AS TO THE ADMISSIBILITY OF

Application No. 12350/86
by Friedrich Wilhelm KREMZOW
against Austria

The European Commission of Human Rights sitting in private on 5 September 1990, the following members being present:

MM. C. A. NØRGAARD, President
J. A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
H. G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
A.V. ALMEIDA RIBEIRO

Mr. H. C. KRÜGER, Secretary to the Commission,

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 1 August 1986 by Friedrich Wilhelm KREMZOW against Austria and registered on 22 August 1986 under file No. 12350/86;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to:

- the Commission's decision of 19 January 1989 to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits;

- the observations submitted by the respondent Government on 23 May 1989 and the observations in reply submitted by the applicant on 18 August 1989;

- the additional observations submitted by the applicant on 29 June 1990 and by the Government on 17 July 1990;

- the parties' oral submissions at the hearing on 5 September 1990;

Having deliberated;

Decides as follows:

THE FACTS

The facts as submitted by the parties may be summarised as follows:

The applicant, an Austrian citizen born in 1938, was a judge in the Austrian courts from 1964 to 1978. He is currently serving a life sentence for murder in Vienna. He is represented

before the Commission by Rechtsanwalt Dr. Wilfried Ludwig Weh of Bregenz.

On 16 December 1982, the applicant voluntarily presented himself before the Regional Court (Kreisgericht) of Korneuburg and confessed to having killed P, a Viennese lawyer for whom he had been working, on 13 December 1982 by shooting him twice in the head area with a revolver. The applicant provided no motive for the homicide, which, according to him, had occurred in his wife's car on a country road while the victim was asleep. Criminal proceedings were instituted and the applicant has remained in detention ever since. Immediately following his arrest, the applicant was taken into psychiatric treatment and observation in view of a danger of his committing suicide and of his overall mental condition. Because of this condition, he was interned in the psychiatric hospital of the City of Vienna from 1 to 20 April 1983 and to the Mittersteig special institution for mentally deranged offenders since 6 December 1983.

On 17 December 1982, the investigating judge (Untersuchungsrichter) appointed two psychiatrists, Drs. G and K, as experts to interview the applicant and prepare reports regarding his criminal responsibility. On 28 February 1984, following a suggestion by Dr. G, it further appointed a psychologist, Dr. Q, to examine the applicant. Only Drs. G and Q, however, accomplished their tasks during the investigation stage.

On 30 November 1983, the public prosecutor for Korneuburg filed an indictment charging the applicant with murder under Section 75 of the Penal Code (Strafgesetzbuch) and with illegal possession of a firearm under Section 36 of the Firearms Act (Waffengesetz). The applicant was further charged with aggravated fraud (schwerer Betrug) under Sections 146 and 147 and breach of trust (Untreue) under Section 153 of the Penal Code for unauthorised use of the victim's professional current account for personal enrichment during the applicant's employment by the victim. The indictment alleged that dire financial straits had led the applicant to defraud P and that the homicide was motivated by a desire to cover up the misuse of the bank account. Finally, the indictment requested that the applicant be committed to an institution for mentally abnormal criminals (Anstalt für geistig abnorme Rechtsbrecher) under Section 21 of the Penal Code so that he be accorded intensive psychiatric treatment. The public prosecutor based this plea on the reports of Drs. G and Q who, while considering that the applicant was not mentally ill to the extent that he could not appreciate the wrongfulness of his act, did find that his "capacity to act with insight was vastly reduced". The psychiatrist, Dr. G, found that the applicant was suffering from a "grave personality disorder" which was "tantamount to a penally relevant mental deviance of great dimension", and that the crime was committed under the influence of this personality disturbance.

The applicant's objection (Einspruch) to the indictment was rejected by the Vienna Court of Appeal (Oberlandesgericht) on 20 December 1983. This Court considered, however, that a second psychiatrist should be appointed as an expert. One of the judges participating in that decision was W.

Subsequently, on 3 December 1984 the applicant challenged W for bias as he had stated during a public news conference that the applicant had used his judicial office only to harass (sekkieren) people. On 14 January 1985, this challenge was accepted by the Court of Appeal.

Regarding the appointment of a second psychiatrist, as ordered by the Court of Appeal, the applicant, in a telephone conversation with the presiding judge of the Regional Court of Korneuburg on 6 February 1984, suggested the names of two psychiatrists. According

to the applicant, the judge responded that Dr. K had to be appointed because "the public prosecutor insists on it" and "I can't start a war with the public prosecutor, I have to work with him". In an official declaration the judge disputed this version, claiming he told the applicant that Dr. K was appointed because he had originally been appointed by the investigating judge. Thereupon, the applicant's challenge of this expert was rejected by the Review Chamber (Ratskammer) of the Korneuburg Regional Court on 18 April 1984.

In a later statement of 19 September 1988, the presiding judge Ko declared that he had had doubts concerning the Court of Appeal's decision ordering the taking of a second psychiatric expert opinion in an interim procedure. Normally, the Court of Appeal should have allowed the objection to the indictment and referred the case back to the investigating judge with a view to obtaining a second psychiatric expert opinion. He had discussed this matter with the above judge W of the Court of Appeal who had shared his doubts but had explained the Court of Appeal's decision by a concern not to compromise ("blamieren") the public prosecutor's department at Korneuburg.

On 24 May 1984, the applicant terminated the mandate of his freely chosen defence counsel due to a conflict of interest which had developed in relation to a civil suit in which the applicant was involved. When informing the Regional Court, the applicant invoked his right under Article 6 para. 3 (c) of the Convention to represent himself, objecting in advance to the assignment of an official defence counsel (Pflichtverteidiger). On 25 May 1984, defence counsel was nevertheless appointed on the ground that representation by counsel was legally required in Assize Court proceedings. The applicant's appeals against this decision to the Constitutional Court (Verfassungsgerichtshof) and to the Vienna Court of Appeal (Oberlandesgericht) were declared inadmissible.

On 13 June 1984, the trial (Hauptverhandlung) commenced before a Court of Assizes of the Regional Court of Korneuburg sitting with a jury (Geschworenengericht). Ko acted as presiding judge with F and R as associate judges.

At the first session of the trial the applicant retracted his confessions which he said were the product of a psychotic aberration. He now asserted that P had committed suicide in his presence in a garage in Vienna and he also made several discovery and evidentiary motions aimed at proving this thesis. The trial was discontinued and referred back to the investigating judge with a view to clarifying the facts as now alleged by the applicant. The charges alleging the misuse of P's bank account were then severed from the indictment and were not pursued.

Following completion of supplementary investigations by the investigating judge, a new trial began on 5 November 1984 before the Court of Assizes which was now differently composed. Ko no longer acted as presiding judge and was replaced in this function by former associate judge R. F continued as associate judge together with a new judge, Pr. A new jury of eight was also selected.

