AS TO THE ADMISSIBILITY OF

Application No. 17116/90
by B.S.
against Switzerland

The European Commission of Human Rights sitting in private on 11 May 1992, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

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 6 August 1990 by B.S. against Switzerland and registered on 4 September 1990 under file No. 17116/90;

Having regard to the observations submitted by the respondent Government on 9 September 1991 and the observations in reply submitted by the applicant on 10 October 1991;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Swiss citizen born in 1950, is a businessman residing in Zurich. Before the Commission he is represented by Mr. L.A. Minelli, a lawyer practising at Forch in Switzerland.

A. Particular circumstances of the case

I.

The applicant runs a sex shop in Zurich for homosexual persons. He sells magazines, books, video films and other objects. Clients know of the shop from advertisements in specialised magazines or from meeting places for homosexuals. From the street the nature of the shop is not discernible.

In a room at the back of the shop the applicant showed video

films to certain persons. The films were changed every one or two weeks. Persons knew of these films by word of mouth. Thus, between 21 and 23 November 1983 the applicant showed the film "New York City", lasting 120 minutes and consisting almost exclusively of sexual acts. Entry to the film was open to any male person interested who paid an entrance fee of 15 SFr or bought sex magazines for over 50 SFr and showed a membership card. Altogether nine persons saw the film.

On 23 November 1983, following a search of the premises, the Zurich District Attorney's Office (Bezirksanwaltschaft) confiscated the film "New York City", the video recorder, and film takings of 60 SFr. Criminal proceedings were then instituted against the applicant. On 28 November 1983 the applicant was questioned by the police.

On 15 March 1984 the Zurich District Attorney's Office issued a penal order (Strafbefehl) convicting the applicant of publishing obscene material contrary to Section 204 of the Swiss Penal Code (Strafgesetzbuch; see below, Relevant domestic law and practice). The applicant was also convicted of driving under the influence of alcohol. For both offences he was fined 6,000 SFr.

Upon the applicant's objection (Einspruch), proceedings were instituted before the Zurich District Court (Bezirksgericht). On 27 June 1984 the Court convicted the applicant of driving under the influence of alcohol and imposed a fine of 1,000 SFr. With regard to the offence of publishing obscene material the Court acquitted the applicant.

In its decision the District Court considered that the nature of the shop was not discernible from the street. Persons wishing to see the film had to disclose that they were homosexuals or show their membership card. There was also a control in that unwanted persons had no access. Thus the Court considered that only a small circle of persons could see the film, namely those who knew of it and wanted to see it.

The Court observed that a young plain clothes policeman had seen the film after paying 15 SFr. The Court considered here the applicant's submissions according to which he had thought the man to be homosexual; he had left the film room very quickly. The fact that the applicant still remembered this client's conduct led the Court to conclude that the applicant had effective control over his clients.

Given the small circle of viewers it could not be said, in the Court's view, that the obscene material had been made "public" within the meaning of Section 204 of the Penal Code. The applicant had undertaken all the necessary precautions to ensure that no viewers were unintentionally confronted with the material.

The judgment was pronounced orally on 27 June 1984. According to a stamp on the last page of the judgment it was served on the applicant on 23 October 1984. According to the subsequent appeal of the Public Prosecutor's Office (Staatsanwaltschaft), the judgment was served on the District Attorney's Office on 29 November 1984.

II.

The Zurich Public Prosecutor's Office appealed against the decision of the District Court to the Court of Appeal (Obergericht) of the Canton of Zurich.

According to the Public Prosecutor's Office, the written reasons of the judgment had been forwarded from the District Attorney's Office on 3 December 1984. Following a request on 4 December 1984 for the transfer of the case-file, the appeal was filed on 6 December 1984. The applicant submits that the minutes (Protokoll) of the criminal

proceedings of the Zurich District Court state: "12 December 1984. On 10 December 1984 ... the Public Prosecutor's Office lodged the appeal" (" Den 12. Dezember 1984. Mit Eingabe vom 10. Dezember 1984 ... hat der Staatsanwalt die Berufung erklärt").

