AS TO THE ADMISSIBILITY OF

Application No. 20918/92
by M. H.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 29 November 1995, the following members being present:

MM. H. DANELIUS, President
S. TRECHSEL
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN

Ms. M.-T. SCHOEPFER, 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 29 October 1992 by M. H. against Switzerland and registered on 6 November 1992 under file No. 20918/92;

Having regard to:

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

- the observations submitted by the respondent Government on 14 June 1995 and the observations in reply submitted by the applicant on 4 September 1995;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is a Swiss citizen residing in Altendorf. Before the Commission he is represented by Mr. M. Ziegler, a lawyer practising at Lachen.

A. Particular circumstances of the case

Proceedings concerning the applicant's conviction

On 25 February 1990, at 17h30, the Cantonal Police (Kantonspolizei) of the Canton of Graubünden arrested the applicant by virtue of a warrant of arrest issued by investigating judge (Untersuchungsrichter) M. The applicant, who was suspected of having set fire to a car and later having reported it as stolen, was remanded in police custody (Polizeihaft).

On 26 February 1990, at 15h30, the applicant was questioned by investigating judge M. whereupon the applicant made a full confession.

On 27 February 1990, at 16h00, the applicant was released.

On 14 May 1991 the public prosecutor (Staatsanwalt) charged the applicant and another person with having committed the offences of attempted fraud (versuchter Betrug) and of misleading the administration of justice (Irreführung der Rechtspflege). The bill of indictment did not refer to any particular facts of the case, and proposed no particular punishment.

Also on 14 May 1991, investigating judge M. submitted a supplement to the bill of indictment in which he demanded a sentence of 12 months' imprisonment for the applicant, considering that he and his accomplice had committed incomplete attempted insurance fraud. Thus, on 24 February 1990, they had driven a car up to a mountain pass where they had set it on fire; they had then reported the car as being stolen. The supplement also requested revocation of a prison sentence of ten days to which the applicant had been sentenced on probation by another court on 13 June 1988.

On 16 May 1991 the Oberengadin District Office (Kreisamt) informed the applicant that the "indictment documents" (Anklageakten) had arrived at the District Office; that the applicant had the opportunity to consult the documents at the District Office until 31 May 1991; that the documents would be transmitted to his lawyer to be returned until 31 May 1991; and that the indictment would not be brought orally. In the applicant's submission, his lawyer did not receive the supplement to the bill of indictment.

On 4 June 1991 the applicant's lawyer returned the documents received; he also informed the Oberengadin District Court (Kreisgericht) that he would not be present at the trial on 14 June 1991.

The trial took place on 14 June 1991. The applicant was present, but not his lawyer. According to the ensuing judgment, the indictment was not stated orally. On the same day, the Oberengadin District Court sentenced the applicant to ten months' imprisonment, suspended on probation, for attempted fraud and misleading the administration of justice. The suspension of the previous prison sentence was revoked. The judgment listed inter alia the facts as established in the bill of indictment, and the punishment proposed in the supplement to the bill of indictment.

In his appeal to the Cantonal Court (Kantonsgericht) of the Canton of Graubünden, the applicant requested the court to find that he had on his own accord not completed the offence of fraud, rather than having committed an incomplete offence. He further requested that the prison sentence be reduced and that the suspension of the earlier prison sentence be maintained. He also alleged a breach of Article 6 para. 1 of the Convention in view of the functions exercised by investigating judge M., and requested costs and expenses to be attributed to the Oberengadin District Office.

On 21 August 1991 the Cantonal Court partly upheld the appeal and reduced the sentence from ten to six months' imprisonment, suspended on probation. No oral hearing was held, and the judgment was not pronounced orally.

The applicant's public law appeal (staatsrechtliche Beschwerde) was dismissed by the Federal Court (Bundesgericht) on 25 March 1992.

In its decision the Federal Court first found that it was not competent to deal with the applicant's public law appeal insofar as he

requested more than the quashing of the previous decision.

Insofar as the applicant complained of investigating judge M., who had also prepared the indictment, the Court referred to Section 72 para. 1 of the Code of Criminal Procedure (Strafprozessordnung; see below, Relevant domestic law) of the Canton of Graubünden according to which investigating judges are only empowered to arrest people, not to impose detention on remand. The decision continued:

<Translation>

> "Contrary to the applicant's opinion, the law determines as the judge who shall order detention on remand within the meaning of Article 5 para. 3 of the Convention the public prosecutor and not the investigating judge ... In the case at issue ... the accused was released from police custody after being temporarily arrested within the period prescribed by law, without the public prosecutor having ordered detention on remand. The complaint that, contrary to Article 5 para. 3 of the Convention, investigating judge M. had first acted as judge ordering detention on remand and later as representative of the prosecution is therefore manifestly unfounded."

