts had been provided for in Frankfurt. In view of the list of cases already pending before them, a hearing could not be held before May 1973.

21. Turning to the events of 21 May 1973, the applicant emphasises that his head injury was exclusively the result of a physical and emotional collapse caused by his long detention partly spent in isolation and the strain of the long hearing on that particular day. There was no intention on his part of obstructing the trial. This was also true with regard to his challenging of the judges. The applicant had reason to believe that the Court tended to restrict his defence by appointing official counsels. The request to replace the representative of the prosecution was in conformity with an accepted practice. According to newspaper reports, the representative of the prosecution had announced prior to the trial that she intended to request a life sentence. This was in violation of her duty under the German procedural law to observe impartiality and objectivity.

22. In conclusion the applicant submits that, at all stages of the proceedings, substantial and unnecessary periods of time elapsed as a result of negligence and incompetence on the part of the authorities. These various periods eventually added up to a total period of more than three years during which he was detained, partly in isolation. He was consequently subjected to a considerable physical and emotional strain endangering his will to defend himself and thus justifying his release pending trial. He emphasises that his silence throughout the proceedings assisted the investigations rather than complicated them since no misleading statements were made by him.

23. The respondent Government submit that the proceedings were carried out competently and without unnecessary delays and that the application is therefore ill-founded as regards the alleged violation of Art. 5 (3) of the Convention.

24. The Government point out that, in accordance with the Commission's case-law, the period under consideration began with the applicant's arrest on 1 December 1970 and ended on 11 December 1973 when he was convicted. The resultant period of three years and eleven days was not unreasonable within the meaning of Art. 5(3) in view of the difficulties in the investigation of the crime and the applicant's own conduct by which he intentionally delayed the proceedings against him.

The Government consider that the applicant's continued detention was necessary as the grounds for detention continued to exist as stated on various occasions by the courts and confirmed subsequently by the applicant's conviction. The above-mentioned decision of 13 November 1972 by the Court of Appeal is referred to as an example for the Court's efforts to expedite the proceedings. A release on bail pending trial was out of the question. Both the suppression of evidence by the applicant and his possible absconding could only be prevented by continuing his detention since, in view of his possible sentence, financial considerations would have played only a minor part in any plans which he might have had to abscond. In support of this consideration the Government refer to the District Court's doubt as to whether the security offered (a sum of 150,000 DM) would have been paid out of the applicant's own resources rather than by a group of persons having an interest in bars and night-clubs in Frankfurt. In the latter case, it would have been entirely unsuited as a guarantee to appear for trial.

25. With regard to the manner in which the proceedings were conducted by the authorities, the Government submit that any delay in the investigations was solely the result of the applicant's knowingly making false statements, in particular by falsely incriminating Mrs. P., by making contradictory statements about the engagement, and by the false allegation that he had suffered a head injury in the Sinai campaign.

26. With regard to the delay in the preparation of the indictment the Government consider that the investigation by the Public Prosecutor was neither delayed nor protracted and that it did not take an unreasonably long time. The offence was not yet cleared up at the time of the applicant's arrest. The applicant denied having committed the crime and did everything to divert the suspicion away from him to the fugitive Mrs. P. It would therefore have been impossible to prepare an indictment within a few weeks. Important evidence, which had not been available at the time of the applicant's arrest, had to be taken as regards the witness H. and in particular the co-accused Mrs. P. This applied also to certain expert medical evidence. Furthermore, numerous witnesses had to be interrogated after Mrs. P.'s return from the U.S.A.

27. With respect to the preliminary judicial investigation, the Government equally considers that there has been no delay for which the authorities could be held responsible. The applicant made no suggestions for further evidence to be taken by the investigating judge and he did not express any doubts about or raise any objections against the result arrived at by the Office of the Public Prosecutor. The Government stress that, in fact, a necessity for further investigations by the investigating judge was not discernible. In this connection the Government point out that the applicant is not blamed for having availed himself of the rights to which he was entitled