On 10 January 1985 the applicant requested the Zurich Court of Appeal not to admit the appeal of the Public Prosecutor's Office for being out of time. He also complained that the different time-limits in Section 412 of the Zurich Code of Criminal Procedure (Strafprozess-ordnung; see below, Relevant domestic law and practice) breached the equality of arms guaranteed by Article 6 para. 1 of the Convention.

On 18 January 1985, after conducting a hearing, the Court of Appeal convicted the applicant of publishing obscene material contrary to Section 204 para. 1 of the Penal Code, and of driving under the influence of alcohol, and imposed a fine of 4,000 SFr.

In its judgment, the Court first noted that the decision of the District Court had reached the Public Prosecutor's Office on 3 December 1984, for which reason its appeal, filed on 10 December 1984, complied with the time-limit of Section 412 of the Code of Criminal Procedure. The different calculation of time-limits was explained by the fact that before the Court of Appeal it was no longer the District Attorney's Office acting as the prosecutor. The Public Prosecutor's Office which now dealt with the appeal had first to acquaint itself with the case-file.

With regard to the offence of publishing obscene material the Court of Appeal considered that Section 204 envisages the protection of the public in a wider sense. The Court noted the conditions of access to the backroom of the applicant's shop and the fact that the membership card stated no particulars of the bearer. It also noted the applicant's submissions that he himself could tell whether or not a person was homosexual. The Court continued:

[Translation]

> "The qualification of publicity does not fall away merely by applying a restriction of the group of viewers. Rather, the latter must clearly be circumscribed and subject to control ... The applicant's film projection occurred - contrary to the view of the lower court - publicly as it was accessible, not to an objectively limited number of a few persons, but an unlimited number of persons, namely all homosexuals and bisexuals. Given the above-mentioned circumstances, the circle of viewers was therefore not sufficiently subject to control ... Moreover, the accused could not determine merely on the basis of the appearance of a person who, when a first-time client, could not be personally known to him, whether he was a homosexual person ... Thus, the applicant, without further ado, granted a plain clothes policeman, who was investigating the sex shop, entry to the obscene film at issue as he incorrectly took him to be a homosexual."

[German]

> "Das Merkmal der Öffentlichkeit entfällt nicht schon durch die Anordnung irgendeiner Begrenzung des Zuschauerkreises, sondern erst, wenn dieser eindeutig umschrieben und überprüfbar ist ... Die fragliche Filmvorführung des Angeklagten erfolgte - entgegen der Ansicht der Vorinstanz - öffentlich, weil sie nicht lediglich einem objektiv begrenzten Kreis von wenigen Personen, sondern einem unbeschränkten Personenkreis, nämlich allen Homo- und Bisexuellen zugänglich war. Der Zuschauerkreis war aufgrund der oben erwähnten Umstände insbesondere nicht genügend überprüfbar ... Zudem konnte der Angeklagte nicht lediglich aufgrund der Erscheinung einer Person, die ihm zumindest als erstmaliger Kunde

persönlich nicht bekannt sein konnte, beurteilen, ob es sich um einen Homosexuellen handle. So gewährte der Angeklagte ohne weiteres auch einem jungen Polizeibeamten in zivil, der eine Überprüfung des Sex-Shops vornahm, Zutritt zum fraglichen unzüchtigen Film, weil er ihn fälschlicherweise für einen Homosexuellen hielt."

In its decision the Court also dismissed the applicant's request to hear the policeman as a witness, inter alia as it would be impracticable to have to hear as a witness every official who had participated during the investigations.

III.

Against this decision the applicant filed a plea of nullity (Nichtigkeitsbeschwerde) with the Court of Cassation (Kassationsgericht) of the Canton of Zurich. In its decision of 25 November 1985 the Court of Cassation upheld the plea of nullity and quashed the previous decision on the ground that the Court of Appeal should have heard the policeman as a witness. Its decision was served on the applicant on 27 December 1985.

IV.