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> "Als haftanordnenden Richter im Sinne von Art. 5 Ziff. 3 EMRK bestimmt das Gesetz somit entgegen der Meinung des Beschwerdeführers nicht den Untersuchungsrichter sondern den Staatsanwalt ... Im vorliegend zu beurteilenden Fall ... ist der Angeschuldigte nach der vorläufigen Festnahme innert der gesetzlichen Frist wieder aus dem Polizeiverhaft entlassen worden, ohne dass vom Staatsanwalt Untersuchungshaft angeordnet worden wäre. Die Rüge, Untersuchungsrichter M. habe entgegen Art. 5 Ziff. 3 EMRK zuerst als Haftanordnungsrichter und später als Anklagevertreter fungiert, geht somit offensichtlich fehl."

The Court then dealt with the applicant's complaint under Article 6 para. 3 (b) of the Convention that he had not been informed of the supplement to the bill of indictment. The Court noted that on 16 May 1991 the Oberengadin District Office had informed the applicant that he could consult the case-file, part of which had been the supplement to the indictment. However, he had failed to do so.

Insofar as the applicant complained under Article 6 para. 1 of the Convention that the Cantonal Court had not conducted an oral hearing and had not pronounced its judgment orally, the Federal Court stated:

<Translation>

> "The applicant does not allege that he duly requested an oral appeal hearing according to S. 144 para. 1 of the Code of Criminal Procedure of the Canton of Graubünden. Furthermore, such a request does not transpire from the file. Therefore the applicant cannot subsequently complain about the lack of an oral appeal hearing and of public pronouncement of the judgment. The invocation of Article 6 para. 1 of the Convention is belated ... The accused might have a compulsory right personally to be present at the appeal hearing if a reformatio in peius was possible ... This is not the case here ..."

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> "Der Beschwerdeführer macht nämlich nicht geltend, dass er rechtzeitig die Durchführung einer mündlichen Berufungsverhandlung gemäss Art. 144 Abs. 1 StPO/GR verlangt habe. Ein solcher Antrag ist auch nicht aus den Akten

ersichtlich. Folgerichtig kann der Beschwerdeführer nicht nachträglich die fehlende öffentliche Berufungsverhandlung und Urteilsverkündung beanstanden. Die Anrufung von Art. 6 Ziff. 1 EMRK erfolgt verspätet... Ein zwingendes Recht auf persönliche Teilnahme an der Rechtsmittelverhandlung stünde dem Angeklagten allenfalls zu, wenn eine reformatio in peius möglich wäre ... Dies ist hier nicht der Fall ..."

Proceedings concerning the applicant's request for compensation

On 26 May 1992 the applicant filed a request with the Samedan investigating judge's office under Article 5 para. 5 of the Convention for compensation amounting to 3,000 SFr for unlawful detention. He submitted in particular that the length of his detention had exceeded the time envisaged by Article 5 para. 3 of the Convention.

On 17 June 1992 the Samedan investigating judge dismissed the request finding that the applicant's detention had not exceeded the maximum period of 48 hours envisaged by the Code of Criminal Procedure.

The applicant's appeal was dismissed on 6 August 1992 by the Cantonal Court of the Canton of Graubünden, the decision being served on the applicant on 5 February 1993. The Court found inter alia that the period envisaged by the Convention organs under Article 5 para. 3 of the Convention could be up to three or four days, whereas in the applicant's case it had lasted less than two days.

The applicant's public law appeal was partly upheld by the Federal Court on 26 May 1993.

Insofar as the applicant complained under Article 6 para. 1 of the Convention of the length of the compensation proceedings, in particular the period of time required by the Cantonal Court to serve its decision of 6 August 1992, the Federal Court found that the proceedings had not lasted inordinately long, and that three levels of jurisdiction had been involved.

The Federal Court further dismissed the applicant's complaint that the previous court had not conducted an oral hearing, as it did not transpire from the case-file that the applicant had filed a request for such a hearing.

