AS TO THE ADMISSIBILITY OF

Application No. 16942/90
by Gert LAGLER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 13 April 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 19 July 1990 by Gert Lagler against Austria and registered on 27 July 1990 under file No. 16942/90;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to :

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 14 September 1992 and the observations in reply submitted by the applicant on 29 November 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1949. He lives in Vienna.

On 20 December 1984 the applicant issued a writ out of the Vienna Regional Court (Landesgericht) against his former parents-in-law in connection with disputes arising out of the financing of a dwelling house. A witness was heard on 26 November 1985 and the proceedings were adjourned until 25 February 1986. On that date, separate proceedings between the parties were joined to the present proceedings. Further witnesses were heard on 6 and 9

June 1986. On 16 October 1986 the applicant was heard and on 27 February 1987 the Court decided to examine the file relating to criminal proceedings pending against the applicant. The proceedings were adjourned.

On 6 September 1988 the Court decided that it did not need to await the outcome of the criminal proceedings before taking a decision in the case. On 31 March 1989 the applicant's former wife and the defendants were heard, and on 11 July 1989 the applicant's former wife was heard again. A further witness was heard on 30 November 1989. On 28 June 1990, with the agreement of the parties, the proceedings were adjourned pending the outcome of the criminal proceedings. The applicant requested the resumption of the proceedings on 2 February 1991. The request was refused on 20 March 1991, but granted on the applicant's appeal (Rekurs) by the Vienna Court of Appeal (Oberlandesgericht) on 8 May 1991.

On 15 May 1993 the Regional Court gave judgment against the applicant. He appealed to the Vienna Court of Appeal which, on 17 November 1993, held a hearing on the appeal.

COMPLAINTS

The applicant initially alleged a violation of Article 6 para, 1 of the Convention by reason of the length of the proceedings. In his observations of 29 November 1993, he also alleged that the proceedings were unfair.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 19 July 1990 and registered on 27 July 1990.

On 13 February 1992 the Commission decided to communicate the application to the respondent Government for observations on its admissibility and merits. The Government submitted their observations on 14 September 1992.

On 23 October 1992 the applicant was granted an extension to 30 November 1992 for submission of his observations in reply. On 19 November 1993 the applicant was reminded that the time-limit for submission of his observations had expired, and that the Commission could conclude that he had lost interest in the case and strike it off its list of cases.

The applicant submitted his observations in reply on 29 November 1993.

THE LAW

The applicant initially alleged a violation of Article 6 para. 1 (Art. 6-1) of the Convention by reason of the length of the proceedings. Article 6 para. 1 (Art. 6-1) of the Convention provides, so far as relevant, as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time ... "

The Commission notes that the applicant introduced the proceedings on 20 December 1984 and the first instance judgment was given on 15 May 1993. The proceedings are now pending before the Vienna Court of Appeal, where a hearing was held on 17

November 1993.

The Government submit that the applicant has failed to exhaust the domestic remedies available to him in that he requested an adjournment of the proceedings on 28 June 1990, and that he did not appeal against the decision to adjourn. They also point out that the applicant has not made any applications under Section 91 of the Courts Act (Gerichtsorganisationsgesetz), nor has he made an hierarchical appeal (Aufsichtsbeschwerde) with the judiciary to speed up the proceedings. The applicant submits that the reason his representative agreed to the adjournment of the proceedings on 28 June 1990 was that a substitute lawyer had had to attend on that day. He points out that the usual lawyer on 2 February 1991 requested that the proceedings be resumed. The applicant states that an application under Section 91 of the Courts Act has only been possible since 1 January 1990, and he considers it anyway to be mere window dressing. He considers that hierarchical appeal are also no real assistance in accelerating proceedings.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress.

It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf., Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15, para. 26; No. 9013/80, Dec. 11.12.82, D.R. 30, p. 96, p.102).

The Commission notes that the applicant, through his lawyer, consented to the adjournment of the proceedings on 28 June 1990. As the period between that adjournment and 2 February 1991, when the applicant's usual lawyer requested that the proceedings be resumed, the Commission finds that this matter concerns the merits of the case, and does not raise questions concerning exhaustion of domestic remedies.

As to the possibility of an application under Section 91 of the Courts Act and a hierarchical appeal, the Commission notes that the Government have given no details of how an application under Section 91 could result in a finding that the proceedings to that point had lasted excessively long, nor how redress could be afforded. The Commission also notes that the provision entered into force only in 1990, that is, over five years after the present proceedings began. As to the possibility of an hierarchical appeal, the Commission recalls that hierarchical appeals in the Austrian legal system do not give the right to an individual to the exercise by the State of its supervisory powers, and that any proceedings which do subsequently take place do not involve the participation of the individual who made the hierarchical appeal in the first place (No. 7464/76, Dec. 5.12.78, D.R. 14, p. 51, 54). The Commission also notes that the Government have not specified how this avenue could have remedied the length of the proceedings complained of. Accordingly, the Commission finds that the application cannot be declared inadmissible for non-exhaustion of domestic remedies.

According to the applicant, the length of the proceedings is in breach of the "reasonable time" requirement of Article 6 para. 1
(Art. 6-1) of the Convention. The Government take the opposite view.

The Commission considers, in the light of the criteria established by the case-law of the Convention institutions on the

question of "reasonable time" (the complexity of the case, the applicant's conduct and that of the competent authorities), and having regard to all the information in its possession, that a thorough examination of this complaint is required as to the merits.

2. In his observations in reply, the applicant for the first time made a complaint concerning the fairness of the proceedings.

The Commission notes that the proceedings which form the substance of this application are still proceeding. The complaint is therefore premature.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES ADMISSIBLE, without prejudging the merits of the case the complaint relating to the length of the proceedings

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (A. WEITZEL)