Proceedings were then resumed before the Court of Appeal of the Canton of Zurich which on 28 August 1986 invited the parties to the appeal hearing on 21 October 1986. On 29 October 1986 the Court of Appeal convicted the applicant of the offence of publishing obscene material and of driving under the influence of alcohol and imposed a fine of 4,000 SFr. The decision was served on the applicant on 17 February 1987.

V.

On 2 March 1987 the applicant filed a plea of nullity against this decision, complaining inter alia of a breach of Article 10 of the Convention. He also referred to the undue length of the proceedings. On 24 March 1987 the Public Prosecutor's Office filed its observations thereupon with the Court of Cassation.

On 2 May 1988 the Court of Cassation convicted the applicant of driving under the influence of alcohol and imposed a fine of 800 SFr. It acquitted him of the offence of publishing obscene material.

In its decision the Court found that it was not up to the Convention States to define what fell under Article 10 of the Convention. Rather, freedom of expression comprised the freedom of individual communication, including the showing of pornographic films. The decision continues:

[Translation]

"According to the facts underlying the contested conviction there was no danger that persons without or even against their intention would have been confronted with the incriminated film. Admittedly the purchase or delivery of the membership card, entitling the bearer to enter the projection room, did not involve serious difficulties ... So it can indeed not be said that it was a closed private group of persons. On the other hand, there can be no doubt that the sex shop in question and, a fortiori, the adjacent separate projection room could only be visited by persons who came with the knowledge of what was awaiting them and intending to see this kind of film ... If in fact the only issue is whether adults, who in full knowledge of its content want to see the film at issue, are indirectly to be

hindered by means of the criminal prosecution of the applicant, no "pressing social need" can be discerned for such a manner of proceeding. If it were an urgent necessity to protect the individual from his wish to see obscene publications, one would consequently also have to punish the private showing of such films, which however is not the case."

[German]

"Nach dem der angefochtenen Verurteilung zugrundeliegenden Sachverhalt bestand keine Gefahr dafür, dass Personen ohne oder gar gegen ihre Absicht mit dem inkriminierten Film konfrontiert worden wären. Zwar ist davon auszugehen, dass der Erwerb bzw. die Aushändigung des Kundenausweises, welcher den Inhaber zum Betreten des Vorführraumes berechtigte, mit keinen grossen Schwierigkeiten verbunden war ..., so dass in der Tat nicht von einem geschlossenen, privaten Personenkreis gesprochen werden kann. Auf der anderen Seite besteht aber kein Zweifel daran, dass der fragliche Sex-Shop und somit erst recht der dazu gehörende separate Vorführraum nur von Personen aufgesucht wurde, die in Kenntnis des sie Erwartenden und mit der Absicht, diese Art von Film zu besichtigen, kamen ... Wenn es faktisch also nur darum gehen kann, erwachsene Personen, welche in Kenntnis des Inhaltes den fraglichen Film sehen wollen, durch strafrechtliche Verfolgung des Beschwerdeführers indirekt daran zu hindern, so kann ein "dringendes soziales Bedürfnis" für ein solches Vorgehen nicht erkannt werden. Hält man es für dringend erforderlich, den einzelnen vor seinem Wunsch zur Betrachtung unzüchtiger Veröffentlichungen zu schützen, so müsste folgerichtigerweise auch die völlig geschlossene, private Vorführung deartiger Filme bestraft werden, was jedoch nicht der Fall ist."

VI.

On 9 May 1988 the Zurich Public Prosecutor's Office filed a plea of nullity against this decision with the Federal Court (Bundesgericht). On 19 June 1988 the applicant filed his observations thereupon.

On 20 September 1988 the Federal Court upheld the plea of nullity, quashed the decision of the Court of Cassation, and sent the case back to that court for a new judgment. The decision was served on the applicant on 14 November 1988.

In its decision, the Federal Court stated with reference to Article 10 of the Convention and the case-law of the European Court of Human Rights:

[Translation]

"There is no reason why the morals of adult persons (among whom there are also persons who are unstable and easily influenced) and thus the morals of society as a whole should not also be protected. In any event, this opinion lies within the margin of appreciation which the European Court has granted to the Convention States. It duly considers the different points of view which can prevail in a democratic society with regard to the necessity of protecting morals."