As regards the composition of the bench, the applicant has submitted an affidavit (notariell beglaubigtes Gedächtnisprotokoll) of the former presiding judge, Ko, dated 19 September 1988 which contains, inter alia, the following statements:

When the case was first assigned to Ko, the distribution of cases (Geschäftsverteilung) concerning Assize Court proceedings was not regulated according to law in the Regional Court of Korneuburg. The Vice-President of the Court asked Ko whether he wished to deal with the applicant's case or another one. He replied that he would deal with any case legally assigned to him. He was then charged with the applicant's case. On the first day of the trial Ko was informed

by a judge of the Court of Appeal, B, that in the meantime measures had been taken to regularise the distribution of cases in the Regional Court so as to prevent complaints from the applicant. Some time before the opening of the trial, the President of the Court of Appeal, D, had come to see Ko in his office in the Regional Court in order to enquire about the applicant's case. D allegedly advised Ko to prevent the applicant from talking too much at the trial and, if necessary, to turn him down ("abwürgen", "niederbügeln"). During the trial, the associate judges, F and R, also tried to influence him in this sense. However, Ko did not interrupt the applicant and eventually the case was referred back to the investigating judge. Although this was not a decision of the presiding judge, the Vice-President of the Regional Court later informed Ko that the Court of Appeal was dissatisfied with his conduct of the trial which had led to this result and that the case would therefore be taken away from him. Formally this was done by a redistribution of cases within the Regional Court on the ground that Ko had applied to be appointed to a different post. This, however, was not the real ground as it must have been known to the persons concerned, in particular the President and Vice-President of the Regional Court, that he had no chance of being appointed to the post in question.

All this was not known to the applicant at the relevant time. However, at the trial the applicant repeatedly challenged the judges R and F for bias.

The applicant had challenged the associate judge F already before the opening of the second trial, on 30 October 1984, together with two other judges of the Review Chamber of the Korneuburg Regional Court, on the ground that they had used the term "murder victim" in a decision handed down on 12 September 1984. This challenge was rejected by the President of the Regional Court, C, on 2 November 1984. C subsequently was challenged because of this decision, but this challenge was also rejected. The applicant's attempts to appeal further against these decisions were rejected as inadmissible.

At the first trial session on 5 November 1984 the applicant again challenged the associate judge F for bias because he had spoken of "murder victim" and also because he had participated in several other decisions of the Review Chamber. He submitted that members of the Review Chamber must be considered as "investigating judges" within the meaning of Section 68 para. 2 of the Code of Criminal Procedure, and were excluded from participation in the trial by virtue of this provision. He invoked his constitutional right to an independent and impartial tribunal. This challenge was immediately rejected by the bench of the Court of Assizes, including F himself.

As regards the presiding judge R, the applicant observes that he had, on 18 July 1984, participated in a decision of the Review Chamber ordering the applicant's continued detention under Section 180 para. 7 of the Code of Criminal Procedure which provides that in cases of "grave suspicion" of offences carrying a minimum penalty of ten years' imprisonment detention on remand shall as a rule be obligatory. In the Review Chamber decision of 18 July 1984 the existence of such a suspicion was stated in the following terms:

> "Having regard to the initial confession, the investigation and the indictment based thereupon [the applicant is] gravely suspected of the crime of murder despite the fact that he has now changed his defence."
>
> ["Aufgrund des ursprünglichen Geständnisses, der durchgeführten Erhebungen und der darauf basierenden Anklageschrift trotz nunmehriger Änderung der

Verantwortung dringend des Verbrechens des Mordes verdächtig"].

R had also participated in three further decisions of the Review Chamber, including those dealing with the challenge of Dr. K and the inspection of the applicant's diaries. However, the applicant did not challenge R on the ground that he had been a member of the Review Chamber. He claims that this fact came to his knowledge only after the conclusion of the proceedings. Nor did the applicant challenge the presiding judge R on the ground that at the beginning of the trial he had ordered the applicant's continued detention under Section 180 para. 7 of the Code of Criminal Procedure. The applicant first challenged him at the trial session of 27 November 1987 for having characterised one of the applicant's motions for evidence as "querulous behaviour aimed at delaying the proceedings". This challenge was immediately rejected by the bench, including R himself.

On 10 December 1984 the applicant again challenged the judges R and F, complaining of a one-sided administration of evidence and the rejection of the applicant's motions for evidence on the ground that they had been made in order to delay the proceedings. The applicant further complained that R had failed to intervene against prejudicial remarks of the psychiatric expert, Dr. K (see below). As regards F, the applicant again referred to his having used the term "murder victim" and alleged, in addition, that during a demonstration of evidence in a garage this judge had held a conversation with a journalist instead of following the proceedings. The applicant finally alleged violations of Article 6 para. 1 and Article 13 of the Convention in that the bench, including the challenged judges, should decide on the challenge and that no remedy existed against the bench's decision. However, the bench, including judges R and F, rejected the above challenge.

On the first day of the trial, the applicant also challenged the court's selection of the jurors, claiming that the Jurors and Lay Judges Act (Geschworenen- und Schöffenlistengesetz) of 1946 had not been followed in that the decision to excuse or not to excuse certain jurors had been taken by the presiding judge and not by the President of the Regional Court. However, following information that the relevant decisions had actually been taken by the Court's President and that the order of the jury service list had been observed, the applicant withdrew his motion (he claims that he subsequently discovered that the information given to him had been incorrect in that the order of the jury service list had not in fact been observed). One juror, Mrs. B, had asked to be relieved from the duty to sit as a juror because she had just lost her husband in an accident and had now to run her farm alone and look after three children and her disabled mother-in-law. She was nevertheless appointed and not replaced when she burst into tears several times and collapsed on the second day of the trial.

The trial court was in session for thirty court days and heard the testimony of some forty-nine witnesses and the reports and testimony of some eight experts. At least two visits to the scene (Lokalaugenschein) were conducted and the applicant suffered an emotional breakdown at one of these. The applicant submitted motions for discovery and offers of evidence aimed at proving that his original confessions stated something which was impossible, that he was not in such financial straits as to have to defraud P, thus providing a motive for the homicide, that P had himself misappropriated money from clients and was guilty of both crimes and unethical practices which led to a depressed, suicidal state of mind and, finally, his suicide on 13 December 1982. These motions, made personally by the applicant at twelve different court sessions, were all rejected.

On 6 December 1984, the psychiatrist, Dr. K, testified and

read his report. He found in the applicant "above-average intelligence, no mental illness which could deprive him of criminal responsibility, but a psychic or mental abnormality of a high degree". In response to a question by the applicant, Dr. K testified that two psychiatric therapists, who had earlier treated the applicant during his detention, disbelieved the suicide version and found it to constitute a "disturbance of the trial", and considered it "trivial and a transparent falsity". The applicant, invoking Article 6 para. 1 of the Convention, objected to this testimony of Dr. K as being likely to prejudge his guilt. He criticised the presiding judge for not having reacted to these statements of the expert. The applicant further submits in this context that on 12 November 1984 the presiding judge overstepped his functions by sending a letter to the Federal Minister of Justice asking him to lift the duty of confidentiality, which bound the two psychiatric therapists who had treated the applicant during his detention, so that they could testify at the trial. They actually did so on 7 December 1984, but their duty of confidentiality was not lifted by the Minister of Justice.

It appears from the documents submitted by the applicant, who was assisted by a court-appointed defence counsel, that virtually all of the written and oral motions and objections made before and during the trial were made personally by the applicant. The applicant also questioned at least some of the witnesses and experts, such as Dr. K. He was not, however, given personal discovery or inspection rights. He states that he and his counsel disagreed on trial strategy and that no relation of confidence existed between them.

