THE FACTS

Whereas the basic facts which are uncontested by the parties may be summarised as follows:

The Applicant is a German citizen born in 1902, living in Munich and having a second residence at St. Jean-Cap-Ferrat in the South of France. He is a journalist and writer.

---

(1) Partial decision of 7th October, 1966, Collection 21, p. 72.

On the basis of documentation assembled by the applicant, a Nuremberg weekly magazine published in February and March, 1952, two articles on the assassination of Ernst vom Rath, an official at the German Embassy in Paris, which, in 1938, led to the Nazi action against the Jewish community in Germany known as "Reichskristallnacht". It was stated in these articles that the assassin, the 17-year old Herschel Grynspan, had not acted for political motives as an agent of world Jewry, as alleged by the Nazi authorities, but for purely private reasons as, according to his own defence, he had homosexual relations with Ernst vom Rath.

On 4th July, 1952, Günter vom Rath, a brother of the deceased, brought charges against the applicant and the publisher of the paper for defamation of the memory of the deceased (Verunglimpfung des Andenkens Verstorbener, Article 189 of the German Penal Code). On these charges, the applicant was indicated by the Public Prosecutor (Staatsanwaltschaft) on 23rd March, 1954. But, after a preliminary investigation, the Regional Court (Landgericht) of Munich I on 10th July, 1957, refused to proceed further at there was not sufficient evidence of a criminal offence. On an appeal lodged by the Public Prosecutor, however, the Court of Appeal (Oberlandesgericht), on 27th January, 1958, ordered trial proceedings to be opened before the Regional Court of Munich.

In this trial, held from 14th November to 21st December, 1960, the Applicant was found guilty and sentenced to five months' imprisonment, the sentence being, however, suspended on probation. The Applicant appealed from this decision (Revision) and on 3rd October, 1961, the Federal Court (Bundesgerichtshof) set aside the judgment, inter alia, on the ground that certain witnesses of the Applicant had not been called, and referred the case to the Regional Court of Augsburg for a new trial.

This Court, after having heard a number of witnesses at Augsburg and, by rogatory commissions in France, Italy and Israel, decided, on 13th March, 1964, to discontinue the proceedings under the Amnesty Act of 1954. Upon request of the Applicant, however, the proceedings had to be resumed according to the provisions of the Amnesty Act.

The Court then fixed 9th June, 1964, as the date for the commencement of the trial in which more than 60 witnesses were to be heard. But when the Applicant requested before the trial that additional evidence, mostly from abroad, should be examined, the Court cancelled the trial and decided, on 8th July, 1964, to dismiss the case on the ground that, in any event, the Applicant's guilt and the consequences of his act were insignificant (Article 153, para. 3 of the Code of Criminal Procedure). The Court argued, inter alia, that the case did not justify any further time-consuming and expensive investigations and proceedings. It appears that at that time the files contained already 3,500 pages. The expenses of the proceedings were declared to be at the charge of the State but the Applicant was not reimbursed for his lawyer's fees.

The Applicant did not appeal from this decision as no appeal is

provided for by the Code of Criminal Procedure in case of a termination under Article 153, paragraph (3). He states that he was advised by his lawyer that not even a Constitutional Appeal (Verfassungsbeschwerde) lies from such a decision.

Whereas the Applicant originally made a number of complaints as to the manner in which the above court proceedings had been conducted. The Applicant referred to Article 6 of the Convention and complained, inter alia, of the extreme length of the proceedings amounting to a total period of 12 years. He alleged that he was seriously impeded in exercising his profession as long as the charge of defamation was pending against him and that he suffered considerable prejudice. He further complained that by the termination of the proceedings as being insignificant he was deprived of his right to a hearing and a determination of the case.

By its partial decision of 7th October, 1966, the Commission, while declaring the remainder of the application inadmissible, decided, in accordance with Rule 45, paragraph 3 (b) of its Rules of Procedure to give notice to the Federal Government and to invite it to submit its observations in writing on the question of admissibility insofar as the application related to the termination of the case by the Regional Court of Augsburg on 8th July, 1964, and the length of the proceedings.

HISTORY OF THE PROCEEDINGS BEFORE THE COMMISSION

Whereas the proceedings before the Commission may be summarised as follows:

On 28th February, 1967, the Federal Government submitted its written observations and the Applicant replied on 29th March - 6th May, 1967. Further submissions were made by the Federal Government on 26th May, 1967, and by the Applicant on 9th - 20th and 25th - 29th May, 1967.

On 31st May, 1967, the Commission decided to invite the Federal Government to submit information as to whether Article 153 of the Code of Criminal Procedure had ever been challenged before the Federal Constitutional Court (Bundesverfassungsgericht) as well as more detailed information on the various stages of the proceedings.

The Federal Government submitted its further written observations on 31st July, 1967, and the Applicant replied on 12th August, 1967. On 4th October, 1967 the Commission decided to invite the Applicant to withdraw or amend certain abusive terms made in his submission of 12th August, 1967, and on 19th October, 1967, he withdrew the abusive terms concerned.

On 15th December, 1967, the Commission decided to ask the parties to make oral explanations with regard to the question whether the Applicant had exhausted the domestic remedies in respect of the termination of the proceedings. At the same time the Commission decided to grant the Applicant legal aid in accordance with a request made by him provided that the general conditions were satisfied. The Commission also decided to adjourn until the oral hearing its decision as to the admissibility of the complaint concerning the length of the proceedings.

On 27th December, 1967, the Applicant withdrew his application for legal aid.

The oral hearing was held on 2nd and 3rd April, 1968.