[German]

"Es ist nicht einzusehen, wieso nicht auch die Moral erwachsener Personen (unter denen sich ebenfalls labile und leicht beeinflussbare Menschen befinden) und damit die gesamtgesellschaftliche Moral schützenswert sein sollten. Jedenfalls liegt diese Ansicht im Rahmen des vom Europäischen

Gerichtshof den Vertragsstaaten eingeräumten Ermessens, welches den verschiedenen Standpunkten Rechnung trägt, die in einer demokratischen Gesellschaft hinsichtlich der Erfordernisse des Schutzes der Moral vorherrschen können."

The Federal Court then considered the Court's judgment in the Müller case (see Eur. Court H.R., judgment of 24 May 1988, Series A No. 133). It continued:

[Translation]

"The difference from the case to be decided today is that in the present case no adults were confronted against their will, and no young persons were confronted with the incriminated film "New York City". But also in such cases punishment is legitimate. As explained above, Section 204 of the Penal Code concerns the protection of public decency and morals. No obscene objects should be propagated and publicly displayed. To achieve this aim a prohibitory norm was enacted and endowed with penal sanctions. Such a penal norm is necessary as the protection aimed at could not (at least not with the same efficiency) be achieved in a different manner."

[German]

"Der Unterschied zum heute zu beurteilenden Fall besteht darin, dass in casu keine Erwachsenen gegen ihren Willen und keine Jugendlichen mit dem inkriminierten Film "New York City" konfrontiert wurden. Aber auch in Fällen dieser Art ist eine Bestrafung zulässig. Wie oben dargelegt, geht es beim Art. 204 StGB um den Schutz der öffentlichen Sittlichkeit und Moral. Es soll verhindert werden, dass unzüchtige Gegenstände verbreitet und öffentlich zur Schau gestellt werden können. Um dieses Ziel zu erreichen, wurde eine Verbotsnorm aufgestellt und diese mit strafrechtlichen Sanktionen ausgestattet. Eine solche Strafnorm ist notwendig, weil der angestrebte Schutz auf andere Weise gar nicht (oder jedenfalls nicht in gleich wirksamer Weise) erreicht werden könnte."

Finally, the Federal Court regarded it as an abuse of rights (rechtsmissbräuchlich) for the applicant to invoke the right to freedom of expression although he was clearly only interested in substantial financial profits from sex business.

The Court thus found that it violated Federal law if Section 204 of the Penal Code was not applied on the grounds that it did not comply with Article 10 of the Convention.

VII.

On 3 April 1989 the Zurich Court of Cassation convicted the applicant of publishing obscene material. In addition to the fine imposed on the applicant on 2 May 1988 he was fined 2,500 SFr.

In its decision, the Court of Cassation noted inter alia that the Federal Court had not expressed itself on the issue whether the applicant's acquittal was still possible on the basis of an interpretation of Section 204 of the Penal Code which complied with Federal law. However, the Court of Cassation considered that undoubtedly (unzweifelhaft) the Federal Court had referred the case back to the Court of Cassation in order to convict the applicant (zur Verurteilung des Beschwerdeführers) according to Section 204.

VIII.

The applicant then filed a public law appeal (staatsrechtliche Beschwerde) with the Federal Court in which he complained of a violation of Articles 6, 8 and 10 of the Convention. On 31 January 1990 the Federal Court dismissed the appeal. The decision was served on the applicant on 16 February 1990.

In its decision the Court noted that the applicant had correctly not complained that Section 204 of the Penal Code contradicted the Convention (see below Relevant domestic law and practice). To the extent that he complained of an indirect violation of Articles 89 and 10 of the Convention the Court declared the public law appeal inadmissible as the appropriate remedy would be the plea of nullity to the Federal Court. In this respect, the Federal Court noted that it had already previously decided on the compatibility in the instant case of the applicant's conviction with Article 10 of the Convention (see above VI.).