under the Code of Criminal Procedure. But the defence and, consequently, the applicant too knew or ought to have known that the application for a preliminary judicial investigation would necessarily cause the proceedings to be prolonged considerably. The defence knew from the indictment that at least one of the two witnesses for the prosecution resided in Vienna and that, for this reason, it had to be expected that rogatory letters would be issued. The investigating judge fixed 7 December 1971 as the date for interrogation of the witness Tu., who had, however, in the meantime moved to Vienna. The application for the interrogation of the witness Th. was made only in the written pleadings submitted by counsel representing the co-defendant, Mrs. P. On 15 December 1971 the applicant refused to make any statements on the matter. After the investigating judge had, in December 1971 and January 1972, formed his own personal opinion on the accused and the circumstances surrounding the offence, he felt convinced in February 1972 that the interrogation of the two principal witnesses could not be dispensed with, in spite of the loss of time resulting therefrom. In view of the difficulties connected with the "milieu" of certain witnesses and the delays usually caused by requests for the hearing of witnesses in another jurisdiction, eight months appear, in the Government's view, to be a relatively short time for this judicial investigation (1). In any event, the applicant himself is entirely responsible for the delay caused by this part of the proceedings in the absence of which trial could have been opened soon after the indictment was served on him.

28. As to the question whether, according to the note made by the investigating judge on 1 December 1971, it would already have been possible during the preliminary judicial investigation to have made an order for a psychiatric examination of the applicant, the Government submit that the two investigating judges in charge of the case declared unanimously that, in view of the impression they had gained of the accused and his behaviour, they had had no doubt whatsoever as to his criminal responsibility and did not think, therefore, that a psychiatric examination was necessary. The Government stress that this view taken by the investigating judges must be respected even though the Court subsequently did order an expert psychiatric opinion to be rendered. The view taken by the investigating judges of the applicant's full criminal responsibility tallied, in the result, with the view taken by the two psychiatric experts Professor Gerchow and Professor Schneller.

29. With regard to the time from the conclusion of the preliminary judicial investigation to the first trial, the Government did not consider that this period was unreasonable ./. .

(1) The Government add that draft legislation abolishing the preliminary judicial investigation is pending.

since witnesses had to be summoned from abroad and a time schedule convenient to the numerous participants had to be agreed upon. They also point to the difficulties arising from the regular compulsory examinations of the grounds for detention. This meant that the files had to be sent on various occasions to the Court of Appeal.

30. Turning to the events connected with the applicant's psychiatric examination, the Government emphasise that, prior to the first trial, the defence had never formally applied for an examination of the applicant's criminal responsibility nor mentioned his skull injury. The Court on its own initiative ordered the psychiatric examination of the applicant as an out-patient. Considering the length of the period between the examination on 7 November 1972 and the rendering of the expert opinion on 4 January 1973, it must be taken into account, according to the Government, that the expert was completely unacquainted with the voluminous files of the case and that such institutes have to cope with a heavy case-load especially towards the end of the year. This period, moreover, included the time between Christmas and New Year's Day when many people go on leave. The Government furthermore submit that, in particular, qualified experts may be pressed for time because of their numerous duties. The opinion of an expert, with the special qualifications in which courts are particularly interested, may well account for a further delay of several weeks. In this connection the Government point out that also the expert Professor Schneller, relying on a thorough clinical examination, reached a result regarding the criminal responsibility which was not different from that reached by Professor Gerchow. The Government add that the preparation of a written expert opinion by a psychiatrist prior to the opening of the trial was not necessary and that there was no reason to replace the expert Gerchow. It is not unusual that accused persons are examined on days when the court does not sit and that psychiatric expert opinions are rendered only in the course of the trial. The question as to whether the applicant had committed the act in a fit of rage (Affektsturm) could only be answered on the basis of the statements made by the eye-witnesses at the trial. An examination of the applicant as an in-patient by a new expert could have been ordered without a loss of time since the first trial having been adjourned there was sufficient time until the new trial.

The Government conclude that it would have been desirable to have had the expert opinion rendered and a date fixed more speedily. On the whole, however, the matter was not dealt with in an incorrect manner nor was there any unreasonable delay.

31. Commenting on the two trials the Government submit that none of the delays were due to the courts seized of the case. The applicant alone is responsible for the delays which he himself caused by false statements and unfounded applications.

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The adjournment of the first trial sine die was caused by the fact that the applicant had inflicted a wound on his head. This was a deliberate act aimed at obstructing the trial rather than the result of a breakdown caused by the alleged strains and stresses of the hearing which had been adjourned for the great part of the day. The new trial was conducted without any undue delay from 25 October 1973 onwards.