The Court then dealt with the applicant's request that he had not been brought promptly before a judge within the meaning of Article 5 para. 3 of the Convention:

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"In the appeal statement it is neither claimed nor demonstrated that investigating judge M. was not a judge or judicial officer within the meaning of Article 5 para. 3 of the Convention. Already in its decision of 25 March 1992 the Federal Court noted that there was no unity of personal functions between the judge ordering detention on remand and the representative of the prosecution ...; it can therefore not be assumed that, in this respect, there was bias on the part of the investigating judge ... It furthermore transpires from the file that the investigating judge had himself been competent to release the applicant from detention in the afternoon of 27 February 1990; the latter therefore had the powers required for the judge or judicial officer. In the present case it must therefore be assumed that according to the law of the Canton of Graubünden the investigating judge satisfied the requirements of Article 5 para. 3 of the Convention."

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"Es wird in der Beschwerdeschrift weder behauptet noch dargetan, Untersuchungsrichter M. sei kein Richter oder richterlicher Beamter im Sinne von Art. 5 Ziff. 3 EMRK. Bereits im Urteil vom 25. März 1992 hat das Bundesgericht ausgeführt, dass keine Personalunion von Haftanordnungsrichter und Anklagevertreter bestanden habe ... ; unter diesem Aspekt kann daher nicht Voreingenommenheit des Untersuchungsrichters angenommen werden ... Aus den Akten ist ferner ersichtlich, dass der Untersuchungsrichter den Beschwerdeführer am Nachmittag des 27. Februars 1990 in eigener Kompetenz aus der Haft entlassen hat; dieser verfügte damit über eine für die Umschreibung des Richters oder richterlichen Beamten notwendige Befugnis. Es ist daher davon auszugehen, dass der Untersuchungsrichter nach bündnerischem Recht im vorliegenden Fall den Anforderungen von Art. 5 Ziff. 3 EMRK genügte."

The Court nevertheless quashed the previous decision as it found that, after the applicant's confession on 26 February 1990, there had no longer been a reason to keep him in custody and that his detention had therefore lasted unnecessarily long.

B. Relevant domestic law

Section 72 para. 1 of the Code of Criminal Procedure of the Canton of Graubünden states, insofar as relevant:

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"The investigating judges ... are authorised if necessary temporarily to arrest persons suspected of having committed offences or misdemeanours ... The public prosecutor must immediately be informed of the arrest; he will decide within 48 hours whether detention must be maintained as detention on remand ..."

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"Die Untersuchungsrichter ... sind befugt, nötigenfalls die eines Verbrechens oder Vergehens verdächtigten Personen vorläufig festzunehmen ... Die Festnahme ist sofort dem Staatsanwalt zu melden, der innert 48 Stunden darüber entscheidet, ob sie als Untersuchungshaft aufrechtzuerhalten ist ..."

Section 100 concerns the indictment (Anklage) and states:

<Translation>

"1. The Public Prosecutor is entitled to bring the indictment before all courts. Before the District Court and the District Court Committee the indictment is as a rule brought by the investigating judge. Also in proceedings before the Cantonal Court and the Cantonal Court Committee the Public Prosecutor may authorise an investigating judge to bring the indictment.

2. Before the Cantonal Court the indictment is always brought orally, before the other courts only if the Public Prosecutor's Office or the Court President regards this as necessary.

3. If the indictment is not brought orally, the Public Prosecutor's Office supplements the bill of indictment with a written request containing the important considerations."

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"1. Der Staatsanwalt ist befugt, die Anklage vor allen Gerichten zu vertreten. Vor Kreisgericht und Kreisgerichtsausschuss vertritt sie in der Regel ein

Untersuchungsrichter. Der Staatsanwalt kann auch im Verfahren vor Kantonsgericht und Kantonsgerichtsausschuss einen Untersuchungsrichter mit der Anklagevertretung beauftragen.

2. Vor Kantonsgericht wird die Anklage stets mündlich vertreten, vor den übrigen Gerichten nur, wenn die Staatsanwaltschaft oder der Gerichtspräsident es für erforderlich halten.

3. Wird die Anklage nicht mündlich vertreten, so ergänzt die Staatsanwaltschaft die Anklageschrift durch einen schriftlichen Antrag mit den wesentlichen Erwägungen."

COMPLAINTS

1. The applicant complains under Article 5 para. 3 of the Convention that investigating judge M. ordered his arrest and later prepared a supplement to the bill of indictment. The applicant points out that in its decision of 25 March 1992 the Federal Court dismissed his public law appeal on the ground that the applicant had not been remanded in custody; in its decision of 26 May 1993 the Federal Court found that the investigating judge indeed had had judicial powers for custody.

2. The applicant raises various complaints under Article 6 para. 1 of the Convention:

- He submits that investigating judge M. was biased as his proposals in the supplement to the bill of indictment were extremely severe.