With regard to the different time-limits for filing an appeal before the Zurich Court of Appeal, the Federal Court regarded the difference as being justified, given the fact that, even if the accused did not at the outset file an appeal, he could do so according to Section 425 of the Code of Criminal Procedure until the end of the appeal hearing. Moreover, the prosecution also had to consider matters of public order and security. In fact, both parties could independently file an appeal. The Court found that no issue arose under the Convention if the Public Prosecutor's Office, before deciding whether it would file an appeal, knew whether the applicant had done so.

IX.

Meanwhile, on 23 December 1988 the applicant was convicted by the Zurich District Court of the new offence of contravening Section 204 of the Penal Code by selling obscene publications in his shop and fined 8,000 SFr. The Court found that everybody had had access to the shop. It noted that policemen had been able to obtain the publications. In any event it was not relevant for the application of Section 204 whether a person could unintentionally be confronted with the obscene material since this provision protected public decency in general.

The applicant's appeal against this decision was dismissed on 15 June 1989 by the Zurich Court of Appeal. His further plea of nullity was dismissed by the Court of Cassation on 8 August 1990.

On 23 October 1990 the Zurich District Attorney's Office issued a penal order in which it convicted the applicant of selling obscene material contrary to Section 204 of the Penal Code and imposed a fine of 9,000 SFr.

B. Relevant domestic law and practice

I.

Article 204 of the Swiss Penal Code provides:

[Translation]

> "1. Anyone who makes or has in his possession any writings, pictures, films or other items which are obscene, with a view to trading in them, distributing them or displaying them in public, or who, for the above purposes, imports, transports or exports such items or puts them into circulation in any way, or who openly or secretly deals in them or publicly distributes or displays them or by way of trade supplies them for hire, or who announces or makes known in any way, with a view to facilitating

such prohibited circulation or trade, that anyone is engaged in any of the aforesaid punishable activities, or who announces or makes known how or through whom such items may be directly or indirectly procured, shall be imprisoned or fined.

2. Anyone supplying or displaying such items to a person under the age of 18 shall be imprisoned or fined.

3. The court shall order the destruction of the items."

[German]

"1. Wer unzüchtige Schriften, Bilder, Filme oder andere unzüchtige Gegenstände herstellt oder vorrätig hält, um damit Handel zu treiben, sie zu verbreiten oder öffentlich auszustellen, wer solche Gegenstände zu den genannten Zwecken einführt, befördert oder ausführt oder sonstwie in Verkehr bringt, wer solche Gegenstände öffentlich oder geheim verkauft, verbreitet, öffentlich ausstellt oder gewerbsmässig ausleiht, wer, um die verbotene Verbreitung oder den verbotenen Vertrieb zu fördern, ankündigt oder sonstwie bekannt gibt, dass sich eine Person mit den genannten strafbaren Handlungen befasst, wer ankündigt oder bekannt gibt, wie und durch wen die genannten Gegenstände unmittelbar oder mittelbar bezogen werden können, wird mit Gefängnis oder mit Busse bestraft.

2. Wer solche Gegenstände einer Person unter 18 Jahren übergibt oder vorzeigt, wird mit Gefängnis oder mit Busse bestraft.

3. Der Richter lässt die unzüchtigen Gegenstände vernichten."

The Federal Court has interpreted the notion "public" as requiring that an indeterminate group of persons, not subject to control (unbestimmter, unkontrollierter Personenkreis), has access to the obscene material. The agreement of the persons concerned is irrelevant (see Arrêts du Tribunal fédéral suisse [ATF] 100 IV 237, 96 IV 68, 87 IV 84).

II.

As regards the time-limit for filing an appeal Section 412 of the Code of Criminal Procedure of the Canton of Zurich states:

[Translation]

"The time-limit for filing an appeal is ten days.

It commences for the injured party and the accused on the day when the judgment is pronounced orally and, where there is no such pronouncement, from the date when the written reasons are served...

For the Public Prosecutor's Office the time-limit for filing the appeal begins on the day when it has been served the written reasons of the judgment. The Public Prosecutor's Office shall record, on the copy of the judgment, the day of its receipt ...."