On 17 December 1984, the applicant asked the Court to be allowed to be present at the oral instruction of the jury and the discussion of the questions submitted to them. This motion was denied and these proceedings were conducted in the absence of the defence, i.e. the applicant and his defence counsel. Nor was a representative of the prosecution present at this procedure.

On 18 December 1984, the jury unanimously found the applicant guilty of murder and unlawful possession of a firearm. They were also unanimous in finding that he did not lack criminal responsibility and, in their handwritten statement of reasons (Niederschrift der Geschworenen), expressed the opinion that "the motive remains unknown, too many possibilities".

The bench, sitting with the jury, set the applicant's sentence at twenty years' imprisonment, the maximum determinate sentence possible under Austrian law. It ordered him to be committed to an institution for mentally abnormal criminals as requested by the prosecution. Detailed reasons, weighing mitigating and aggravating factors, were given for this sentence. Finally, the Court refused to rule on the claims of the private parties, referring them to the ordinary civil courts.

On 4 January 1985 the applicant complained to the Court of Appeal by way of hierarchical appeal (Aufsichtsbeschwerde) that he had not received the judgment within the statutory time-limit of fourteen days. On 21 January 1985 he challenged the presiding judge, R, on the same ground, claiming that the delay, which hindered the applicant in preparing his appeals, revealed bias on the part of that judge. However, the Court of Appeal on 22 January 1985 rejected the hierarchical appeal finding that the delay was justified by the necessity to prepare also the voluminous transcript of the trial for the applicant's use. Relying on this decision, the President of the Regional Court on 23 January 1985 rejected the challenge of the presiding judge.

The applicant lodged complaints against the judgment of the Court of Assizes both with the Constitutional Court and the Administrative Court, claiming that, due to the procedure for

appointing the jury, the Court of Assizes could not be considered as an independent and impartial tribunal within the meaning of the Federal Constitution. These complaints were rejected as inadmissible by decisions of the Constitutional Court of 14 March 1985 and of the Administrative Court of 12 June 1985.

The applicant also filed a plea of nullity (Nichtigkeits-beschwerde) with the Supreme Court (Oberster Gerichtshof) complaining that he had been denied the right to defend himself, and the right to a fair trial due to the bias of judges, that all offers of proof had been rejected, that comments of Dr. K were prejudicial and that he was excluded from the oral instructions of the jury.

The applicant's mother and wife filed a further plea of nullity and an appeal (Berufung) with the Supreme Court complaining of the length of the sentence and the commitment of the applicant to an institution for mentally abnormal criminals.

The public prosecutor appealed against the sentence and asked that a life sentence be imposed.

Finally, the son of the victim P, being one of the private parties, appealed against the decision to refer his claims to the ordinary civil courts.

The Supreme Court transmitted the case file to the Attorney General (Generalprokurator). The Attorney General's position paper ("croquis") was received by the Supreme Court on 2 August 1985. The applicant moved for personal discovery of this report on 18 September 1985.

On 4 June 1986, the Supreme Court set the hearing on the pleas of nullity and the appeals for 2 July 1986. The applicant claims that the relevant notification of the Attorney General was accompanied by the file including the Supreme Court's draft decision prepared by its judge rapporteur. The applicant further submits that according to an official statement of the judge rapporteur the draft decision was discussed between the members of the Supreme Court prior to the oral hearing. The Government admit that such a draft decision was in the file, but deny that it was ever made available to the Attorney General or that informal votes on the decision to be taken by the Supreme Court were taken prior to the hearing on 2 July 1986.

The notification of the date of the Supreme Court's hearing which was sent to the applicant provided that at the hearing of the pleas of nullity the applicant could only appear through his official defence counsel; at the hearing of the appeals he would not be brought to the Court as the conditions of Section 296 para. 3 of the Code of Criminal Procedure were not met.

On 19 June 1986, the applicant petitioned the Supreme Court to be allowed to attend the hearing of the pleas of nullity in person, a right accorded to defendants who are not incarcerated. In this respect he invoked Articles 6 and 14 of the Convention and observed that in 1986 alone he had been granted permission thirty times to appear personally at various courts and administrative authorities in Vienna. At the same time the applicant observed that no decision had so far been taken on his request to get a copy of the Attorney General's "croquis" and that a procedure whereby the Attorney General, but not the defence, was informed of the views of the members of the Supreme Court on the various remedies would violate the principle of equality of arms stipulated in Article 6 of the Convention.

On 25 June 1986 the Supreme Court rejected the applicant's petition to be brought to the hearing on the pleas of nullity and his motion to discover the "croquis" of the Attorney General and to inspect the case file. The Supreme Court noted that the applicant had

not applied to be brought to the hearing of the appeals. It had no doubts concerning the constitutionality and conformity with Article 6 of the Convention of Section 286 para. 2 of the Code of Criminal Procedure which stipulates that an accused in detention has no right to appear personally at the hearing of a plea of nullity, but only a right to be represented by counsel. Moreover, the applicant personally was not entitled to receive a copy of the Attorney General's "croquis". Article 6 of the Convention had been observed because a copy of this document had been made available to his official defence counsel. The applicant's defence counsel was notified of this decision at the hearing on 2 July 1986.

On 2 July 1986, in the absence of the applicant and after having obtained some factual clarifications from the trial court under Section 285 f of the Code of Criminal Procedure on which the applicant was not given an opportunity to comment, the Supreme Court rejected the applicant's and his relatives' pleas of nullity. It allowed both the public prosecutor's appeal and in part the appeal of the applicant's relatives, sentencing the applicant to life imprisonment and nullifying the commitment to an institution for mentally abnormal criminals, the applicant thus being required to serve the life sentence in prison. Finally, the Supreme Court rejected the private party's appeal.

According to the applicant, the Supreme Court's decision is a replica of the "croquis" of the Attorney General. The Supreme Court evaluated the aggravating and mitigating circumstances discussed by the trial court and found that it had incorrectly refused to recognise the applicant's self-surrender as a mitigating circumstance under Section 34 para. 16 of the Penal Code. However, taking the mitigating and aggravating circumstances as a whole, it considered that the latter by far outweighed the former, including the applicant's abnormal mental condition at the time of committing the crime. The treacherous crime, approaching a "liquidation" of the unsuspecting victim in order to prevent the discovery of the applicant's own financial improprieties, showed such a base state of mind that only a life sentence was proportionate to his guilt.

COMPLAINTS AND LEGAL SUBMISSIONS

The applicant complains under Article 6 para. 1 of the Convention that the Assize Court, sitting with jury, was objectively or structurally not an "independent and impartial tribunal". Two of the three members of the bench at his trial had participated in decisions of the Review Chamber of the Regional Court involving preventive detention, challenges of an expert witness, and confiscation of the applicant's diaries, thus mingling functions of an investigative or inquisitorial nature with those of a trial judge.

The applicant also challenges the structural "independence and impartiality" of the jury in that the compiling of the lists of prospective jurors is arbitrary and suffused with partisan politics, that the jurors are selected without any participation of the opposing parties, and that no mechanism exists enabling the accused to determine whether or not a prospective juror is biased, and therefore to intelligently challenge a hypothetically biased juror.