- He further complains, also under Article 6 para. 3 (b) of the Convention, that he was not informed of the supplement to the bill of indictment. While the case-file was sent to his lawyer, the supplement was not included. Thus, he was not informed of investigating judge M.'s proposal to revoke the suspension of a previous sentence.

- Moreover, the Cantonal Court gave its decision of 21 August 1991 without an oral hearing and did not pronounce its judgment publicly.

- The applicant also complains of the length of the compensation proceedings.

3. Under Article 13 of the Convention the applicant complains that the Federal Court in its decision of 25 March 1992 did not regard itself as competent to deal with his requests insofar as he had requested more than the quashing of the previous decision.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 October 1992 and registered on 6 November 1992.

On 5 April 1995 the Commission decided to communicate the application to the respondent Government in respect of the applicant's complaint under Article 6 paras. 1 and 3 (b) of the Convention that he was not informed of the supplement to the bill of indictment.

The Government's written observations were submitted on 14 June 1995. The applicant replied on 4 September 1995.

THE LAW

1. The applicant complains under Article 5 para. 3 (Art. 5-3) of the Convention that investigating judge M. ordered his arrest and later prepared a supplement to the bill of indictment. The applicant relies on Article 5 para. 3 (Art. 5-3) of the Convention which states, insofar as relevant:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ..."

The Commission recalls that the impartiality of a judicial officer ordering detention on remand may appear open to doubt if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority (see Eur. Court H.R., Huber judgment of 23 October 1990, Series A no. 188, p. 18, para. 43; Brincat judgment of 26 November 1992, Series A no. 249-A, p. 12, para. 21).

However, no issue arises under Article 5 para. 3 (Art. 5-3) of the Convention if the arrested person is released before any judicial control of his detention would have been feasible (see Eur. Court H.R., Brogan and others judgment of 29 November 1988, Series A no 145-B, p. 31 et seq., para. 58).

In the present case the authorities of the Canton of Graubünden did not take any decision ordering the applicant's detention on remand. Such a decision would only have been called for according to Section 72 para. 1 of the Code of Criminal Procedure of the Canton of Graubünden, if the applicant's custody had lasted 48 hours. The applicant was released from police custody within 46 hours of his arrest, i.e. before judicial control of his detention would have become feasible.

Hence, no issue arises in the present case under Article 5 para. 3 (Art. 5-3) of the Convention.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention of the lack of impartiality of investigating judge M. during the trial proceedings in view of particularly severe proposals in his supplement to the bill of indictment.

Article 6 para. 1 (Art. 6-1) states, insofar as relevant:

"In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ... Judgment shall be pronounced publicly ...".

Thus, the guarantees of independence and impartiality enshrined in Article 6 para. 1 (Art. 6-1) of the Convention apply to a "tribunal". Contrary to the applicant's view, they do not apply to the prosecuting authorities. It follows that the complaint of the lack of impartiality of investigating judge M. is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant complains under Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention that he was not informed of the supplement to the bill of indictment. His lawyer received the case-file, but the supplement was not included.

Article 6 para. 3 (b) (Art. 6-3-b) states:

"3. Everyone charged with a criminal offence has the following minimum rights:

...

b. to have adequate time and facilities for the preparation of his defence."

a) The Government submit that in respect of this complaint the applicant has not complied with the requirement as to the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention. Thus, before the Commission he is complaining that he had indeed on 16 May 1991 received the case-file, though the supplement was not included. However, the applicant failed to raise this complaint before the Cantonal Court or the Federal Court.

The applicant submits that before both these courts he complained that he had not seen the supplement, and that for this reason he has complied with the requirements under Article 26 (Art. 26) of the Convention.

The Commission notes that before the Federal Court the applicant complained that he had not been informed of the supplement to the bill of indictment. This complaint, which he is now raising before the Commission, was dealt with, and then dismissed, by the Federal Court in its decision of 25 March 1992.

This complaint cannot therefore be declared inadmissible for non-exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

b) The Government further submit that the supplement to the bill of indictment was dated 14 May 1991. On 16 May 1991 the applicant's lawyer was informed that the indictment documents had been deposited at the Oberengadin District Office, and that the indictment would not be brought orally. In the light of Section 100 para. 3 of the Code of Criminal Procedure of the Canton of Graubünden, the applicant's lawyer should therefore have been aware that in this case there would be a written supplement to the indictment. However, the applicant's lawyer failed to ask for this document and also did not participate at the trial. In any event, the judgment of 14 June 1991 of the Oberengadin District Court clearly listed the requests stated in the supplement to the indictment; the applicant thus had the possibility to file an appeal before the Cantonal Court which had full powers in the case.