[German]

"Die Berufungsfrist beträgt zehn Tage.

Sie läuft dem Geschädigten und dem Angeklagten von der Eröffnung des Urteils und, wo eine solche nicht erfolgt ist, von der schriftlichen Mitteilung an ...

Der Staatsanwaltschaft läuft die Frist zur Berufung von dem Tage

an, an welchem die schriftliche Urteilsausfertigung bei ihr eingegangen ist. Sie hat den Tag des Eingangs auf dieser Ausfertigung auszumerken...".

According to Section 414 of the Code of Criminal Procedure, the time-limit commences again if the Public Prosecutor's office, during the time-limit for filing the appeal, requests consultation of the case-file.

Section 425 of the Code of Criminal Procedure provides that the accused may until the end of the appeal hearing join the appeal of the Public Prosecutor's Office and file requests with regard to all parts of the first instance decision, "as if he himself had filed the appeal" ("wie wenn er selbst die Berufung eingelegt hätte").

III.

According to Section 113 para. 3 of the Federal Constitution (Bundesverfassung) the Federal Court cannot examine whether a Federal Act (Bundesgesetz), such as the Penal Code, complies as such with the Constitution or the Convention. Complaints about violations by cantonal authorities of the Constitution or the Convention must in the last resort be filed with the Federal Court by means of a public law appeal (Section 84 of the Federal Judiciary Act, Organisationsgesetz). The incorrect application of a Federal Act must be raised in a plea of nullity (Section 268 of the Federal Act on Criminal Procedure, Bundesstrafprozessordnung). Where it is complained that a judge, by incorrectly interpreting a Federal Act, has breached the Convention, this complaint is considered as one of an indirect violation of the Convention (mittelbare Konventionsverletzung) which must be raised in a plea of nullity (See ATF 116 I a 74 f, 112 IV 133).

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention of the undue length of the criminal proceedings instituted against him.

2. Also under Article 6 para. 1 the applicant complains of various breaches of the principle of equality of arms. He submits that both in the District Court and the Court of Appeal proceedings no member of the prosecution is obliged to be present at the hearing. He further points out the difference in serving the written reasons of the judgment, i.e. no date of receipt is stamped on the written reasons served on the District Attorney's Office. There is thus no objective proof of the moment when the Office received the judgment. Finally, the applicant complains about the different calculation of time-limits under Sections 412 and 414 of the Code of Criminal Procedure.

3. Under Article 10 of the Convention the applicant complains of his conviction for showing the film "New York City". He submits that his right to freedom of expression has been breached. He complains that Section 204 is not sufficiently precise and that the conviction was unnecessary, given the fact that only persons who intended to see the film could do so, and that young people were not allowed in.

4. Under Article 8 of the Convention the applicant further complains that, as the nature of the shop was not discernible from the street, the prohibition to show the film on his own premises breached his right to respect for private life.

5. The applicant extends the complaints under Articles 8 and 10 of the Convention to his subsequent convictions for selling obscene publications in his shop. With reference to Article 26 of the Convention he submits that in respect of these convictions an appeal to the Federal Court would have been pointless.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 August 1990 and registered on 4 September 1990.

On 27 May 1991 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

The Government's observations were received by letter dated 7 September 1991 and the applicant's observations by letter dated 10 October 1991.

THE LAW

1. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention of the undue length of the criminal proceedings instituted against him.

a) Under Article 26 (Art. 26) of the Convention the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The applicant points out that he raised this complaint in his plea of nullity on 2 March 1987, though he was not obliged actively to contribute to shortening the proceedings. In any event, a complaint about the length of proceedings would be pointless, since the Federal Court has so far never ordered a lower court to conclude a trial by a certain date.

The Government contend that the applicant has not exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention. He did not raise a complaint based on Article 4 (Art. 4) of the Federal Constitution before the domestic courts. The Federal Court could for instance give instructions to a lower court to expedite the proceedings.