Under Article 6 para. 1 the applicant also complains that two of the trial judges revealed prejudice in their trial rulings, comments and interventions. The bench acted illegally in its selection of the jury by violating Austrian statutes and excusing or not excusing prospective jurors in an arbitrary manner.

Finally, the applicant alleges a violation of Article 6 para.1 of the Convention in that a judge of the Court of Appeal, W, participated in the rejection of his objection against the indictment. The judge concerned was found to be biased against the

applicant at a later hearing.

The applicant complains of a global violation of Article 6 at his trial as a result of a cumulation of individual violations of various rights enumerated therein.

The applicant alleges violations of the presumption of innocence guaranteed by Article 6 para. 2 of the Convention in that the prosecution relied on his original confession and in that the Court placed the burden on the applicant to prove lack of criminal responsibility; moreover the Court appointed a psychiatrist with a close relationship to the prosecution and who, testifying as an expert, improperly expressed opinions as to the applicant's guilt and the spuriousness of his defence.

The applicant also attacks the Austrian system of court-appointed psychiatric experts as violating his right to present evidence on his own behalf. He asserts that the court psychiatric experts have traditionally worked in close contact with the public prosecutor and that their function strips them of independence and impartiality. In these circumstances, the denial of his motion to have a faculty psychiatric opinion from an Austrian university (Fakultätsgutachten) on the question of criminal responsibility, violated the "equality of arms".

The applicant further claims that Article 6 para. 3 (d) of the Convention was violated in that he was denied the attendance and examination of witnesses and the presentation of other evidence on his own behalf under the same conditions as allowed the prosecution; all his offers of proof to gather and submit evidence were rejected as being "exploratory" (Erkundungsbeweis).

The applicant additionally complains of a violation of Article 6 para. 3 (c) of the Convention in that he was denied his right to represent himself by having a court-appointed defence counsel forced on him by the trial court, although as a former judge, the applicant was capable of representing himself.

The applicant finally complains of the exclusion of the defence from the bench's oral instructions to the jury and the discussions of the questions submitted to them for decision. He submits that, since no instructions of the jury preceded the taking of evidence, there was no way for the parties to know if the jury understood the law it was asked to apply; thus secrecy of the instructions and discussion of questions leaves room for manipulation by the bench.

Regarding the proceedings before the Supreme Court, the applicant claims that the special position accorded the Attorney General in the hearing of nullity pleas and appeals violates Article 6 para. 1 of the Convention by undermining the Court's "independence and impartiality". This close relationship between the Court and the Attorney General, a prosecutorial agency, violates the principle of "equality of arms" as well. Despite previous decisions by the Convention organs aimed at changing the long tradition of dependence of the Supreme Court on the Attorney General, the practices still violate the Convention. The Supreme Court sends the Attorney General the entire case file long before the defence has access thereto, as well as the draft decision of the Supreme Court's judge rapporteur, to which the defence has no access. The Attorney General will then provide a position statement or "croquis" which is traditionally used by the Supreme Court as the basis for its final decision. This in itself constitutes an unfair disadvantage to the defence and a violation of the "equality of arms". This equality was also violated because the Attorney General was told which Chamber of the Supreme Court would deal with the case and who was the Supreme Court's rapporteur. This information was not available to the defence.

A further violation of the "equality of arms" is alleged in regard to the Supreme Court's procedure under Section 285 f of the Code of Criminal Procedure, whereby the Court obtained additional information on evidence which only came to light in the appeal proceedings and on which the defence was not given any opportunity to be heard.

The applicant alleges a global violation of his Article 6 para. 1 right to a fair hearing on appeal in that the Supreme Court decided on the pleas of nullity and appeals without seeing the applicant, without a transcript of the trial and without questioning the experts.

In raising the applicant's sentence of twenty years in an institution for mentally abnormal criminals to a life sentence in prison, the Supreme Court furthermore relied on a motive of covering up criminal fraud conduct which had not been proved and had been found to be unconvincing by the jury. This reliance on unproved evidence also violated the presumption of innocence.

The applicant further complains that the Supreme Court violated Article 6 para. 3 (c) of the Convention by denying his request to be present at the hearing of the plea of nullity. He asserts that the right to defend himself in person at an appeal hearing is essential to fair trial where the Supreme Court can increase the sentence. The Supreme Court's failure to advise him or his defence counsel of the denial of his motion to be present until the day of the hearing also violated his right under Article 6 para. 3 (b) of the Convention to have adequate time for the preparation of his defence.

In addition the applicant asserts that Article 14 of the Convention, in conjunction with Article 6 para. 3 (c), was violated in that appellants who are not detained have the right to attend hearings before the Supreme Court and, in particular, have the right to the last word.

The applicant also alleges a violation of Article 14 in conjunction with Article 5 of the Convention in that the Supreme Court found that he had acted with extreme "treacherousness" (Heimtücke) despite the undisputed evidence of mental or psychic impairment.

Finally, the applicant complains of a violation of Article 13 in that there are no sufficient domestic remedies in Austria to challenge violations of Article 6. Thus it is not possible to challenge the constitutionality of Austrian legislation, the composition of the jury, and decisions on bias of judges and experts, on self-representation and on the right to be present at the appeal hearing before the Supreme Court.

PROCEEDINGS

The application was introduced on 1 August and registered on 22 August 1986. On 19 January 1989 the Commission decided, pursuant to Rule 42 para. 2 (b) of the Rules of Procedure, to bring the application to the notice of the respondent Government and to invite them to submit before 7 April 1989 their observations in writing on its admissibility and merits.

Following an extension of the above time-limit at the request of the Government, they submitted their observations on 23 May 1989. The applicant was requested to reply thereto before 10 July 1989. At his request, the time-limit was extended and he submitted his observations on 18 August 1989.

On 2 April 1990 the Commission decided to invite the parties,

pursuant to Rule 42 para. 3 (a) of the Rules of Procedure, to submit further observations in writing before 15 June 1990 and, pursuant to Rule 42 para. 3 (b), also to submit observations orally at a hearing on the admissibility and merits of the case. Questions were put to the parties in this context.

After both parties had been granted extensions of the above time-limit, the applicant submitted additional observations on 29 June and the Government on 17 July 1990.

The oral hearing of the parties took place on 5 September 1990.

The Government were represented by their Agent, Ambassador Dr. Helmut Türk of the Federal Ministry of Foreign Affairs, assisted by Ministerialrat Dr. Wolf Okresek of the Federal Chancellery and Ministerialrat Dr. Gert Felsenstein of the Federal Ministry of Justice. The applicant was represented by his counsel, Rechtsanwalt Dr. Wilfried Ludwig Weh of Bregenz, assisted by Mrs. Eva Weh.

THE LAW

1. The applicant first complains of the composition of the Korneuburg Court of Assizes which he claims was not an "independent and impartial tribunal established by law" as required by Article 6 para. 1 (Art. 6-1) of the Convention.

a) The applicant submits with regard to the procedure for the appointment of the jury, as regulated in the Austrian Jurors' and Lay Judges' Act 1946, that the parties do not assist in the selection of the jury which allegedly is subject to political influences and that in his case the procedure followed was unlawful in that the jury was in fact selected by the presiding judge of the trial rather than the President of the Regional Court. The applicant withdrew his initial objections against the procedure after having been led in error by the presiding judge. The decisions to excuse or not to excuse certain jurors were arbitrary. The excuse of Mrs. B, who had personal problems and suffered a nervous breakdown during the trial, should have been allowed. Finally, the substitute jurors were not appointed in the right order.