C. PARTICULAR POINTS AT ISSUE

32. The following particular points are at issue with regard to the applicant's complaint concerning the length of his detention on remand during the two criminal proceedings against him.

- (1) What period of detention is covered by the requirement of "reasonable time" under Art. 5 (3) of the Convention?
- (2) Whether or not the reasons given by the German courts that the applicant should be kept in detention on remand were relevant and sufficient?
- (3) Whether or not the judicial authorities handled the applicant's case in a manner which unreasonably prolonged his detention on remand?

D. OPINION OF THE COMMISSION (1)

33. Before stating its opinion on the question of a violation of Art. 5 (3) of the Convention by reason of the length of the applicant's detention on remand, the Commission is concerned with the question what period of detention on remand should be considered under that Article.

It is of the opinion that the reasoning of the European Court of Human Rights in the Wemhoff Case is applicable in the circumstances of the present case and the Commission therefore considers that the period of detention covered by the requirement of a "reasonable time" commenced with the applicant's arrest on 1 December 1970 and ended with his conviction on 11 December 1973; from then onwards he was no longer detained in accordance with Art. 5 (1)(c) but was a person detained "after conviction by a competent court" within the meaning of Art. 5 (1)(a) (cf. Wemhoff Case "THE LAW" para. 9).

The Commission notes that the applicant consequently was detained during a period of three years and eleven days.

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- (1) MM. BUSUTTI and CUSTERS express a separate concurring opinion in accordance with Rule 52 (3) of the Commission's Rules of Procedure (see p. 3 footnote 1).

34. Next, with regard to the grounds of detention on remand, the Commission recalls that the German courts found that the applicant had tried to induce a witness to make false statements; it was therefore to be expected that he would attempt to intimidate the witnesses for the prosecution; furthermore, he had been in the Federal Republic without a residence permit and had no family ties there. Both the probable attempts by the applicant to suppress evidence and his possible absconding could only be prevented by continuing his detention; the deposit by the applicant of the proposed bail would not have ensured his appearance at the trial since, in view of the possibility of a severe sentence, financial considerations would have played only a minor part in any plans which he might have had for absconding. Furthermore, it would not have been apt to prevent the applicant from intimidating witnesses.

The Commission appreciates these arguments and considers that they were relevant and sufficient to justify the applicant's detention on remand.

35. As regards the third question on the other hand, the Commission considers that, however relevant and sufficient the reasons in the public interest put forth by the national judicial authorities may be to keep a person in custody, this alone did not exempt the authorities from the obligations imposed by Article 5 (3) of the Convention when they themselves were shown to have conducted the case in a manner which had unreasonably prolonged his detention on remand, thus imposing on him a greater sacrifice in the interest of public order than could normally be expected of a person presumed to be innocent.

The Commission considers that the question whether any delays by the judicial authorities, during the course of the proceedings against the applicant, were avoidable, arises in connection with the translation of the indictment, with the preliminary judicial investigation, with the examination of the applicant's criminal responsibility and with the postponement of the trial.

36. With regard to the translation of the indictment into Hebrew, the Commission notes that it took approximately five weeks, which seems to be a considerable time, but not unreasonable. In particular, the applicant, who does understand some German, and was defended by a German-speaking counsel, could have avoided the delay altogether by having his lawyer take the necessary steps for the procedure to carry on, awaiting an official translation, without delaying the proceedings.

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37. With regard to the preliminary judicial investigation, the Commission notes that it took a little over nine and a half months, which seems to be a considerable time, especially as the evidence collected during this period did not add anything to that which was collected during the previous investigation proceedings. In this connection, the Commission considers the function of the preliminary judicial investigation under the German statute of criminal procedure. While the ordinary investigation proceedings (Ermittlungsverfahren) are carried out under the authority of the public prosecutor (Staatsanwaltschaft), the preliminary judicial investigation (gerichtliche Voruntersuchung) is carried out by an investigating judge (Untersuchungsrichter). The investigating judge has to repeat the entire investigation and may have to collect further evidence, if the accused asks for it. In murder cases, the request for a preliminary judicial investigation could not, by law, be denied (Article 178 paragraph (1) last sentence of the Code of Criminal Procedure as in force in 1971). The Commission notes that the applicant has requested a preliminary judicial investigation without asking for any additional evidence. The only result has been, therefore, the delaying of the procedure. Part of this delay was caused by the fact that the main witnesses had moved to Vienna. This called for rogatory letters which unavoidable are rather time-consuming. The Commission therefore finds that the respondent Government cannot be held responsible for this delay.

