AS TO THE ADMISSIBILITY OF

Application No. 17310/90
by Lothar RUPRAT
against Austria

The European Commission of Human Rights sitting in private on 1 December 1993 , 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
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS

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 2 October 1990 registered on 7 October 1990 by Lothar RUPRAT against Austria under file No. 17310/90;

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

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case as submitted by the applicant may be summarized as follows:

The applicant is an Austrian national born in 1969 and residing in Höchst. Before the Commission he is represented by Mr. W. L. Weh, a lawyer practising in Bregenz.

A. Particular circumstances of the case

On 30 January 1989 the Feldkirch Public Prosecutor's Office (Staatsanwaltschaft) preferred a bill of indictment on the applicant and four others. The four others were juveniles at the time of the proceedings. The applicant and the juveniles were, inter alia, accused of having caused bodily harm (Körperverletzung) to two identified and one unidentified victim. The applicant was also accused of having uttered dangerous threats (gefährliche Drohung) against one of his co-accused.

On 23 March 1989 a hearing took place before the Feldkirch Regional Court (Landesgericht) sitting as Juvenile Court (Jugendgericht). According to the minutes of the hearing the Public Prosecutor requested to adjourn the hearing for two months in order to give the accused the opportunity to settle the charge outside court (außergerichtlicher Tatausgleich). If the case would be settled outside court, the proceedings against the juveniles could be

discontinued. The Court granted the Public Prosecutor's move.

On 5 May 1989 the Regional Court provisionally discontinued the criminal proceedings against the juveniles (vorläufige Einstellung durch das Gericht). The Court found that the juvenile accused had apologized to the identified victims and had repaired the damage caused to them.

On 1 August 1989 a court hearing took place before the Regional Court. According to the transcript of the court hearing the applicant was questioned by the Judge and the Judge warned the applicant's lawyer not to interrupt him.

On the same day the Regional Court convicted the applicant and sentenced him to a fine of 150 daily rates of AS 150 each, two-thirds of the fine as a conditional sentence for a probationary period of two years.

On 4 August 1989 the applicant lodged an appeal, which was substantiated on 30 August 1989.

On 5 September 1989 the Regional Court rectified its judgment correcting in the verdict the place of the offence as regards the dangerous threat. On 10 October 1989 the Innsbruck Court of Appeal (Oberlandesgericht) dismissed the applicant's complaint about the rectification. The Court of Appeal found that the correct place of the offence followed from the reasons of the Regional Court's judgment. The Regional Court was competent to rectify such a mere writing mistake.

On 7 December 1989 the Senior Public Prosecutor (Oberstaatsanwalt) submitted a position paper of two and a half pages on the applicant's appeal ("croquis") to the Court of Appeal. In the Senior Public Prosecutor's opinion the applicant's appeal was ill-founded. He submitted in particular that the Regional Court's reasoning in its judgment was not defective as the Regional Court had taken sufficient evidence and assessed the evidence correctly.

On 3 January 1990 a court hearing on the applicant's appeal against his conviction took place before the Innsbruck Court of Appeal. In the course of the hearing the applicant's lawyer requested to inspect the Senior Public Prosecutor's "croquis". This request was dismissed by the Court. The Court found that it could not let the applicant's lawyer inspect the position paper because it contained handwritten comments by a member of the Court. Therefore, it allowed to be drawn conclusions as to the Court's internal decision making process and thus was exempt from the right of access to the file (Akteneinsicht). The applicant's lawyer then challenged the members of the Court for bias as the Court had infringed his right to defence and because they had already decided on the applicant's complaint against the rectification of the judgment. Also this move was dismissed by the Court of Appeal. However, having heard the applicant's defence the Court of Appeal decided to repeat and supplement the taking of evidence on the charges against the applicant.

On 30 January 1990 the applicant challenged again the Court of Appeal for bias. On 6 February 1990 the President of the Court of Appeal dismissed the applicant's request.