The Commission recalls that in previous cases against Switzerland concerning the length of proceedings it found that, in order to comply with the requirements under Article 26 (Art. 26) of the Convention, the applicant had to file with the authority concerned a complaint based on Article 4 (Art. 4) of the Federal Constitution or Article 6 para. 1 (Art. 6-1) of the Convention. However, these cases concerned pending proceedings. The Commission also found that the situation was different if the applicant complained about the length of proceedings which had been terminated, and where Swiss law provided no further remedy (see No. 13523/88, Dec. 4. 10. 90, to be published in D.R., with further references).

In the present case the applicant is complaining about the entire length of the proceedings, after their termination, ending with the service on 16 February 1990 of the decision of the Federal Court of 31 January 1990. However, there is no remedy available under Swiss law to complain about the undue length of proceedings which have already been terminated.

The applicant's complaints cannot therefore be rejected under Article 26 (Art. 26) of the Convention for non-exhaustion of domestic remedies.

b) As regards the well-foundedness of the complaint the applicant submits that the case involved no complex issues and that he did not contribute to the length. In his view the period to be considered under Article 6 para. 1 (Art. 6-1) of the Convention commenced on 23

November 1983 with the search of his premises and ended on 16 February 1990, when he received the judgment of the Federal Court of 31 January 1990.

The Government agree that the period to be examined under Article 6 para. 1 (Art. 6-1) of the Convention commenced on 23 November 1983, the date when the applicant's premises were searched, but contend that it ended on 13 April 1989; on this date the decision of the Zurich Court of Cassation, which decided finally on the applicant's complaints under Article 10 (Art. 10) of the Convention, was served on the applicant.

The Government submit that the only part of this period in respect of which Article 26 (Art. 26) of the Convention has been complied with relates to the plea of nullity proceedings before the Federal Court. However, this complaint would be manifestly ill-founded, since the Federal Court decided on 20 September 1988, i.e. five months after the plea of nullity was filed. Even if the public law proceedings were to be considered, the period of nine months leading to the decision of 31 January 1990 could be considered reasonable.

The Commission, having regard to the parties' submissions under Article 6 para. 1 (Art. 6-1) of the Convention, considers that these complaints raise serious issues of fact and law which require an examination of the merits. This part of the application cannot therefore be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. Under Article 6 para. 1 (Art. 6-1) the applicant complains of a breach of the principle of equality of arms in that the written reasons of the District Court judgment are served differently with no date of receipt being stamped on them, and the time-limits for filing an appeal are calculated differently. He also complains that the prosecution is not obliged to be present at the hearing before the District Court or the Court of Appeal.

The Government submit that in this respect the applicant has not exhausted domestic remedies according to Article 26 (Art. 26) of the Convention.

a) The Commission notes that the applicant's public law appeal to the Federal Court referred to the complaints about the difference in serving the written reasons of the judgment and in calculating the time-limits. In this respect, the applicant complied with the requirements under Article 26 (Art. 26) of the Convention.

In examining the substance of the applicant's complaints, the Commission notes that the time-limit granted to the Public Prosecutor's Office for filing the appeal ran from the date when the latter received the written reasons of the judgment, whereas for the applicant it commenced when judgment was pronounced. However, in the District Court proceedings it is the District Attorney's Office which undertakes the prosecution. The appeal is introduced by a new party, the Public Prosecutor's Office, which must acquaint itself with the case. Thus, there is an objective justification for this difference. There is also no indication of a manipulation to the applicant's disadvantage in the manner in which receipt was acknowledged when the judgment of 27 June 1984 was served on the District Attorney's Office. In any event, according to Section 425 of the Code of Criminal Procedure the accused may until the end of the appeal hearing join the appeal of the Public Prosecutor's Office.

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

b) In so far as the applicant complains that the prosecution is not obliged to be present at certain hearings, the applicant has not shown that he obtained a decision of the Federal Court on this complaint. He has, therefore, not exhausted the domestic remedies available to him under Swiss law within the meaning of Article 26 (Art. 26) of the Convention, and this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. Under Article 10 (Art. 10) of the Convention the applicant complains of a breach of his right to freedom of expression in that he was convicted for showing a film. The applicant also complains that the prohibition to show the film on his own premises breached his right to respect for private life within the meaning of Article 8 (Art. 8) of the Convention.

a) According to Article 26 (Art. 26) of the Convention the Commission may only deal with the matter "within a period of six months from the date on which the final decision was taken".