SUBMISSIONS OF THE PARTIES

Whereas the written and oral submissions by the parties may be summarised as follows:

A. As to the length of the proceedings

I. 1. The Federal Government submitted on 28th February, 1967, the following report prepared by the Bavarian State Ministry of Justice concerning the question of the length of the proceedings:

"(1) Investigations by the Public Prosecutor
On 18th July, 1952, the Public Prosecutor, on a charge brought by the brother of the assassinated against the Applicant, Graf Soltikow, on 4th July, 1952, instituted the investigations and indicted the Applicant on this charge with Landgericht München I on 23rd March, 1954.
In the course of the investigating proceedings, the Public Prosecutor had twelve witnesses heard by eight different courts (Amtsgerichte) in the Federal Republic of Germany and one court in Paris. In addition to this, written testimony was obtained from two witnesses who live in Germany. It was impossible to take the evidence of all the witnesses at one and the same time because at the beginning of the proceedings their names were not yet known; for the evidence taken often contained indications to persons who might come in question as witnesses to testify in the matter, the subject of the investigations. The examination of witnesses was also delayed because the investigations necessary for tracing the whereabouts of certain witnesses took a considerable time.

Another reason for the length of the proceedings was, besides these time-consuming investigations, the applicant's complaint to the Public Prosecutor General in München and, subsequently, to the Bavarian State Ministry of Justice, about the initiation of the proceedings. To give an example, it took nearly three months, before the applicant himself could be heard, since he was not in Munich all the time.

After the public charge had been preferred by the prosecutor, the applicant challenged the members of the 1st Penal Chamber of Landgericht München I, the court having jurisdiction in this case, on the ground of bias. This challenge was dealt with and dismissed in proceedings before three instances, which lasted from 29th April, 1954, to 7th December, 1954.

Apart from this, the applicant filed an application for a preliminary judicial investigation. This application was dismissed by Landgericht München I by a decision, dated 22nd January, 1955. On the applicant's appeal, the Bayerisches Oberstes Landesgericht, by decision of 7th April, 1955, ordered the preliminary investigation proceedings to be opened for the purpose of clarifying the facts.

In the meantime, the court had given the deceased's brother leave to join the proceedings as intervenor. This, too, was challenged by the applicant without success. At this stage of the proceedings, the Court (Penal Chamber) had ordered a judicial examination of three witnesses in the Federal Republic and of three further witnesses in Paris and San Francisco, respectively.

(2) Preliminary investigation by the court
The preliminary investigation by the court at first lasted from 2nd May, 1955, to 13th March, 1956. The judge carrying on the investigation ordered ten witnesses to be examined to be examined in the Federal Republic and one abroad. Five witnesses, residents of München, were examined by him personally; the applicant was heard by him three times.

The supplementary preliminary investigation subsequently applied for the Public Prosecutor lasted from 18th July, 1956, to 5th February, 1957. The reason given by the Public Prosecutor for this application was that it was necessary to hear three new witnesses for the defence whom the applicant had named.

During this stage of the preliminary investigation proceedings several

witnesses were heard and the testimony of a witness living in South America obtained. The judge secured information from the Institut für Zeitgeschichte in München; he made enquiries with the Government of the Land Schleswig-Holstein, and, finally, searched for the whereabouts of the deputy president of the former Volksgerichtshof.

During these preliminary investigation proceedings, too, the witnesses could not be heard all at once, since they became known to the court only by and by.

(3) The trial proceedings before Landgericht München I
On 13th May, 1957, the Public Prosecutor applied for the trial to be opened by filing the bill of indictment (Anklageschrift) with Landgericht München I. By its decision of 10th July, 1957, this court refused to open the trial proceedings on the ground that there was no evidence proving that 'subjectively', i.e. from the applicant's perspective, the elements of a punishable act within the meaning of Article 189 of the German Criminal Code (paragraph 189 StGB) had been present. On the immediate objection of the intervenor the trial proceedings were opened by an order of Oberlandesgericht München, dated 7th January, 1958.

Before fixing the date of the trial, the Penal Chamber had nine further witnesses examined. In addition to this, it had to decide on a number of applications by the applicant for further evidence to be taken, for the appointment of official counsel for his defence, and for a reopening of the preliminary investigation proceedings.

The Appeal Court (Oberlandesgericht) of München rejected an application by the applicant for a rectification of the order opening the trial proceedings.

Finally, on 4th July, 1960, the date for the trial could be fixed; the trial took place before the 5th Penal Chamber of Landgericht München I from 14th November, 1960, to 21st December, 1960 the hearing going on for 12 days. The applicant was found guilty of a misdemeanour of defamation of the memory of a deceased person and sentenced to 5 months' imprisonment, the sentence being suspended on probation.

(4) The review proceedings (Revision)
On the applicant's appeal filed on 23rd December, 1960, the Federal Court of Justice set the judgment of Landgericht München I aside on procedural grounds on 3rd October, 1961, and remitted the case to Landgericht Augsburg for reconsideration and new decision.

After filing his appeal, the applicant challenged, though without success, three judges of the 5th Penal Chamber of Landgericht München I on the ground of bias and also applied - again without success - for a restoration of the status quo ante in order to be able to submit further complaints in connection with his appeal.

(5) Proceedings before Landgericht Augsburg
The files in the applicant's case arrived at Landgericht Augsburg on 19th December, 1961. In preparation of the trial the Court ordered a judicial examination of three witnesses in the Federal Republic and of fifteen witnesses abroad (France, Israel, Italy). In addition to this, a commissioned judge took the testimony of four witnesses; a fifth witness was requested by him to make a statement in writing. He, finally, called for the production of the "Grünspan-Files" kept with the Federal Ministry of Justice, the Document Centre, and the Public Prosecutor of the former Soviet Zone of Occupation.

The Court in Augsburg, furthermore, had to deal with several procedural applications and complaints by the applicant and the intervenor.

In December 1963, the officially appointed counsel for the defence was replaced by another counsel.

By decision of 13th March, 1964, the Court in Augsburg terminated the criminal proceedings under Article 2, paragraph 2, of the Amnesty Act 1954 (Straffreiheitsgesetz 1954) of 17th July, 1954, (BGBl. I, page 203) on the ground that a sentence of more than three months' imprisonment was not to be expected. But on the request of the applicant who claimed to be innocent, the proceedings were resumed (Article 17 of the Amnesty Act 1954).