On 14 March 1990 the Court of Appeal held a court hearing and heard four witnesses, the former co-accused of the applicant, and two police officers who carried out the police investigations. According to the transcript of the court hearing the applicant's lawyer requested the Court of Appeal to order the Senior Public Prosecutor to specify the exact time when the applicant allegedly had uttered dangerous threats. This request was dismissed by the Court of Appeal. The Court of Appeal found that it had to proceed on the basis of the judgment at

first instance.

On 4 April 1990 the Court of Appeal held a further court hearing and heard two more witnesses.

On 4 April 1990 the Innsbruck Court of Appeal dismissed the applicant's appeal. The Court found that the applicant had admitted to have beaten up two identified persons together with his former co-accused. Together with his former co-accused he had also beaten up a third person who remained unidentified. In this respect the Court relied on the statement of the witnesses. The Court further found the applicant guilty of having menaced with threats of causing bodily harm to one of his former co-accused after the latter had deposited a statement with the police. In this respect the Court changed the date of the offence from 28 November 1988, as stated in the judgment at first instance, to 27 November 1988.

On 8 May 1990 this judgment was served on the applicant.

On 24 July 1990 the applicant requested again to inspect the whole case file and in particular the Senior Public Prosecutor's "croquis".

On 31 July 1990 the Court of Appeal dismissed the applicant's request.

Following a suggestion by the applicant, the Attorney General's Office (Generalprokuratur) introduced on 7 September 1990 a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) against the Regional Court's decision of 3 January 1990 and the Court of Appeal's decision of 31 July 1990, both refusing access to the Senior Public Prosecutor's "croquis".

On 25 September 1990 the Supreme Court granted the plea of nullity and declared that the decisions of 3 January and 31 July 1990 had violated the law. The Court found that written submissions filed by the Senior Public Prosecutor were not exempt from the right to inspect the file. If the working method of a member of the Court of Appeal required to make notes on these submissions, a copy of the original must be made to secure that the Senior Public Prosecutor's submissions remain available for inspection by the accused. The "croquis" of 7 December 1989 was thereupon made available to the applicant.

B. Relevant domestic law

According to Section 259 no. 2 of the Code of Criminal Procedures the Court has to acquit the accused if the prosecution withdraws its bill of indictment after the trial (Hauptverhandlung) has been opened, but before the Court retires to decide the judgment.

According to Section 227 para. 1 of the Code of Criminal Procedure the presiding judge discontinues the proceedings if the prosecution withdraws the bill of indictment before the opening of the trial.

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention about his conviction and the fairness of the criminal proceedings against him. He alleges that he was convicted at first instance against the express wish of the Public Prosecutor. He alleges further that he was questioned by the Court at first instance in an inquisitory manner and threatened that criminal proceedings for defamation could be instituted against him. He submits also that his right to an effective defence was violated because at no point in the proceedings, the prosecution was ordered by the courts to specify the exact time and

place when the applicant allegedly had uttered dangerous threats. Lastly, he submits that his conviction for causing bodily harm was arbitrary as he was convicted for having caused injuries of an unspecified extent to an unidentified bicycle driver.

2. Under the same provision he complains that the principle of equality of arms had been violated because the Court of Appeal refused to transmit to the applicant the Senior Public Prosecutor's "croquis".

THE LAW

1. The applicant complains about his conviction and also about the criminal proceedings against him.

Article 6 para. 1 (Art. 6-1) of the Convention, as far as relevant, reads as follows:

> "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 established by law. ..."

With regard to the judicial decisions of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its task is to ensure the observance of the obligations undertaken by the parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

In the present case the applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention about the alleged unfairness of the proceedings in several respects.

a) He submits that he was convicted at first instance against the express wish of the Public Prosecutor.

However, the Commission notes that at the hearing before the Feldkirch Juvenile Court on 23 March 1989 the Public Prosecutor only referred to a possible discontinuation of the criminal proceedings against the juveniles. Having regard to Section 227 para. 1 and Section 259 no. 2 of the Code of Criminal Proceedings, the Commission considers that the Public Prosecutor was in a position to withdraw his bill of indictment if he wished to do so. In these circumstances there is no appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention in this respect.

b) He submits further that he was questioned by the Court in first instance in an inquisitory manner and threatened that criminal proceedings for defamation could be instituted against him.