In the applicant's opinion, it is uncontested that he never received the supplement to the bill of indictment. In fact, the supplement contained the actual indictment, and had the same date as the indictment itself. This leads to the conclusion that the supplement was purposely not transmitted to the applicant. Moreover, the District Court knew that the applicant would not be represented by a lawyer. The Court should have transmitted all documents ex officio. As a result, the applicant could not defend himself in respect of the punishment proposed which was not mentioned in the bill of indictment, only in the supplement.

The Commission recalls that on 14 May 1991 the public prosecutor indicted the applicant of various charges. On the same day, investigating judge M. submitted a supplement to the indictment in which he stated the relevant facts and made proposals as to the applicant's punishment.

On 16 May 1991 the applicant and his lawyer were informed that the indictment documents could be consulted at the Oberengadin District Office until 31 May; and that the indictment would not be stated orally. The indictment documents were transmitted to the applicant's lawyer, though the supplement to the bill of indictment was not included. On 4 June 1991 the applicant's lawyer returned the documents; he also informed the District Court that he would not appear at the trial.

The entire case-file was open for consultation at the Oberengadin District Office until 31 May 1991.

The Commission further considers that the applicant's lawyer knew

that the indictment would not be brought orally. He should therefore have been aware that in this case, according to Section 100 para. 3 of the Code of Criminal Procedure of the Canton of Graubünden, a supplement would be added to the bill of indictment. The lawyer could therefore have been expected duly to consult the case-file at the District Office until 31 May 1991 or, alternatively, to have inquired whether such a supplement had been prepared.

The applicant, on the other hand, knew that his lawyer would not be present at the hearing and that the indictment would not be stated orally. In order to prepare his own defence he was free to consult the case-file. However, the applicant equally failed to avail himself of this opportunity.

Even assuming that the applicant only became aware of the lawyer's absence after the time-limit for consultation had expired on 31 May 1991, the applicant has not shown that he requested a prolongation of the time-limit, or applied for an adjournment of the trial, in order duly to consult the indictment documents.

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

4. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that on 21 August 1991 the Cantonal Court gave its decision without an oral hearing and that it did not pronounce its judgment publicly.

As regards the absence of a public hearing, it is not disputed in the present case that the first instance trial proceedings before the Oberengadin District Court were conducted publicly.

The absence of publicity before a second or third instance court may be justified by the special features of the proceedings at issue. However, the situation may be different, where a court of appeal has jurisdiction to review the case both as to facts and law (see Eur. Court H.R., Ekbatani judgment of 26 May 1988, Series A no. 134, p. 14, para. 32; Helmers judgment of 29 October 1991, Series A no 212-A, p. 16, para. 36).

In the present case, the Commission need not resolve whether the applicant was entitled to an oral hearing before the Cantonal Court as in any case he failed to request such a hearing. The applicant also did not apply for the public pronouncement of the judgment. He must therefore be considered as having in these respects waived any rights which he might have had under Article 6 para. 1 (Art. 6-1) of the Convention.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. Under Article 6 para. 1 (Art. 6-1) of the Convention the applicant also complains of the length of the compensation proceedings.

The Commission notes that the proceedings commenced on 26 May 1992 when the applicant filed a request for compensation for unlawful detention. While the proceedings were still pending when the applicant introduced his application, the Commission will examine the proceedings lasting until 26 May 1993, the date on which the Federal Court in last resort rejected the request for compensation. The period to be examined thus lasted twelve months.

According to the Convention organs' case-law, the reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case and with the help of the following criteria: the complexity of the case, the conduct of the applicant, and

the conduct of the authorities dealing with the case (Eur. Court H.R., Vernillo judgment of 20 February 1991, Series A no 198, p. 12, para. 30).

In the light of these criteria and in the circumstances of the present case - the applicant's case was heard by courts at three levels -, the Commission does not find that the notion of a "reasonable time" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention was exceeded.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. Under Article 13 (Art. 13) of the Convention the applicant complains that the Federal Court in its decision of 25 March 1992 did not regard itself as competent to deal with his requests insofar as he had requested more than the quashing of the previous decision.

The Commission has examined this complaint under Article 6 para. 1 (Art. 6-1) of the Convention. It considers that this provision does not grant a right to the full examination of a case by the highest domestic court, in the present case by the Federal Court (see mutatis mutandis Eur. Court H.R., Delcourt v. Belgium judgment of 17 January 1970, Series A no. 11, p. 14 et seq., para. 25).

The remainder of the application is therefore also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)