Thereupon the Court informed the applicant's counsel on 1st April, 1964, that the trial was scheduled for June 1954 and requested him to submit concise applications with regard to the evidence he wished to be taken.

On 22nd April, 1964, the date for the trial was fixed for 9th June, 1964. It was intended to summon sixty-eight witnesses - eleven of these from abroad (France, Italy, Monaco, Israel).

On 21st May, 1964, Landgericht Augsburg cancelled the trial date because it had been found in the meantime that the then addresses of several witnesses, who had already been named and some of whom had already been examined at an earlier date, were unknown and because the applicant had applied for further witnesses to be heard (some of them from Israel, Monaco, Hungary), the names of some of whom had not even been given. The Court considered that it could not do without an examination of these witnesses and that in certain cases a confrontation of these witnesses was necessary. In its view, a trial without these witnesses being present did not premise success.

Finally, the criminal proceedings were terminated by Landgericht Augsburg on 8th July, 1964, under Article 153 (3) of the Code of Criminal Procedure (para. 153 (3) StPO) on the ground that the guilt was negligible and the consequences insignificant."

In its submission of 28th February, 1967, the Federal Government made the following observations on the different parts of these proceedings:

"Ref. paragraph (1): (Investigations by the Public Prosecutor)

(a) During the period 18th July, 1952, to 23rd March, 1954, fourteen witnesses had to be heard in all. Not only had the whereabouts of some of these witnesses to be ascertained, sometimes the names of new witnesses cropped up and these had first to be traced. The courts seized of these witnesses' examinations had to be provided with the necessary material on record in each case. One witness was heard by rogatory commission in Paris; it is generally known that it takes a certain time for such letters rogatory to be dealt with.

It must be added that the applicant himself entered two complaints against the initiation of the criminal proceedings and that the files and records were needed for the consideration of those complaints. In addition to this, the applicant's own hearing was delayed by nearly three months as a result of his changes of address.

(b) After his indictment, the applicant challenged the judges of the 1st Penal Chamber of Landgericht München I on the ground of bias in proceedings before the courts of the first, second and third instance. These proceedings took until 7th December, 1954. In view of their wide scope and the fact that the courts of three instances had to deal with them, a period of a little over seven months cannot be regarded as inadequately long.

(c) The applicant, furthermore, objected to the brother of the deceased being allowed to join the proceedings as intervenor. This objection delayed the beginning of the trial proceedings still further.

Ref. paragraph (2): (Preliminary investigation by the Court)

At this stage of the proceedings eleven witnesses had to be heard both in the Federal Republic and abroad, some of them being witnesses for the defence whom the applicant had named. These witnesses, too, had not been known from the very beginning of the proceedings; their existence an the necessity of hearing their testimony was not revealed until during the preliminary investigation proceedings. The other investigations made also consumed time since they had to be carried out conscientiously. In addition to all this, the Public Prosecutor had to acquaint himself, before the trial proceedings were opened, with the contents of the quite voluminous record and files drawn up during the preliminary investigation proceedings. The Federal Government is of the view that if all these circumstances are taken into consideration, the preliminary investigation proceedings, which lasted from 2nd May, 1955, until 13th May, 1957, did not take an unreasonably long time.

Ref. paragraph (3): (Trial proceedings before Landgericht München I)

Also during this stage of the proceedings, Landgericht München I, and also the Oberlandesgericht of München, where the intervenor had filed an objection (Beschwerde) against the Landgericht's refusal to open trial proceedings, had to examine in great detail all the material piled up so far, in order to be able to decide whether or not the trial proceedings should be opened. The mere fact that the trial took twelve days shows what quantities of material had to be dealt with in the proceedings and that this mass of material had also been decisive for the course and the duration of the investigation proceedings and the preliminary proceedings.

Ref. paragraph (4): (Review proceedings - Revisionsverfahren)

The reason why the Federal Court of Justice could not decide the petition for review filed on 23rd December, 1960, until 3rd October, 1961, is also to be found in the large quantities of material that had to be dealt with in the proceedings and in the fact that during this time, the applicant filed two new applications, both of which were not connected with the review proceedings immediately.

Ref. paragraph (5): (Proceedings before Landgericht Augsburg)

Up to 13th March, 1964, this Court alone ordered the hearing of twenty-three witnesses, fifteen of them in foreign countries. The fact that it was intended to summon sixty-eight witnesses for the trial, which had been scheduled for 9th June, 1964, again proves what quantities of material had to be coped with in these proceedings. The pace of the proceedings was determined also by the difficulties experienced in ascertaining the names and addresses of witnesses."

The Federal Government submitted that, with regard to the special circumstances of the case and to the fact that many of these circumstances resulted form the applicant's own conduct, the applicant's complaint that the proceedings took an unduly long time was manifestly ill-founded.

2. The Federal Government's further observations of 31st July, 1967, included a long and detailed list of decisions taken by the various courts and authorities concerned during the course of the criminal proceedings against the applicant. The Federal Government submitted that this summary, which was based on facts communicated by the Bavarian State Ministry of Justice, clearly revealed that the proceedings had been considerably prolonged by the applicant's complaints and numerous application, which included requests for the hearing of further witnesses.

II. 1. The applicant in his observation in reply of 20th March - 6th May, 1967, also referred to the five stages of the proceedings mentioned by the Federal Government and commented on them as follows:

(1) Investigations by the Public Prosecutor

In this respect the applicant pointed out in particular that the Public Prosecutor already in a letter of 13th July, 1954, to the Regional Court of Munich referred to Dr. X, a judge at the Federal Court, as an "important new witness" who ought to be heard. The applicant alleged that this judge, who later was appointed a Presiding Judge (Senatspräsident) of the Federal Court, was the same person as an Assessor X, in the service of the ill-famed SD and the Gestapo who in 1941-1942 had interrogated Grünspan with regard to the assassination of vom Rath. The applicant complained that the judicial authorities, although being informed of these facts by the letter, never heard X. during the following ten years of proceedings.

All other witnesses heard by the prosecutor, except three, could give no decisive evidence and were only heard to delay the proceedings and avoid involving X., which would cause a "world-wide scandal".