38. With regard to the examination of the applicant's criminal responsibility, the Commission notes that, while the possibility of such an examination was first raised by the applicant's counsel on 1 December 1971, the examination was decided upon ex officio only on 17 October 1972, the expert opinion was not yet available at the opening of the first trial on 10 May 1973 and it was not until August 1973 that the applicant was admitted to a mental hospital for a psychiatric examination. Although these seem to be considerably long periods, the Commission does not find it necessary to decide to what extent they influenced the duration of the detention on remand as a whole, for the following reasons:

It may be recalled that the investigating judge, on 1 December 1971, recorded that "according to a communication from Rechtsanwalt Geis, the question of a psychiatric examination shall be approached as soon as possible. Mr. Geis wishes to make proposals." (emphasis added). These proposals, however, were not made until 10 May 1973 when the applicant's counsel applied for an ethnological examination.

The German Code of Criminal Procedure requires the taking of evidence ex officio, as far as it is of importance for the decision to be taken (Article 244 para. (2) of the Code of Criminal Procedure). The investigating judge apparently did not think that this was a case for psychiatric examination, while the Third Criminal Chamber came to the opposite conclusion. As the experts finally did not find that the criminal responsibility of the applicant was diminished, it cannot be said that the investigating judge was negligent in not ordering an examination ex officio, in

particular as he was waiting for the proposals promised by the applicant's counsel, but proferred only 17 months later. Furthermore, the applicant waited until the opening of the first trial to mention a skull injury allegedly caused by a hand-grenade during the Sinai campaign of 1956.

On the other hand, the Commission notes that psychiatric experts are, in most European countries, overburdened with work. While, as a general rule, a Government can be held responsible for the doings of an expert (cf. Report on Nielsen, paragraph 52), the Commission notes that, in the present case, the court had no means of coercion likely to speed up the work of Professor Gerchow effectively.

39. With regard to the postponement of the trial, the Commission notes that, on 21 May 1973, the hearing lasted from 1000 to 2200 hours. Most of the time was used for deliberations in camera of the Court, the applicant taking part in the audience only during 65 minutes. The trial finally could not be continued, because the applicant had suffered that day a head injury of uncertain origin. The Commission does not find it necessary to decide whether this injury was caused by a fall due to exhaustion, as the applicant alleges, or by his own deliberate action, as the Government submit. It considers that, in either case, the Government cannot be held responsible for a delay thus caused, as the hearing itself could not have burdened the applicant with excessive stress.

40. On the whole, the Commission finds that, while it is true that the detention of three years and eleven days pending trial was partly due to avoidable delays, these delays could essentially be avoided by the applicant. He could have had the indictment translated by having his lawyer take the necessary steps for the procedure to carry on, awaiting an official translation without delaying the proceedings, he could have renounced the preliminary judicial investigation and he could have made the proposals promised concerning the psychiatric examination at the appropriate time. On the other hand, the applicant has not done anything at all in order to speed up the procedure. In particular, with regard to the applicant's submission that, by remaining silent, he did actually assist the investigation, the Commission finds it difficult to accept this argument as, for example, an earlier mentioning of the alleged skull injury would probably have avoided any delay caused by the psychiatric examination.

It is true that the behaviour of the applicant was in conformity with the German Code of Criminal Procedure. As a general rule, an accused person cannot automatically be held responsible for any prolongation of the proceedings while he is in detention, merely because he has availed himself of rights to which he is entitled. On the other hand, the Commission always held that the behaviour of a detained person can be

relevant to the question of whether the time of detention was "reasonable" (Applications No. 297/57, Yearbook 2, pp. 204; No. 530/59, Yearbook 3, p. 184; No. 892/60, Yearbook 4, p. 240; No. 1404/62, Yearbook 7, p. 104; No. 2465/65, Collection of Decisions, 24, p. 50; No. 2516/65, Yearbook 9, p. 435; No. 3637/68, Yearbook 13, p. 438; Reports of the Commission in the cases of Matznetter, European Court of Human Rights Series B Matznetter Case, p. 33, and Neumeister, European Court of Human Rights Series B, p. 30). The same opinion was implicitly adopted by the Court in the Stögmüller Case (European Court of Human Rights, Series B, para. 16).