The Government submit that the provisions of the Jurors' and Lay Judges' Act 1946, which have in the meantime been replaced by new legislation, were in line with the standard in other Convention States and not contrary to the Convention. In particular Article 6 para. 1 does not require participation of the parties in the selection of the jury. It is sufficient that under Austrian law individual jurors can be challenged as biased and that the impartiality of the court is ensured in this way. The applicant withdrew his initial objections to the procedure and did not subsequently lodge a plea of nullity concerning the composition of the jury, as he could have done under Section 345 para. 1 (1) of the Code of Criminal Procedure. He therefore did not exhaust the domestic remedies in this respect. In any event the jury was composed according to the requirements of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission may leave open whether or not the applicant has exhausted all domestic remedies as the above complaint is inadmissible on another ground.

The Commission is satisfied that the decisions concerning the selection of the jury were taken by the competent organ, i.e. the President of the Regional Court, according to the applicable provisions of the Jurors' and Lay Judges' Act. It is not contrary to Article 6 para. 1 (Art. 6-1) that this Act did not allow the participation of the parties in the selection of the jury.

Nor is it contrary to this provision that some discretion was

left to the Court's President as regards the acceptance or refusal of excuses by persons included in the jurors' lists. In a system primarily based on a chance selection of the jurors the exercise of such discretionary powers is not arbitrary even assuming that, in the case of Mrs. B., a different decision might have been more appropriate. The Commission notes that this juror was able to exercise her functions normally after her nervous breakdown at one stage of the proceedings. In any event substitute jurors were present, according to the law, who could have been called in if one of the main jurors had not been able to exercise his functions. The Commission finds no indication that any of the decisions concerning the selection of the jurors was based on their opinions or attitudes. It has not been claimed that any of the jurors was biased.

The Commission therefore finds that the applicant's right to an "independent and impartial tribunal established by law" has not been infringed by the selection and composition of the jury.

b) The applicant complains that two of the professional judges, including the presiding judge, lacked both objective and subjective impartiality.

The presiding judge allegedly lacked objective impartiality because he had taken part in a number of Review Chamber decisions involving directions for the investigation (inter alia supervision of the applicant's correspondence, inspection of his personal diaries which contained notes on his conversations with his defence counsel, refusal of requests for evidence and rejection of objections against an allegedly biased psychiatric expert). He had further made rulings on the prolongation of the applicant's detention on remand, and in this context assessed the suspicion against the applicant, as a member of the Review Chamber and subsequently, at the beginning of the trial, in his capacity as presiding judge. In the latter capacity he had also shown subjective bias against the applicant by failing to intervene against certain statements of the above psychiatric expert, by writing a letter to the Minister of Justice concerning the lifting of the duty of confidentiality of medical officers who had treated the applicant, and by rejecting one of the applicant's requests for evidence on the ground that it amounted to "querulous behaviour aimed at delaying the trial".

The applicant claims that the second judge concerned also lacked objective impartiality in that he had taken part in Review Chamber decisions, and that he was subjectively biased in that he had shown preconceived ideas about the case by using the words "murder victim" and "instrument of the act" which were incompatible with the applicant's defence based on suicide. Moreover, this judge failed in his duties by not giving his full attention to a demonstration of evidence and instead conversing with a journalist.

The Government claim that the above two judges were impartial both from the objective and the subjective point of view. Participation in Review Chamber decisions is not as such a circumstance susceptible of undermining a judge's impartiality at the trial, because the Review Chamber's functions are different from those of the investigating judge whom it supervises. In the particular case of a jury trial, the professional judges of the bench are not called upon to take part in the finding of guilt, which is the exclusive task of the jury, and also for this reason their impartiality cannot be seen as being compromised by their earlier participation in Review Chamber decisions. The decisions on the prolongation of the applicant's detention on remand did not involve the assessment of a qualified suspicion as in the Hauschildt case (Eur. Court H.R. judgment of 24 May 1989, Series A no. 154) and therefore the presiding judge's objective impartiality was not compromised. Nor did his conduct at the trial reveal subjective bias. The statements of the psychiatric expert cannot be imputed to the court and an intervention against

these statements by the presiding judge was not required because the applicant was given an opportunity to reply. Finally, the use of certain words by the presiding judge and one of the assistant judges, if placed in the right context, also did not reveal subjective bias. The term "instrument of the act" was a neutral one, the term "murder victim" just a repetition of the words used in the relevant application by a private party, and the words "querulous behaviour" finally were used in relation to a matter of minor importance and in circumstances where they appeared justified.

Impartiality means that even the appearance of partiality must be avoided (cf. Eur. Court H.R. Piersack judgment of 1 October 1982, Series A no. 53, and De Cubber judgment of 26 October 1984, Series A no. 86). The Commission does not consider that the impartiality of the judges on the bench of a jury trial is subject to a different standard because they do not take part in the votes on the verdict. In Austria they have an important role concerning the direction of the trial, including in particular the taking of evidence and the legal instruction of the jury - they can set aside the verdict and they also participate in the vote on the sentence. It is therefore required that they be fully impartial.

However, the earlier participation of trial judges in decisions of the Review Chamber supervising the investigation does not create an appearance of partiality, in particular if, as in the present case, the decisions in question relate only to isolated aspects of the investigation and do not involve a decision on whether or not the accused should be brought to trial or otherwise a general assessment of the evidence or legal issues to be discussed at the trial (cf. No. 9976/82, Ben Yaacoub v. Belgium, Comm. Report 7.5.85, Series A no. 127A, p. 13 paras. 103 et seq.). The two judges who had taken part in Review Chamber decisions supervising the investigation of the applicant's case therefore did not lack objective impartiality for this reason.

The presiding judge was involved in two decisions on the prolongation of the applicant's detention on remand which were based on Section 180 para. 7 of the Austrian Code of Criminal Procedure. The Review Chamber decision of 18 July 1984 to which the applicant has especially referred rested on formal criteria (confession, investigation, indictment), which were not discussed in substance. The applicant's new defence was also mentioned, but apparently found insufficient to undermine the suspicion of murder. The qualification of the suspicion as "grave" ("dringend"), did not mean a "particularly confirmed suspicion" or a "very high degree of clarity as to the question of guilt" as in the Hauschildt case (Eur. Court H.R. judgment of 24 May 1989, loc. cit., p. 22 paras. 51 - 52). The decision on the applicant's detention thus remained within the boundaries of suspicion and did not improperly encroach upon the trial court's tasks i.e. the determination of the defendant's guilt (cf. Hauschildt judgment, ibid., para. 50). There is accordingly no appearance of the presiding judge lacking objective impartiality because of his involvement in the above decisions on the applicant's detention.

Nor is there any appearance of subjective bias against the applicant on the part of the two judges concerned. The conduct of a long and difficult trial necessarily required a number of procedural decisons to be taken by the presiding judge. That some of these decisions were unfavourable to the applicant cannot in itself be seen as indicating bias. That the presiding judge did not intervene against a statement of a psychiatric expert does not mean that he approved this statement, in particular as he gave the applicant the opportunity to reply immediately. The presiding judge's letter to the Minister of Justice may have been unusual, but clearly aimed at the clarification of certain facts and did not interfere with the applicant's defence. Finally, the rejection of a request for evidence on the ground that it was "querulous behaviour aimed at delaying the

trial" may have been justified in the circumstances. In any event it did not amount to a premature rejection of the applicant's line of defence as a whole nor did it reveal a generally unfavourable attitude of the presiding judge towards the applicant.