(2) Preliminary investigation by the Court

The applicant immediately informed the investigating judge that the hearing of other witnesses, with a few exceptions, could be suspended until X. had been heard. The applicant offered extensive evidence as to the identity of X. and his own knowledge of the original Grünspan files. The investigating judge, however, refused to record statements by the applicant to this effect and warned him that the applicant could expect charges of defamation if he repeated these allegations against Senatspräsident X. in his written submissions. In order to drag out the proceedings the investigating judge had numerous unimportant witnesses examined with regard to "non-essential, secondary matters, but studiously avoided hearing the all-important witness X."

(3) The trial proceedings before the Regional Court of Munich

The Court did its utmost to protract the proceedings and gain time. The applicant lived under constant pressure during these interminable proceedings. In particular, the Court had numerous witnesses examined by rogatory commissions outside Munich, although these witnesses were only remotely associated with the case and their testimony had already been recorded by the investigating judge. The applicant had requested that all witnesses should be heard directly by the trial court so he would have a chance to cross-examine them and, in fact, many of the witnesses were heard again at the trial and thus the proceedings had been unnecessarily delayed.

(4) The appeal proceedings (Revision)

The improper proceedings of the trial court resulted in 117 points of appeal which had to be examined carefully by the Federal Court and thus "entailed delays and an enormous loss of time".

(5) Proceedings before the Regional Court of Augsburg

In the course of these proceedings the intent to delay became particularly obvious. According to the applicant's lawyer the Presiding Judge (Landgerichtsdirektor) had stated that he was due to retire and "that as long as he remained in office he would under no circumstances conduct these highly unpleasant proceedings". The Presiding Judge did, however, not retire until the end of April 1963. The Court refused to call X. as a witness and the applicant and his lawyer were even threatened by a prosecution officer with charges of defamation if they insisted on this witness being called.

2. On 12th August, 1967, the applicant stated in reply to the Federal Government's further observations of 31st July, 1967, that the summary of the proceedings against him submitted by the Government was, in fact, misleading. The summary should properly only have listed orders

and decision by the Public Prosecutor's Office or the Courts. Such a summary would show that during twelve years only 123 "orders or decisions " were issued, i.e. an average of ten decisions per year, more than half of which in no way contributed to further the criminal proceedings. In this respect, the applicant quotes several examples of decisions by the Regional Court which were later set aside on his appeal.

The applicant alleges in particular the following procedural irregularities which, in his opinion, contributed to the length of the proceedings:

(a) In April, 1954, the applicant requested the opening of a formal preliminary investigation (gerichtliche Voruntersuchung) by the Regional Court of Munich but his application was refused on 22nd January, 1955, by the Court. This decision was set aside by the Bavarian Supreme Court (Oberstes Landesgericht) of Munich on 7th April, 1955. Thus, the proceedings had been delayed for almost a year.

(b) On 1st March, 1958, the applicant requested the investigating judge to appoint a defence counsel. His application was refused and this decision was upheld by the Criminal Chamber but set aside, on the applicant's further appeal, by the Court of Appeal (Oberlandesgericht) of Munich. As a result, the defence counsel was not appointed until 28th August, 1958.

(c) The case files were then sent to the applicant's lawyer, but the Court omitted to set any time-limit for the return of the files and also failed to order their return within a reasonable time. The applicant's lawyer was thus allowed to keep the files for five months and during this time the Court took no action with regard to the case. In tolerating this enormous delay the Court clearly showed its intention to retard the proceedings.

(d) In spite of the applicant's protests the investigating judge ordered the hearing of witnesses at their residence by letters rogatory. After the closure of the preliminary investigation the Regional Court of Munich also had a large number of witnesses examined at their place of residence, several of whom had already been heard during the preliminary investigation although not under oath. These witnesses were then only asked to confirm their previous statements and the long time actually spent at this stage was not justified. This delay was particularly unnecessary since the applicant had made it clear that he wished the witnesses to be heard again at the trial in order to be able to cross-examine them. It was obvious that the judges wanted to delay the trial as long as possible in the hope that they by then would have been transferred from the Criminal Chamber concerned with the case.

(e) When the case later was referred to the Regional Court of Augsburg for a new trial this Court resorted to similar means of delay. For this purpose a Single Judge was commissioned to hear certain witnesses, while other witnesses were heard by rogatory commission at their residence in Germany or abroad. Since the applicant again requested that all witnesses should be heard at the trial, it was obvious that the delay caused by these hearings could have been avoided. The principal reason was that the Presiding Judge wanted to defer the trial until his retirement.

(f) In spite of the applicant's repeated requests, the Augsburg Court refused to call Dr. X. as a witness. Instead, the Court incurred further delay by asking the American Document Centre in Berlin to submit information as to the identity of the Assessor X. who had been in the service of the Gestapo. Following receipt of information on this point from the Ministry of Justice more time was lost in tracing a cousin of X., called Y., who also had worked for the Gestapo and, according to the Prosecution, was the official concerned with the

Grünspan case. However, neither of the two cousins was ever heard as a witness. The judges were afraid that Y., if heard under oath, might have incriminated his cousin and the applicant's request that he should be called as a witness was therefore rejected.

(g) The applicant asked the Presiding Judge at the Regional Court in Augsburg to give him advice with regard to the choice of counsel (Pflichtverteidiger) and at the applicant's request the lawyer recommended by the judge, Dr. Z., was eventually appointed. This lawyer was, however, a former prominent Nazi leader which the judge must have known and was merely appointed as a matter of form. In fact, the lawyer had the instructions from the Court and Public Prosecutor to "impede and obstruct" the applicant's defence and the applicant was later forced to ask for a new counsel. After Dr. Z. had been appointed the Court refused to take action on motions for evidence to be heard emanating from the applicant himself. In this respect, the applicant refers to a letter from the Court dated 23rd May, 1962, which speaks of an agreement whereby all communications from the applicant would first be passed on to the defence counsel for an examination whether or not the evidence offered was relevant and likely to serve the proceedings.. Numerous requests for evidence to be heard which he addressed to his defence counsel were suppressed.