The German Code of Criminal Procedure provides for ample rights for the defence and, to a limited degree, gives to the accused a choice as to whether he prefers a more thorough preparation of the trial or a speedier procedure and this system also confers upon him a certain responsibility. Within certain limits, he has to bear the consequences of his choice.

In the present case, the Commission finds that the applicant has availed himself excessively, if not abusively, of certain legal possibilities including the preliminary judicial investigation and, with respect to the psychiatric examination, the right to remain silent. This behaviour could not have failed to extend the period spent in detention on remand in a manner foreseeable to the applicant and his counsel.

41. For the reasons indicated above, the Commission considers that there were no delays which were avoidable for the judicial authorities, and that therefore the applicant was not detained beyond reasonable time pending trial. In conclusion, the Commission considers, by eleven votes to one vote, that Article 5, paragraph (3), of the Convention has not been violated in the present case.

E. SEPARATE OPINION OF MM. TRECHSEL and WELTER (1)

While in agreement with the conclusion of the Commission, I cannot follow its finding on the period of detention to be considered under Art. 5 (3) of the Convention, although it is in accordance with the jurisprudence of the European Court of Human Rights as quoted by the Commission. This jurisprudence, it has to be stressed, was challenged by the Commission itself in its Report on the Application No. 2614/65, Ringeisen v. Austria, para. 99. The Court did not reject this challenge, but left the question open (judgment of 16 July 1971, para. 109, p. 44).

It may be recalled that the relevant passage of Art. 5 (3) of the Convention reads as follows: "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial ...". This wording allows for two interpretations, none of which was adopted in the present Report by the Commission. An interpretation sticking strictly to the grammar of the passage quoted above, in the English text, would lead to the conclusion that the relevant period of detention ends the moment the trial opens, for at that moment the detained person is brought to trial. A different result is obtained if the clear meaning of the guarantee is considered: before being convicted by the competent tribunal, a person is considered to be innocent (Art. 6 (2) of the Convention), and should therefore not be detained beyond reasonable time. The relevant period would therefore end the moment the presumption of innocence ends, that is, when the judgment becomes final.

The Court has rejected the first alternative because "(it) is impossible to see why the protection against unduly long detention on remand which Article 5 seeks to ensure for persons suspected of offences should not continue up to delivery of judgment, rather than cease at the moment the trial opens" (judgment Wemhoff, para. 8). It is also in contradiction with the French text. I can agree with this argument.

The Court rejected the second alternative because: "this would exclude the arrest at the hearing of convicted persons who appeared for trial while still at liberty, whatever remedies are still open to them ... It cannot be overlooked moreover that the guilt of a person who is detained during the appeal or review proceedings, has been established in the course of a trial conducted in accordance with the requirements of Article 6. It is immaterial, in this respect, whether detention after conviction took place on the basis of the judgment or ... by reason of a special decision confirming

(1) M. WELTER expresses a separate opinion in accordance with Rule 52 (3) of the Commission's Rules of Procedure (see p. 3 footnote 1)

the order of detention on remand. A person who has cause to complain of the continuation of his detention after conviction because of delay in determining his appeal, cannot avail himself of Article 5 (3) but could possibly allege a disregard of the 'reasonable time' provided for by Article 6 (1)." (Wemhoff Case, The Law, para. 9).

I do not find these arguments to be convincing. Article 5 (3) has to be read in its systematic context. It protects a person whenever he is detained under Article 5 (1)(c). With a suspect, this is the case as long as he is neither set free nor convicted and sentenced so that his detention falls under Article 5 (1)(a). The Commission, in its decision on the admissibility of the Application No. 3911/69 (Yearbook 12, p. 321, 330), has expressly stated that, under the German Code of Criminal Procedure, this was not the case until the decision has become final. The Convention does not give any indication that under certain circumstances a person detained under Article 5 (1)(c) should not benefit from the guarantee provided for in Article 5 (3).