The Commission recalls that it would be overstraining the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally arouse false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings. The mere possibility of an accused being subsequently prosecuted on account of allegations made in his defence cannot be deemed to infringe on his rights under Article 6 para. 3 (c) (Art. 6-3-c). The position might be different if it were established that, as a consequence on national law of practice in this respect being unduly severe, the risk of subsequent prosecution is such that

the defendant is genuinely inhibited from freely exercising these rights (Eur. Court H.R., Brandstetter judgment of 28 August 1991, Series A no. 211, pp. 23 and 24, paras. 52 and 53).

The Commission notes that, according to the transcript of the Regional Court's hearing on 1 August 1989, the applicant was questioned by the Judge and the Judge warned the applicant's lawyer not to interrupt him. The Commission notes further that the transcript of the court hearing does not indicate threats that defamation proceedings could be instituted against the applicant.

The applicant submits that in this respect the transcript is incomplete. However, the Commission finds that the applicant, who was represented by defence counsel, did not sufficiently specify the circumstances of his questioning by the Court at first instance and the way and the context in which the Judge allegedly had threatened him.

It follows that this complaint does not disclose a violation of Article 6 para. 1 (Art. 6-1) of the Convention either.

c) The applicant further complains that his right to an effective defence was violated because at no point in the proceedings the prosecution was ordered by the Court to specify the exact time and place when the applicant allegedly had uttered dangerous threats. He also submits that his conviction for causing bodily harm was arbitrary as he was convicted for having caused injuries of an unspecified extent to an unidentified bicycle driver.

The Commission recalls that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair (Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

The Commission notes that the applicant requested a clarification by the prosecution regarding the charge of dangerous threats only at the hearing before the Court of Appeal on 14 March 1990 during the appeal proceedings, when he was already convicted for having uttered dangerous threats on 28 November 1988. The Commission notes further that Court of Appeal heard witnesses on this charge in the presence of the applicant and his lawyer. The Court of Appeal eventually found that the applicant had committed the offence of uttering dangerous threats on 27 October 1988. Moreover, as regards the charge of having caused injuries of an unspecified extent to an unidentified bicycle driver, the Court of Appeal took evidence and found that this incident was sufficiently proven by the statement of the witnesses.

The Commission does not find that the taking and assessment of evidence shows any arbitrariness, or that the applicant's right to defence was restricted in any way.

In these circumstances, there is no appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention in this respect.

2. The applicant lastly complains that the principle of equality of arms had been violated because the Court of Appeal refused to transmit to the applicant the Senior Public Prosecutor's "croquis".

The Commission recalls that the principle of equality of arms is only one feature of a wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. However, whatever method is

chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon (Eur. Court H.R., Brandstetter judgment of 28 August 1991, Series A no. 211, pp. 27, paras. 66 et seq.).

The Commission notes that in the present case the applicant did not receive the Senior Public Prosecutor's "croquis" during the appeal proceedings. However, it also notes that on 25 September 1990 following a plea of nullity for the preservation of the law, the Supreme Court declared unlawful the Court of Appeal's decisions of 3 January and 31 July 1990 whereby the applicant was refused access to the Senior Public Prosecutor's submissions. The Supreme Court found that the Court of Appeal's decisions had violated the applicant's right of access to the case file.

In these circumstances the Commission considers that the applicant's complaint was resolved before the introduction of the present application in such a way that he could not claim to be a victim within the terms of Article 25 para. 1 (Art. 25-1) of the Convention. The Commission finds in particular that the Supreme Court acknowledged the existence of a breach of the applicant's right of access to the case-file, which is an aspect of the concept of as fair trial under Article 6 para. 1 (Art. 6-1) of the Convention. Moreover, the conviction of the applicant did not depend on this procedural mistake, as the "croquis" was brief and, in any way, superseded by the taking of new evidence before the Court of Appeal.

It follows that the applicant's complaints under Article 6 para. (Art. 6-1) 1 of the Convention are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)