B. As to the termination of the proceedings under Article 153 of the Code of Criminal Procedure

I. 1. The Federal Government's written observations of 28th February, 1967, stated in this respect as follows:

"The dismissal of the case by Landgericht Augsburg on 8th July, 1964, under Article 153 (3) of the German Code of Criminal Procedure, in no way violates the applicant's right of being presumed innocent until proved guilty according to law (Article 6 (2) of the Convention). No sentence was imposed on the applicant. The Court did not dismiss his case on the ground that his guilt 'was insignificant'; it merely said: 'His guilt therefore appears to be insignificant'. The Court did not find him guilty. The applicant, therefore, is doubtlessly innocent within the meaning of Article 6 (2) of the Convention. The decision by which his proceedings were terminated did not raise a presumption of guilt.

The principle of presuming a person to be innocent until found guilty does not allow the anticipation of a sentence, by an imposition of any measures tantamount to punishment. This has been made quite clear by the Federal Constitutional Court (in its decision BVerfGE 19, page 347).

No such measures were taken with regard to the applicant; by the decision under Article 153 (3) of the German Code of Criminal Procedure his proceedings were terminated without any such findings being made or any such measures being taken against him as might prejudice his legal position of being deemed innocent. Thus the applicant as not suffered any disadvantage from the decision.

The applicant has not lodged a constitutional complaint with the Federal Constitutional Court against the termination of the criminal proceedings. The Federal Government, it is true, takes the view that both the legal provision contained in Article 153 of the Code of Criminal Procedure and the application of this provision in the applicant's concrete case are consistent with the Basic Law and with Article 6 of the Convention. But if the applicant was of the opinion that the termination under Article 153 (3) of the Code of Criminal Procedure was inconsistent with the entitlement to a fair hearing and the presumption of innocence, the obvious thing for him to do would have been to try and challenge the view and its legal basis by lodging a constitutional complaint. As the Federal Government takes up the above-mentioned position with regard to the merits of such a

constitutional complaint, it leaves open the question whether or not the applicant - at least from his own point of view - could have relied on Article 103 of the Basic Law for the admissibility of a constitutional complaint. In view of all this, the application, as far as the above-mentioned complaints with regard to Article 6 of the Convention are concerned, appears to be inadmissible also for the further reason that the applicant has not exhausted the domestic remedies within the meaning of Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
.....
Insofar as the application must not be regarded as inadmissible for the mere reason that the domestic remedies were not exhausted, it is in any case manifestly ill-founded and therefore inadmissible."

2. The Federal Government, having been invited by the Commission to submit further information as to whether Article 153 of the Code of Criminal Procedure had ever been challenged before the Federal Constitutional Court, in this respect stated in its written observations of 31st July, 1967, as follows:

"Out of the decisions in which the Federal Constitutional Court has taken a position, from the substantive point of view, on the question of the compatibility of Section 153 of the Code of Criminal Procedure (StPO para. 153) with the Basic Law or the application of that provision, the Federal Government has been able to trace only that published on page 320 of Volume 14 of the published decisions of the Federal Constitutional Court.

By that decision the Federal Constitutional Court granted a constitutional appeal (Verfassungsbeschwerde) which had been filed on the following facts: the plaintiff in a libel action had applied for the prosecution of a certain respondent and for himself to be joined in the proceedings as a Third Party (Nebenklägerin). After the indictment had been preferred, the District Court (Amtsgericht), which had not adjudicated on the plaintiff's application for being admitted as a Third Party, terminated the proceedings under StPO para. 153 (III). The plaintiff first lodged an appeal (Beschwerde) against that decision with the Regional Court (Landgericht). That Court rejected the appeal on the ground that, according to StPO U 153 (III) final clause, the decision of the District Court was not open to appeal.

The Federal Constitutional Court set aside the District Court's decision on the termination of the proceedings on the ground that Article 103, paragraph 1, of the Basic Law (right to be heard in court) had been violated and remitted the case to the District Court. For details of the observations of the Federal Constitutional Court, reference is made to the above-mentioned published decision.

The Federal Government, furthermore, has obtained knowledge of a decision by the District Court Berlin-Tiergarten, in the criminal matter 274 Cs 12/64, whereby that court, under Article 100 (1) of the Basic Law, laid before the Federal Constitutional Court, for the latter's decision, the question whether or not in that case the requirement of consent by the public prosecutor at the District Court (Amtsanwaltschaft) to the proposed termination of the proceedings under StPO U 153 (III) was compatible with the independence of judges as guaranteed by Article 97 of the Basic Law and with the principle of separation of power provided for in Article 20 of the Basic Law.

In that case no decision was made by the Federal Constitutional Court because the District Court Tiergarten set aside its decision of 31st March, 1965, by which it had suspended the proceedings and referred the case to the Federal Constitutional Court, and the proceedings before the Federal Constitutional Court thus came to an end.

To conclude, the Federal Government may be permitted to refer once again to its observations of May 1967 on the question of Article 26 of

the Convention. As may be seen from the Federal Constitutional Court's decision on the problem of the right of being heard in court then mentioned by the Federal Government, that Court's practice in this question is constantly developing. It was, therefore, not at all unreasonable to expect the applicant to file a constitutional appeal in accordance with the principle of international law which requires domestic remedies to be exhausted first."

II: 1. The applicant's complaints with regard to the termination of the proceedings, as set out in his written submissions, may be summarised as follows:

(a) He was entitled to a hearing and determination of the case, as expressly ordered by the Federal Court, and eventually to an acquittal and he was deprived of this right by the termination of the case as being insignificant. The termination was unwarranted taking into consideration the length and extent of the previous examination as well as the great historical importance of the events involved.

(b) The courts did not content themselves with the proof that Grünspan had stated before the French and German authorities that homosexual relations with Ernst vom Rath were the basic reason of his act, but required the proof that such relations had, in fact, existed. This exceeded the universal standard of professional diligence required of journalists in countries recognising the freedom of the press.