The applicant submits that in his public law appeal he raised the complaint under Article 6 para. 1 (Art. 6-1) of the Convention about the inequality of arms. Had the Court upheld his appeal, it would have established that the Public Prosecutor had belatedly filed his appeal against the District Court's acquittal which would then have become final. The Federal Court's decision of 31 January 1990 must therefore be considered the final one for the purpose of Article 26 (Art. 26) of the Convention.

The Government contest that the applicant complied with the time-limit in Article 26 (Art. 26) of the Convention. The Zurich Court of Cassation was bound by the Federal Court's previous decision of 20 September 1988. The applicant's public law appeal no longer concerned Article 10 (Art. 10) of the Convention. Hence, the applicant should have brought his application before the Commission against the decision of the Federal Court of 20 September 1988. Even if one relied on the decision of the Zurich Court of Cassation of 3 April 1989, the application would still have been introduced out of time.

The Commission observes that on 3 April 1989 the Zurich Court of Cassation convicted the applicant of publishing obscene material. Against this decision the applicant filed a public law appeal with the Federal Court in which he complained inter alia under Article 6 (Art. 6) of the Convention of a breach of the equality of arms in respect of the filing of an appeal. On 31 January 1990 the Federal Court dealt in substance with this complaint and then dismissed it.

Nevertheless, the Federal Court could have upheld the applicant's complaint under Article 6 para. 1 (Art. 6-1) of the Convention and quashed the conviction pronounced by the Zurich Court of Cassation. As the applicant is complaining that his conviction breached Articles 8 and 10 (Art. 8, 10) of the Convention, the public law appeal filed with the Federal Court must be considered an effective remedy within the meaning of Article 26 (Art. 26) of the Convention.

It follows that the period of six months specified in Article 26 (Art. 26) of the Convention must be calculated as from 16 February 1990, i.e. the date on which the decision of the Federal Court of 31 January 1990 was served on the applicant. The present application was introduced on 6 August 1990. The applicant has therefore complied with the time-limit specified in Article 26 (Art. 26) of the Convention.

b) As regards the well-foundedness of the complaint the applicant contends that, contrary to the requirements of Article 10 para. 2 (Art. 10-2) of the Convention, Section 204 is not sufficiently precise to serve as a legal basis for such a conviction. Moreover, the latter

was unnecessary, given the fact that only persons who intended to see the film could do so and young persons were not allowed in.

The Government submit that the Federal Court, in its decision of 20 September 1988, examined the conformity of the applicant's conviction with the requirements of Article 10 (Art. 10) of the Convention. This decision was considered sufficiently important to warrant publication in the official collection of decisions of the Federal Court (ATF 114 IV 116 et seq.).

The Commission, having regard to the parties' submissions under Article 10 (Art. 10) of the Convention, considers that these complaints raise serious issues of fact and law which require an examination of the merits. Moreover, the further complaint under Article 8 (Art. 8) of the Convention cannot be separated from these serious issues of fact and law. This part of the application cannot therefore be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. In so far as the applicant complains under Articles 8 and 10 (Art. 8, 10) of the Convention of his subsequent convictions of other offences of selling obscene publications in his shop, the Commission considers that he has not shown that he obtained a decision of the Federal Court on these complaints. He has, therefore, not exhausted the domestic remedies available to him under Swiss law within the meaning of Article 26 (Art. 26) of the Convention, and this part of the application must therefore be rejected under Article 27 para. 3 Art. 27-3).

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the proceedings, and his complaints under Articles 8 and 10 (Art. 8, 10) of the Convention about his criminal conviction for showing a film; and unanimously,

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission
(H.C. KRÜGER)

President of the Commission
(C.A. NØRGAARD)