As to the words used in a decision for which one of the associate judges was co-responsible, the Commission agrees with the Government that the term "instrument of the act" (Tatwaffe) is a neutral expression not susceptible of justifying an assumption of subjective bias. The expression "murder victim" ("Mordopfer") did not take account of the applicant's defence which was based on a suicide version. However, the judge explained this as an inconsiderate repetition of the words used in the relevant application by a private party. This application concerned a minor item unrelated to the central issue in the case. The Commission therefore does not find that the use of this expression revealed a biased attitude of the judge concerned towards the applicant. Finally, the Commission also sees no indication of bias in the conversation of this judge with a journalist during a demonstration of evidence.

The complaints of the applicant concerning the composition of the Korneuburg Court of Assizes are therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant next complains that before this Court he did not enjoy a "fair hearing" as required by Article 6 para. 1 (Art. 6-1) of the Convention and that his rights under Article 6 para. 3 (c) (Art. 6-3-c) (the right to defend himself in person) and (d) (Art. 6-3-d) (the right to the examination of witnesses on his behalf under the same conditions as witnesses against him) were also violated as well as the presumption of innocence enshrined in Article 6 para. 2 (Art. 6-2). The Commission finds it appropriate to examine first the various specific complaints before proceeding to a global assessment of the fairness of his trial.

a) Invoking his right "to defend himself in person" under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention, the applicant claims that at his trial he should as a former judge have been allowed to defend himself without the assistance of an official defence counsel. The imposition of a counsel in whom he had no confidence interfered with his general line of defence; in a number of instances he and his defence counsel disagreed and Austrian law gave precedence to the counsel's position. Moreover, following the appointment of an official defence counsel he could not personally exercise certain rights such as the right to make procedural applications or the right to inspect the file.

The Government submit that the legal requirement of representation by counsel in Assize Court proceedings serves the protection of the accused and that the applicant practically conducted his defence himself.

The Commission has consistently held that a legal requirement of representation by counsel in certain types of proceedings does not as such violate Article 6 para. 3 (c) (Art. 6-3-c). This provision guarantees inter alia that proceedings against the accused will not take place without adequate representation for the defence if this is required by the interests of justice and the accused is unable to pay for it. The accused has no absolute right to determine the manner in which his defence is ensured. The States may regulate the conditions under which the accused is authorised to exercise the right to defend himself in person (cf. No. 2676/65, Dec. 3.4.67, Coll. 23 p. 31; No. 2645/65, Dec. 19.7.68, Coll. 28 p. 43; No. 5923/72, Dec. 30.5.75, D.R. 3 p. 43; and No. 9127/80, Dec. 6.10.81, D.R. 26 p. 238). They may also require that an accused represented by a lawyer must generally exercise his procedural rights through this lawyer (No. 7138/75, Dec. 5.7.77, D.R. 9 p. 50) and regulate the

appearance of counsel before courts and their obligation to respect certain principles of professional conduct (No. 7572/76, 7586/76 and 7587/76, Ensslin and others v. the Federal Republic of Germany, Dec. 8.7.78, D.R. 14 p. 64).

The Commission, however, points out that having regard to the text of Article 6 para. 3 (c) (Art. 6-3-c), which expressly mentions the right of the accused to defend himself in person, the regulations in question must give sufficient scope to this right and any limitations must be based on the interests of justice, including the protection of the accused himself.

The Commission considers that the above principles have been observed in the present case. The interests of justice may require legal representation of the accused even if he is an experienced lawyer. Even if the accused is an experienced lawyer, he may not always be able to act in his own best interests, in particular if there is evidence of a possible psychiatric impairment. Insofar as the applicant claims that he had no confidence in his official defence counsel, it would have been open to him to ask for his replacement or to appoint a lawyer of his own choice, as he had in fact done at the first stage of the proceedings. Moreover the Commission finds no indication of a fundamental disagreement between the applicant and his official defence counsel. As the Government observe, the applicant largely conducted his defence himself and his official counsel limited himself to supporting and ratifying the applicant's various requests and submissions.

In these circumstances the Commission finds no appearance of a violation of the applicant's right under Article 6 para. 3 (c) (Art. 6-3-c) to defend himself at his trial.

b) The applicant submits that these proceedings were opened following an irregular procedure by the Court of Appeal: one of the judges was biased against the applicant as later confirmed by the Court of Appeal in its decision of 14 January 1985. The Court of Appeal should have accepted his objection to the indictment and should have ordered a supplementary investigation rather than the taking of additional psychiatric expert evidence in an interim procedure.

The Government claim that the Court of Appeal's decision to reject the applicant's objection against the indictment was taken on 20 December 1983, whereas the applicant did not complain of it before 1 August 1986. Therefore the complaint was raised outside the six months' time-limit stipulated in Article 26 (Art. 26) of the Convention. In any event this decision did not involve a determination of the criminal charges against the applicant. In the Government's view the decision was lawful and at the relevant time there were no grounds to doubt the objective impartiality of the above judge, such grounds having arisen only at a later date.

The Commission accepts that the Court of Appeal was not directly called upon to determine the criminal charges against the applicant. Nevertheless its decision on the admission of the indictment was relevant for the trial and therefore for the fairness of the proceedings as a whole, which can only be judged after the termination of the proceedings. Therefore the Commission cannot reject the applicant's above complaints for non-compliance with the six months' rule, but must deal with its substance.

The Commission is not required to consider the lawfulness of the Court of Appeal's decision under Austrian law. It may leave open whether the requirement of "impartiality" also applies to a court which decides on the admission of the indictment, as in the present case there was no reason to doubt the impartiality of the Court of Appeal's judges at the relevant time. Its decision to order a second psychiatric expert opinion to be taken before the start of the trial

does not appear unfair as the consultation of a second psychiatrist had in fact already been decided by the investigating judge. The Commission further notes that the subsequent statement of one of the Court of Appeal's judges at a press conference provided a ground for his successful challenge, but this cannot retroactively deprive the Court of Appeal's decision of its justification. Consequently there is no appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention by virtue of the Court of Appeal's procedure.

c) The applicant complains that the second psychiatric expert then appointed was biased against him; that this appointment was based on a request by the prosecution, and that at the trial this expert made inadmissible statements prejudging the applicant's new defence based on the suicide version which was described as incredible, having regard to declarations of two therapists who had treated the applicant during his detention and to which the above-mentioned expert referred. The presiding judge not only failed to intervene against the expert's statements, but even reacted to them by writing a letter to the Minister of Justice in which he requested that the duty of confidentiality which bound the therapists be lifted. The applicant claims that the circumstances surrounding the hearing of the above-mentioned expert made the whole trial unfair.