(c) The Augsburg Court has in fact found that he was guilty even if his guilt was said to be minor. He refers to certain evidence which was known to the Court and should have led to his immediate acquittal.

2. The applicant's written submissions with regard to the question whether he has exhausted the domestic remedies available to him under German law may be summarised as follows:

(a) The Code of Criminal Procedure does not provide for an appeal against a decision to terminate proceedings under Article 153 of the Code. In July 1964, the applicant asked, however, W., a well-known lawyer with long experience of constitutional law, whether a decision to terminate proceedings under this Article had ever been challenged in the Federal Constitutional Court, or, in any event, whether there was any prospect of success if he lodged a constitutional appeal against the decision of the Augsburg Court of 8th July, 1964. W., as well as two of his previous three counsels and a further lawyer whom he also consulted, gave a negative answer to these questions.

(b) Nevertheless, the applicant personally enquired at the Federal Constitutional Court but was told by a "high official" in the President's Office that a constitutional appeal would have no chance of success and that in case of such an appeal even a punitive fee of 1,000 DM might be imposed. The applicant stated that he could not indicate the name of the official in question but that he would certainly recognise him.

(c) The applicant further submitted that, considering the length of the previous proceedings in his particular case and his bad state of health, he could not have been expected to lodge a constitutional appeal which itself would have taken several years to be decided. As an example he referred to a recent case where the Federal Constitutional Court concluded after seven years of proceedings that there had been a violation of the Basic Law.

(d) With regard to the decision of the Federal Constitutional Court of 23rd October, 1962, (Collection of Decisions, Vol. 14, page 320) cited by the Federal Government in its observations of 31st July, 1967, the applicant submitted that this decision was not published in July, 1964, and was at that time obviously unknown to both W. and the high official at the Federal Constitutional Court. In this respect, the

applicant also referred to a letter dated 5th July, 1967, in which he was informed by an official of the President's Office (Präsidialrat), having asked whether Article 153, paragraph 3, of the Criminal Code had been the subject of a decision by the Federal Constitutional Court, that no decision with supporting reasons (begründete Sachentscheidung) had yet been issued by the Court with regard to this question).

III. 1. The oral arguments made by the Agent of the Federal Government may be summarised as follows:

(a) It is true that the Federal Constitutional Court has not yet given any reasoned judgment in a case where Article 153, paragraph 3,of the Code of Criminal Procedure has been applied in a similar way.

The applicant could, however, undoubtedly have based a constitutional appeal on Articles 2 and 103, paragraph 1 of the Basic Law. It should, in particular, be noted that the jurisprudence of the Federal Constitutional Court with regard to the interpretation of the right to a "hearing in accordance with the law" (rechtliches Gehör) guaranteed by Article 103 is constantly developing. The Federal Government in this respect refers to several decisions by the Federal Constitutional Court, inter alia, to the decision of 23rd October, 1962, already cited in the written observations. This decision which appears in the Collection of Decisions (Vol. 14, page 320) was published already in 1963.

(b) As to the applicant's statements that he was advised by one, or possibly a number of lawyers, that a constitutional appeal would be without any prospect of success, the Federal Government points out that, according to the Commission's previous jurisprudence, the applicant is obliged to bear the risk of failure to avail himself of the domestic remedies which might have been successful. Consequently, the applicant cannot excuse himself by saying that he was wrongly advised by his lawyers.

(c) The Federal Government has made enquiries with regard to the alleged conversation in July 1964 with a "high official" at the Federal Constitutional Court. The President of the Court has informed the Federal Government that all visitors to the Court have to obtain a visitor's ticket. This ticket gives details of the time when the visit starts and ends and has to be signed by the official visited. According to the President's investigations, no such ticket was ever issued to the applicant in 1964. Neither have the officials of the Court, who have been heard by the President, been able to confirm that the applicant visited the Court at that time. It is significant that the applicant in his latest submissions to the Commission has considerably toned down his previous allegations on this point and the information concerned is now said to have been given during a casual meeting in the Court building.

The applicant has not been able to specify whether the official concerned was a judge, an official at the President's Office, or one of the numerous assistants employed at the Court.

(d) The applicant's statement that he could not in the circumstances have been expected to lodge a constitutional appeal, considering the long time normally required for such proceedings, is contradicted by his own experience. He had, prior to July 1964, already lodged three appeals with the Federal Constitutional Court, one in 1952 and two in 1958, and the decisions in all three cases were given within six months. The Federal Government could cite a large number of cases concerned with the interpretation of Article 103, paragraph 1, of the Basic Law which have been dealt with by the Federal Constitutional Court within a comparatively short time.

(e) When considering whether the applicant could have been expected to lodge a constitutional appeal against the decision of the Augsburg

court of 8th July, 1964, the Federal Government refers to the applicant's attitude in certain other court proceedings roughly at the same time.

In 1960, criminal proceedings had been brought against the applicant in the District Court of Hannover on a charge of having made defamatory remarks about another author. In the course of these proceedings the applicant repeatedly requested that the proceedings should be terminated under Article 153, paragraph 3, of the Code of Criminal Procedure which the Court refused to do. The applicant asserted that for health reasons he was unable to appear at a hearing. Finally, the District Court ordered that he should undergo a medical examination in this respect. On 14th July, 1964, the applicant without assistance of a lawyer lodged an appeal with the Federal Constitutional Court against the decision of the Hannover Court, whereas at exactly the same time he failed to do so with regard to the decision of the Augsburg Court which is in issue before the Commission. In the proceedings before the Federal Constitutional Court, the medical expert consulted did not confirm the applicant's assertions about his health. His complaint was subsequently rejected by the Federal Constitutional Court as being lodged out of time.

In August 1964 thus only a few weeks after the decision of the Augsburg Court, the applicant tried to raise the matter again by means of a civil action against Günther von Rath. He then claimed damages and stated that he had assigned his claim to the B...., a company founded by the applicant and over which he obviously still exerted decisive influence. When von Rath refused to pay proceedings were instituted against him by the company. This case is still pending in the Regional Court of Wiesbaden.