I am unable to follow the argument of the Court, according to which the solution here proposed would make it impossible to arrest a person appearing at the trial while still at liberty. As long as the person is not convicted, Article 5 (1)(c) can be invoked; after the final conviction, that is, after the time during which appeal was possible has elapsed without an appeal being filed, or after a higher instance has rendered a judgment which can immediately be executed, the detention is covered by Article 5 (1)(a).

It could be argued that this is to the disadvantage of systems with legal remedies prohibiting immediate execution of the sentence, because under these systems detention on remand would have, of needs, to be longer than in other countries. This would also create inequality between High Contracting Parties. Such inequalities, however, cannot be avoided. On the contrary, the Convention itself protects them through Article 60, which reads: "Nothing in this Convention shall be constructed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party ...". The construction made by the Commission in the present case does, in my opinion, limit fundamental freedoms as granted under the laws of High Contracting Parties which provide for legal remedies stopping the execution of a sentence pending appeal.

Such countries would, in fact, be strongly hampered if Article 5 (3) set a fixed time limit for the "reasonableness" of detention on remand. This, however, is not the case. In deciding whether detention was "reasonable", various criteria

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have to be applied, and the circumstances of the particular case are of essential importance. One such circumstance is the fact that appeal proceedings had to be carried out. It is evident that an applicant has to accept a longer period of detention on remand if he files an appeal. Still, this ought not to be a ground for depriving him of all protection. The need for protection is particularly urgent whenever the detention on remand pending appeal is not recognised as part of the sentence, or if a person is detained after acquittal pending appeal lodged by the public prosecutor. For these reasons I am of the opinion that the period of detention on remand to be considered under Article 5 (3) of the Convention does not end before the judgment becomes final.

APPENDIX IHISTORY OF PROCEEDINGS

Item	Date	Note
Examination of admissibility (Commission)		
Introduction of application	28 February 1973	
Registration of application	16 March 1973	
Examination by group of three members (Rules 34 and 45 of the Rules of Procedure, old version)	7 April 1973	MM. Sperduti Lindal Opsahl
Order of the President of the Commission to give notice of the application to the Government of the Federal Republic of Germany in accordance with Rule 42(2) of the Rules of Procedure, old version	7 April 1973	
Receipt of Government's observations on admissibility	14 June 1973	
Receipt of applicant's observations on admissibility	9 July 1973	
Commission's deliberations and decision to obtain further information from the Government	20 July 1973	MM. Fawcett Sperduti Ernacora Welter Lindal Daver Opsahl Langan Custers Nørgaard
Receipt of respondent Government's additional information	13 September 1973	
Receipt of applicant's comments in reply to the respondent Government's information	10 October 1973	

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Item	Date	Note
Examination by Commission and decision on admissibility (Appendix II)	17 December 1973	MM. Fawcett Sperduti Busuttil Kellberg Daver Opsahl Mangan Custers Nørgaard Polak Frowein
Receipt of Government's observations on the merits	29 March 1974	MM. Fawcett Sperduti Ermacora
Commission's decision to continue with its proceedings without applicant's observations on the merits	17 July 1974	Triantafyllides Welter Busuttil Kellberg Daver Opsahl Mangan Custers Nørgaard Polak Frowein
Commission's deliberations	7 October 1974	MM. Fawcett Sperduti Ermacora Triantafyllides Welter Busuttil Kellberg Daver Opsahl Mangan Custers Nørgaard Polak Jörundsson
Commission's deliberations	18 December 1974	MM. Fawcett Triantafyllides Busuttil Kellberg Daver Mangan

Item	Date	Note
		(ctd)
		MM. Custers Polak Frowein Jörundsson Dupuy
Commission's deliberations and final vote	29 May 1975	MM. Fawcett Sperduti Ermacora Kellberg Daver Mangan Nørgaard Polak Frowein Jörundsson Dupuy Trechsel
Adoption of Report	9 July 1975	MM. Fawcett Sperduti Triantafyllides Welter Busuttil Kellberg Daver Mangan Custers Nørgaard Polak Frowein Dupuy Trechsel