The Government refer to the first presiding judge's statement that the expert was appointed, not because of an intervention of the prosecution, but because he had already been appointed by the investigating judge. In the Government's view this expert was not biased, in fact his opinion was not expressed in an excessive manner as he adopted a cautious approach concerning the therapists' statements. The applicant was given an opportunity to reply immediately. The presiding judge's letter to the Minister of Justice aimed at a clarification of the facts and in no way undermined the applicant's defence. The therapists were heard at the trial, but could not testify on the question of the applicant's new defence because their duty of confidentiality had not been lifted by the Minister. The Government see no unfairness of the proceedings on account of these facts.

The Commission has already found above that the hearing of the second psychiatric expert did not involve subjective bias on the part of the presiding judge. It sees no reason to regard the procedure adopted as unfair. It was not unfair to appoint the expert who had been called in at the investigation stage but who had not carried out his functions at that stage. The applicant's allegations concerning statements of the first presiding judge during a telephone conversation on 6 February 1984 are not corroborated by any objective evidence. Even assuming that the prosecution had insisted on the consultation of this particular expert, this would not have made his hearing unfair.

The expert's critical remarks concerning the applicant's new defence did not, in the Commission's view, constitute an element of unfairness. They were cautious and the expert refrained from adopting the views of the two therapists as his own opinion. He merely referred to their statements which concerned a central aspect of the case.

The Commission sees no reason why the presiding judge should have intervened against the expert's statements. He gave the applicant an opportunity to reply immediately. The writing of a letter to the Minister of Justice may have been unusual but cannot be regarded as unfair. The principle of objectivity was observed because the therapists to which the letter referred could also have given evidence in the applicant's favour. Ultimately they were not heard because their duty of confidentiality was not lifted. There was therefore no direct evidence before the Court on the motives of the applicant's new defence, but this cannot be regarded as unfair.

d) The applicant has also complained that generally the administration of the evidence was one-sided, in that experts heard at the trial tend to have biased views because of their involvement in the investigation where there is close co-operation with the prosecution, and in that most requests for evidence by the defence were rejected while those of the prosecution were allowed, sometimes even when they concerned the same item. He invokes his right under Article 6 para. 3 (d) (Art. 6-3-d) of the Convention to the examination of witnesses on his behalf under the same conditions as witnesses against him.

The Government deny a violation of this provision and generally refute the allegation that the administration of the evidence in the applicant's case was unfair. The Court carefully examined not only the prosecution's charge of murder, but also the applicant's defence based on the suicide theory. The experts did not base their opinions merely on the file, but also on their own independent observations. The Supreme Court thoroughly scrutinised each of the applicant's requests for evidence and found that their rejection was justified for objective reasons.

The Commission notes that the first trial was interrupted because the applicant, changing his defence, relied on the suicide version. A supplementary investigation was carried out and at the second trial the Court dealt very extensively with the applicant's new defence arguments. The Commission notes that numerous requests for evidence submitted by the applicant were rejected, but finds no indication that generally the evidence for the defence was not examined under the same conditions as the evidence for the prosecution.

This also applies to the administration of the expert evidence in the present case. The Commission finds no basis for the allegation that any experts who have taken part in the investigation cannot be regarded as neutral. The applicant has not shown why an individual expert could not be regarded as neutral and, in addition, that he was not allowed to call in a counter-expert on behalf of the defence (cf. Nos. 11170/84, 12876/87 and 13468/87, Brandstetter v. Austria, Comm. Report 8.5.90, para. 148). He has failed to substantiate his allegations in this respect. He did not request the appointment of counter-experts on the ground that the experts consulted were not neutral. In respect of the above-mentioned psychiatric expert whom he challenged as biased, he requested his replacement but not the appointment of an additional expert. There was, in fact, a second psychiatric expert whose neutrality the applicant did not challenge. The Commission considers that in these circumstances the rejection of the applicant's request for a faculty opinion did not amount to a violation of his rights under Article 6 para. 3 (d) (Art. 6-3-d) in isolation or in conjunction with Article 6 para. 1 (Art. 6-3-d+6-1). The situation complained of is not comparable to that in the Bönisch case (Eur. Court H.R. judgment of 6 May 1985, Series A no. 92).

Nor is there any appearance of a violation of Article 6 para. 3 (d) (Art. 6-3-d) or Article 6 para. 1 (Art. 6-1) as regards the administration of evidence in other respects.

e) Still with regard to the administration of the evidence, the applicant alleges a violation of the presumption of innocence as guaranteed by Article 6 para. 2 (Art. 6-2) of the Convention, in that he was subjected to a reversal of the burden of proof as regards his criminal responsibility and that undue reliance was placed on his original confession, and in that the presiding judge did not intervene against the statements of the second psychiatric expert.

The Commission finds no indication of a violation of the presumption of innocence. There was no reversal of the burden of

proof. The prosecution was required to prove the charges in the indictment. It could rely on the applicant's original confession. It was further required to prove the applicant's criminal responsibility. The applicant was free to submit arguments in his defence concerning both issues, but was not required to prove his innocence or his lack of criminal responsibility. Neither the psychiatric expert's statements nor the presiding judge's conduct of the hearing of this expert affected the presumption of innocence under Article 6 para. 2 (Art. 6-2).

f) Finally, the applicant claims that the proceedings were unfair and contrary to Article 6 para. 1 (Art. 6-1) of the Convention because the parties were not allowed to be present at the legal instruction of the jury by the presiding judge (Section 323 of the Code of Criminal Procedure). He stresses the importance of the summing up and claims that the absence of the parties may lead to improper manipulation of the jury by the presiding judge, although the presiding judge is required to prepare a written memorandum on the legal instruction which can be controlled in subsequent nullity proceedings.

The Government deny a violation of the right to a "fair and public hearing" by this procedure. They submit that the rights to a public hearing and equality of arms end with the conclusion of the trial hearing. The parties obtain the questions to be answered by the jury and the written memorandum on the legal instruction at the end of this hearing and this is sufficient to satisfy the right to a fair hearing. The subsequent meeting of the presiding judge with the jury is exclusively aimed at preparing the jurors, who have no training as judges, for their task. It is thus part of the court's deliberations which subsequently lead to the passing of judgment. A right of the parties to take part in these deliberations cannot be derived from Article 6 para. 1 (Art. 6-1). The Austrian regulation corresponds to the European standard - there are several other Contracting States (including Switzerland, Italy, France, Finland and Greece) where the summing up and legal instruction of the jury also take place in the absence of the parties.

The Commission accepts that a distinction must be drawn between the requirements of "fair hearing" and "public hearing" in Article 6 para. 1 (Art. 6-1). The "fair hearing" requirement concerns the criminal proceedings as a whole; it can also be violated at the stage of the proceedings which concerns the preparation of the judgment. However, the applicant has not substantiated that the proceedings in the present case have been unfair at this stage. In essence he claims that the right to a "public hearing" should extend to the summing up and legal instruction of the jury in order to allow a control of its fairness.

As the European Court of Human Rights observed in the cases of Pretto (judgment of 8 December 1983, Series A no. 71, p. 11 paras. 21 - 22), Axen (judgment of 8 December 1983, Series A no. 72, p. 12 paras. 25 - 26), and Sutter (judgment of 22 February 1984, Series A no. 74, pp. 12 - 13 paras. 27 - 28),

> "the public character of proceedings before the judicial bodies referred to in Article 6 para. 1 (Art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1 (Art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention. ... Whilst the member States of the Council of Europe all subscribe to this principle of publicity, their legislative systems and judicial practice reveal

some diversity as to its scope and manner of implementation as regards both the holding of hearings and the 'pronouncement' of judgments. The formal aspect of the matter is, however, of secondary importance as compared with the purpose underlying the publicity required by Article 6 para. 1 (Art. 6-1). The prominent place held in a democratic society by the right to fair trial impels the Court, for the purposes of the review which it has to undertake in this area, to examine the realities of the procedure in question".