IV. The applicant's submissions in reply to the oral arguments made by the Agent of the Federal Government may be summarised as follows:

(a) With regard to the decision of the Federal Constitutional Court of 23rd October, 1963, (Collection of Decisions, Vol. 14, page 320) the applicant considers that this case could easily be distinguished from his own. The procedural situation was entirely different since the other case concerned an appeal by a third party wishing to act as a co-plaintiff and not by the accused and was based on the fact that the third party had not been heard before the proceedings were terminated. The applicant emphasises that he had been heard before the termination of the proceedings and he was therefore advised that no constitutional appeal could be based on an allegation that he had been denied a hearing.

(b) As to the question concerning the time required for a constitutional appeal, the Federal Government has referred to his own experience. The appeals he lodged with the Federal Constitutional Court were, however, all rejected at a preliminary stage without having been examined as to the merits. The proceedings in cases which have been examined thoroughly by the court have, on the other hand, taken six or seven years. He had not the possibility to wait for such a long period since the witnesses who could give evidence of the events of 1938 were dying one after the other.

(c) The applicant submits that, after twelve years of proceedings, he was at the time of the ultimate decision of the Augsburg Court brought to financial destitution. He suffered from bad health and was in a state of deep depression. On 2nd November, 1962, and again subsequently, he had been told by his lawyer, Dr. Z., who was acting on information, or instruction, from the Public Prosecutor and one of the judges, that he would be prosecuted for defamation if he pursued the case in such a way that Dr. X. became involved. He seriously believed in this treat and in this situation he considered it as suicide to lodge a constitutional appeal which necessarily would have implicated X., a colleague of the judges of the Federal Constitutional

Court. He could therefore hardly be expected to institute such proceedings.

V. During the oral hearing the Commission decided to invite the Agent of the Federal Government to comment on the applicant's statements with regard to the alleged threat of prosecution if he continued the matter in such a way as to implicate Dr. X.

In reply, the Agent of the Federal Government referred to a number of letters submitted by the applicant between August 1963 and June 1964, to the Regional Court of Augsburg and the Court of Appeal in Munich. In these letters the applicant, inter alia, repeatedly requested the hearing of Dr. X. and made frequent statements to the effect that the latter was identical with the Assessor X. who had interrogated Grünspan. Reference was also made to a letter of 9th June, 1964, in which the applicant asked the Federal Court to transfer the proceedings from the Augsburg Court to another court. In this letter the applicant commented at great length on the X. question. It should be noted that Dr. X. at that time was still a Presiding Judge of the Federal Court.

THE LAW

Whereas Article 6, paragraph (1) (Art. 6-1) of the Convention states that in "the determination of .... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time";

Whereas it is not disputed that on 4th July, 1952, criminal charges were brought against the applicant for defamation of the memory of the deceased, that he was indicated by the Public Prosecutor on 23rd March, 1954, and that the ensuing proceedings against the applicant lasted until 8 July 1964, when the Regional Court of Augsburg, acting under Article 153, paragraph (3), of the Code of Criminal Procedure, discontinued the case on the ground that the applicant's guilt was insignificant and the consequences of his action unimportant;

Whereas the applicant complains of the extreme length of the proceedings which amounted to a total period of twelve years and alleges that this constitutes a violation of Article 6 (Art. 6) of the Convention;

Whereas the Federal Government has submitted that, having regard to the special complexities of the case, many of which resulted from the applicant's own conduct, the applicant's complaint that the proceedings took an unduly long time must be rejected as manifestly ill-founded;

Whereas Article 27, paragraph (2) (Art. 27-2), of the Convention, in requiring the Commission to declare inadmissible any application from an individual, which it considers to be "manifestly ill-founded", does not permit the Commission to reject a complaint whose lack of foundation cannot be so described (cf. Application No. 2294/64 - Gericke v. the Federal Republic of Germany, Yearbook of the European Convention on Human Rights, Vol. 7, pages 348, 354);

Whereas in the present case the Commission has carried out a preliminary examination of the information and arguments submitted to it by the parties with regard to the applicant's complaint that he was denied a determination of the criminal charge against him within a reasonable time as is required by Article 6, paragraph (1) (Art. 6-1), of the Convention;

Whereas the Commission finds that this complaint is of such complexity that its determination should depend upon an examination of its merits;

Whereas it follows that it cannot be regarded as manifestly ill-founded within the meaning of Article 27, paragraph (2) (Art. 27-2), of the Convention;

Whereas, therefore, it cannot be declared inadmissible on that ground;

Whereas, in regard to the applicant's complaint concerning the termination of the case against him under Article 153, paragraph (3), of the Code of Criminal Procedure it is to be observed that, 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;

Whereas it is further to be observed that the said Article 153, in fine, provides that a decision to terminate proceedings under paragraph (3) of that Article is not subject to appeal;

Whereas it follows that the applicant could not have attacked the decision of the Regional Court of Augsburg of 8th July, 1964, by way of appeal to a higher criminal court;

Whereas, however, the Federal Government has submitted that the applicant could have lodged an appeal with the Federal Constitutional Court against this decision and that such a constitutional appeal could have been based in particular on Article 103, paragraph (1), of the Basic Law which stipulates that "in the Courts everyone has the right to a hearing in accordance with the law"; whereas the Government has emphasised that the applicant, by failing to exhaust this remedy, has not complied with Article 26 (Art. 26) of the Convention;

Whereas both parties have agreed that the Federal Constitutional Court has as yet not given a decision concerning a similar appeal of an accused person against a decision to terminate the proceedings against him under Article 153, paragraph (3), of the Code of Criminal Procedure; whereas this is a fact directly relevant to a consideration of the question whether or not the applicant would have had any prospect of success if he had lodged a constitutional appeal;

Whereas the Federal Government has, however, referred to a number of decisions of the Federal Constitutional Court and stated that the jurisprudence of the Court with regard to the application of Article 103, paragraph (1), of the Basic Law is constantly developing and that its provision requiring a "hearing in accordance with the law" can be regarded as the equivalent of the notion of "fair trial" in the sense of the requirements of Article 6, paragraph (1) (Art. 6-1),of the Convention;

Whereas the question whether Article 103, paragraph (1), of the Basic Law could have been invoked by the applicant by way of a constitutional appeal is a question of German constitutional law which, as a matter of principle, lies within the competence of the Federal Constitutional Court and is not a question for determination by the Commission; whereas the Commission is obliged to confine itself to recording that, although this question has apparently not yet been settled by the German courts, the applicant has nevertheless not clearly established that it was impossible for him to appeal to the Federal Constitutional Court on this ground (see Application No. 712/60 - Retimag S.A. v. the Federal Republic of Germany, Yearbook, Vol. 4,p. 384, 406);

Whereas, further, the Commission finds generally that, in order to comply with the requirements of Article 26 (Art. 26) of the Convention, an applicant is obliged to exhaust every domestic remedy which cannot clearly be said to lack any chance of success; whereas, in this context, the Commission observes that the applicant has himself repeatedly stated that both the decision to terminate the case against him under Article 153, paragraph (3), of the Code of Criminal Procedure and the conduct of the proceedings leading to that decision violated the rights guaranteed under the Basic Law; whereas, therefore, it cannot be said that a constitutional appeal would have been without any prospect of success;

Whereas, accordingly, the applicant must in principle be considered to have been under the obligation to avail himself of this remedy;

Whereas, however, the applicant has submitted that in view of certain special circumstances he should be absolved from the obligation to resort to a constitutional appeal; whereas the Commission has recognised in its jurisprudence that in particular circumstances an applicant may exceptionally be absolved from exhausting a domestic remedies available to him; whereas in this connection the Commission has further held that the appreciation of such circumstances falls within the competence of the Commission (e.g. Application No. 222/56 - X. v. the Federal Republic of Germany, Yearbook, Vol. ", p. 344, 351 and the Commission's decision of 22nd December, 1967, on the admissibility of application No. 2396/65); whereas it is, therefore, necessary for the Commission to examine whether the particular submissions by the applicant in this respect reveal any such circumstances as could validly have absolved the applicant from exhausting all domestic remedies at his disposal;

Whereas, firstly, the applicant has submitted that he was advised by several lawyers that a constitutional appeal would have no prospect of success; whereas in this respect the Commission has constantly held that advice by lawyers as to the possibility of success on appeal does not constitute a valid excuse for not exhausting a particular remedy (cf. application No. 1488/62 - X v. Belgium, Collection of Decisions, Vol. 13, p. 93, 96); whereas the Commission specifically refers to its decision in this sense of 22nd March, 1958, declaring inadmissible Application No. 272/57, which concerned the advice of a lawyer as to the possible result of a constitutional appeal in the Federal Republic of Germany;

Whereas the applicant has further submitted that about July 1964 he personally enquired at the Federal Constitutional Court and was told by a "high official" that his appeal would have no success; whereas the Federal Government has submitted in reply that no record of such a conversation existed; whereas the applicant at the oral hearing has elaborated his original statements and now maintains that the conversation concerned took place during a casual meeting in the Court building; whereas, even assuming that such a conversation occurred, the Commission finds that statements made by an unidentified official during the course of a casual meeting cannot absolve the applicant from the requirement to exhaust all available remedies;

Whereas the applicant also claims that having regard to the long time normally required for proceedings on a constitutional appeal, he could not have been expected to lodge such appeal; whereas the Federal Government has referred, by way of example, to several cases in which the Federal Constitutional Court has dealt with constitutional appeals of a similar kind within a year; and whereas the Federal Government, in particular, has pointed out that the applicant's previous constitutional appeals had been dealt with within that period; whereas it is true that the Commission in its jurisprudence has recognised that alleged delay of proceedings in the Federal Constitutional Court, if proved, could possibly excuse an applicant from the obligation to seize that Court; whereas, however, the Commission finds that in the present case, the applicant has failed also in this respect to show that the existence of any such circumstances which would validly have absolved him from the duty to avail himself of a constitutional appeal;

Whereas, finally, the applicant has referred to his bad state of health and financial distress at the time when a constitutional appeal could have been lodged; whereas he has also submitted that in November, 1962 and again subsequently, he had been told by his counsel, allegedly acting on information, or instruction, from a prosecution officer and a judge, that he would be prosecuted for defamation if he pursued the case in such a way that Dr. X., a Presiding Judge of the Federal Court,

became involved and that he therefore considered it tantamount to "suicide" if he lodged a constitutional appeal in which he set out details of the X. question; whereas the Federal Government has, however, referred to a number of letters written by the applicant to different courts, including a letter of 9th June, 1964, to the Federal Court, in which the applicant repeatedly requested the hearing of Dr. X. as a witness or stated that the latter was identical with an Assessor X. who had been in the service of the Nazi regime; whereas the Federal Government has submitted that such conduct both before and during the period when he could still lodge a constitutional appeal clearly indicates that he was not afraid of ventilating this opinion and therefore of bringing the matter before the Federal Constitutional Court;

Whereas the Commission finds that, even assuming that the applicant was threatened with prosecution if he pursued his case by way of a constitutional appeal, the applicant's activities during the period concerned shows that the reason he abstained from lodging a constitutional appeal was not because of any fear of repercussions; nor does the Commission consider that the applicant has shown that other elements in his personal situation amounted to such circumstances as could have absolved him from the need to exhaust this remedy;

Whereas, therefore, the condition as to the exhaustion of domestic remedies laid down in Articles 26 and 27, paragraph (3) (Art. 26, 27-3), of the Convention has not been complied with by the applicant as regards this part of the application;

For these reasons and without in any way prejudging the merits of the case, the Commission

1. Declares admissible the part of the application that relates to the length of the criminal proceedings against the applicant (Article 6, paragraph (1) (Art. 6-1), of the Convention);

2. Declares the remainder of the application inadmissible.