In the above-mentioned cases and also in the Ekbatani case (judgment of 26 May 1988, Series A no. 134, p. 13 para. 28) the Court further stressed that account must be taken of the entirety of the proceedings conducted in the domestic legal order, and that exceptions from the principle of publicity can be justified, in particular where the courts do not have the task of establishing the facts of the case, but only of interpreting the legal rules involved (Ekbatani judgment, loc. cit., p. 14 para. 31).

There was a public hearing of the applicant's case before the Korneuburg Court of Assizes which covered all aspects, including the taking of the evidence and arguments by the parties on the legal qualification of the facts. The questions to the jury were determined in a public procedure and the bench's legal instruction to the jury was likewise made public in its written form. Only the oral instruction of the jury by the presiding judge on the basis of the written memorandum elaborated by the bench took place in the absence of the parties and was not public. This oral instruction covered both the facts and the legal questions of the case. The reason given for the exclusion of the parties and the public in general is that this part of the proceedings is seen as belonging to the internal deliberations of the court.

The Commission recalls that in its above judgments the European Court of Human Rights has accepted a certain margin of appreciation of the Contracting States as regards the scope and implementation of publicity enshrined in Article 6 para. 1 (Art. 6-1). It notes that apart from Austria several other European States also have legal systems where the instruction of the jury is not public. In these circumstances the Commission finds that the respondent State's margin of appreciation is not overstepped if it adopts such a system. It is not unreasonable to exclude publicity at this stage on the ground that the discussion of the case with the jury prior to its vote on the verdict is part of the internal deliberations of the court.

g) Having found each of the more specific procedural complaints of the applicant unfounded, the Commission also finds that the combination of the various issues raised by him did not make the trial as a whole unfair. It considers that the Assize Court proceedings in question provided the applicant with all the guarantees of a "fair and public hearing before an independent and impartial tribunal established by law".

The applicant's above-mentioned complaints concerning the proceedings before the Korneuburg Court of Assizes are therefore manifestly ill-founded and must be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant has raised a number of further complaints concerning the proceedings before the Supreme Court.

He complains under Article 6 paras. 1 and 3 (c) in conjunction with Article 14 (Art. 6-3-c+14) of the Convention that, unlike an accused at liberty, he was not allowed to be personally present at the Supreme Court's hearing in which not only questions of law, but

also questions of fact and an assessment of his personality were at issue. In particular he considers it as unfair that, without his personal presence, the Supreme Court raised his sentence from twenty years' imprisonment in an institution for mentally abnormal criminals to life imprisonment in an ordinary prison, relying on a motive of financial offences which had not been established by the court of first instance.

He submits that the rejection of his request to be brought to the hearing before the Supreme Court was not justified and was disproportionate, in particular if compared to the many other instances where he was allowed to be brought before courts or administrative authorities. Moreover, the relevant decision was not served upon him before the hearing, thus leaving him insufficient time of preparation (Article 6 para. 3 (b)(Art. 6-3-b). The fact that his above request to be brought before the Supreme Court was limited to the hearing of the pleas of nullity cannot, in the applicant's view, be interpreted as implying a waiver of his right to request his presence at the hearing of the appeals from sentence, the Supreme Court's hearing being a combined one and his presence in any event being required in the interest of justice. By not being allowed to be present, he was also deprived of his right to the "last word" which he would otherwise have had.

The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Supreme Court's nullity proceedings in which additional information obtained in the procedure under Section 285f of the Code of Criminal Procedure was used without giving the applicant an opportunity to comment thereon.

He also complains under Article 6 para. 1 (Art. 6-1) of the way in which the Supreme Court's judgment was prepared. The Attorney General's office was not only told to which Chamber of the Supreme Court the case had been assigned and who was the judge rapporteur, but was also provided with the Supreme Court's file including a draft judgment prepared by the judge rapporteur prior to the hearing. The Attorney General's office was thereby given a privileged position incompatible with the principle of equality of arms. Furthermore, the preparation of a draft judgment prior to the Supreme Court's hearing was in itself unfair, in particular as the draft judgment was adopted unchanged as the Supreme Court's decision after the hearing, which thus became an empty formality where the additional arguments of the defence had no chance of being taken into account.

Finally, the applicant alleges a violation of Article 5 in conjunction with Article 14 (Art. 14+5) of the Convention as regards the sanction imposed by the Supreme Court, and a violation of Article 13 (Art. 13) of the Convention as regards the scope of the remedies available before the Supreme Court to redress violations of Article 6 (Art. 6).

The Government submit that, with regard to his presence at the Supreme Court hearing, the applicant has not exhausted the domestic remedies insofar as this concerns the hearing of the appeals from sentence. The applicant's request to be brought to the Supreme Court was made for the hearing of the pleas of nullity and thus implied a waiver of his right to be present at the hearing of the appeals. In any event the applicant's personal presence at the hearing of the pleas of nullity and the appeals was not required under the Convention as the Supreme Court was exclusively called upon to deal with questions of law. The Government contest that the decision concerning the applicant's presence was served belatedly and that in assessing the relative weight of aggravating and mitigating circumstances, the Supreme Court went beyond the findings of the court of first instance.

As to the use of additional information the Government observe

that this information (i.e. certain parts of the victim's diary) was relied upon by the Supreme Court only in an obiter dictum to confirm a finding based on the file, and that in any event this information was made available to the defence through the court of first instance prior to the Supreme Court's hearing.

Finally, as regards the Supreme Court's judgment, the Government do not contest that a draft was prepared by the judge rapporteur prior to the hearing. They deny, however, that this draft was made available to the Attorney General's office. The latter's position paper was brought to the knowledge of the defence prior to the Supreme Court's hearing, and therefore the principle of equality was preserved - in particular if one considers the special role of the Attorney General who is not the adversary of the defence in the Supreme Court proceedings but has more the function of a neutral assistant of the Court. Moreover, at the hearing before the Supreme Court the defence could reply to the Attorney General's arguments and comment on any other aspect of the case. The hearing was not a mere formality because the applicant's defence arguments would in fact have been taken into account in the decision if they had convinced the Court.

The Commission considers that the applicant's complaints concerning the Supreme Court proceedings are closely interrelated and therefore cannot be separated. It further considers that they raise complex and difficult questions of law and fact, in particular as regards the refusal of the applicant's personal presence at the hearing in which his sentence was considerably aggravated, and as regards the procedure for the preparation of the judgment prior to the hearing of the pleas of nullity and appeals. In these circumstances the applicant's complaints cannot at this stage be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. They require to be determined as to their merits, no other ground of inadmissibility having been established.

For these reasons, the Commission

1. DECLARES the applicant's complaints relating to the Supreme Court's proceedings ADMISSIBLE, without prejudging the merits of the case;

2. DECLARES the remainder of the application INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)