AS TO THE ADMISSIBILITY OF

Application No. 20161/92
by Eckhard Heinrich TAPPE
against Austria

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

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

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

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

Having regard to the application introduced on 13 March 1992 by Eckhard Heinrich TAPPE against Austria and registered on 16 June 1992 under file No. 20161/92;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a German citizen, born in 1948, is presently detained at the Stein prison in Krems (Austria).

Before the Commission he is represented by Mr. Albert Heiss, a lawyer practising in Innsbruck.

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

On 20 September 1989 the applicant was arrested by the French police in Nice in the company of S., a German citizen.

The police discovered in S.'s car traveller cheques and a firearm. A search of the applicant's car and hotel room was at first without result.

On 21 September 1989, the Interpol Office in Vienna transmitted to the French authorities a request of the investigating judge at the Innsbruck Regional Court (Landesgericht) to order the applicant's provisional detention. The applicant was suspected of having been involved in armed robberies committed in Austria in 1987.

Criminal investigations were also pending against the applicant

and S. in Germany.

On 22 September 1989 the Innsbruck Regional Court issued a warrant of arrest against the applicant on the grounds that there was a strong suspicion that together with accomplices he had committed aggravated robberies on 2 October 1987 in Seekirchen and on 14 October 1987 in St. Johann and an attempted aggravated robbery on 15 October 1987 in Saalfelden. The Regional Court pointed out that stolen traveller cheques had been found in the applicant's and S.'s possession and that on 6 October 1987 a witness had recognised the applicant as one of the offenders. According to the Regional Court there was also a danger of the applicant absconding and a danger of collusion.

On the same day the French authorities were informed of this warrant of arrest and of the intention of the Austrian Government to submit a formal request for the applicant's extradition through the diplomatic channel.

According to a procès-verbal of the German Federal Criminal Office (Bundeskriminalamt) of 4 October 1989, traveller cheques and a firearm had been discovered during a further search of the applicant's car carried out on 26 September 1989 in Nice by French policemen in the presence of two members of the Federal Criminal Office.

On 13 December 1989 the indictment chamber of the Court of Appeal of Aix-en-Provence authorised the applicant's extradition to Austria.

On 8 August 1991 the applicant was extradited to Austria.

On 9 August 1991 the Innsbruck Regional Court ordered the applicant's detention on remand on the grounds that there was a strong suspicion that he had committed armed robberies and that the danger of his absconding and the danger of collusion persisted.

On 12 September 1991 the applicant asked the Innsbruck Regional Court to order his release as he had been arrested on 20 September 1989 in France without any reasonable grounds. His arrest and following detention were therefore unlawful. Further, it was not justified to assume that there was a risk of collusion four years after the offences had been committed.

By a decision of 12 September 1991 the Review Chamber (Ratskammer) at the Innsbruck Regional Court decided that the applicant's detention be continued on the grounds that there was a strong suspicion that he had committed criminal offences, that there was a danger of his absconding and that it resulted from letters addressed to his girl-friend that there was also a risk of collusion. The Court refused to examine the question of the lawfulness of the applicant's arrest in France in 1989.

The applicant appealed against this decision.

On 16 October 1991 the Innsbruck Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal. It confirmed that there were serious grounds for suspecting the applicant of having committed criminal offences and that the risk of his absconding still persisted. However, with regard to the time which had elapsed since his arrest, the Court found that the risk of collusion could no longer be relied upon.

On 5 March 1992 a German undercover agent was heard as a witness before the police in Fürstenfeldbruck (Germany) and declared that he had seen the traveller cheques which the applicant and S. had in their possession and had later hidden in their cars.

On 28 October 1992 the Innsbruck Public Prosecutor filed an

indictment charging the applicant and S. with aggravated robbery and attempted aggravated robbery.

Thereafter the applicant challenged the presiding judge of the Court of Assizes (Geschworenengericht) on the ground that he had officiated as investigating judge for part of the preliminary proceedings. He maintained that the presiding judge was excluded by operation of law from participation at the trial. In fact, Article 68 para. 2 of the Code of Criminal Procedure (Srafprozessordnung) provided that " a person shall be disqualified (ausgeschlossen) from participating or deciding in the trial proceedings if he has acted as investigating judge in the same case ...".

On 28 December 1992 the President of the Innsbruck Regional Court decided that the presiding judge of the Court of Assizes was not precluded from involvement by Article 68 para. 2 of the Code of Criminal Procedure. The various acts carried out by him prior to the trial in replacement of the investigating judge consisted in the transmission of documents and the fixing of expert fees and could not be considered as the exercise of functions of an investigating judge excluding him from participation.

On 15 April 1993 the German Federal Ministry of the Interior refused to authorise the German undercover agent to disclose his identity and to appear as a witness before the Innsbruck Regional Court for reasons of his personal safety.

At a hearing of 24 June 1993 before the Court of Assizes the applicant's defence counsel contested the reading out of the German undercover agent's declaration at the trial.

On 30 June and 1 July 1993 the trial was held before the Court of Assizes at the Innsbruck Regional Court, sitting with three judges and eight jurors. On 1 July 1993 the jury returned a verdict by which the applicant and his accomplice S. were found guilty of two aggravated robberies committed on 2 October 1987 in Seekirchen and on 14 October 1987 in St. Johann and of one attempted aggravated robbery committed on 15 October 1987 in Saalfelden.

The members of the jury answered the questions as follows:

"Main question No. 1

Is S. guilty of having taken on 2 October 1987 from H. Z. as the responsible person of the savings bank (Raiffeisenkasse) in Seekirchen am Wallersee money in an amount of 2 352 000 AS as well as 4 golden bracelets of a value of 6 300 AS in order to retain unlawful possession of these items for himself or a third person, offence intentionally committed in association (Section 12 of the Criminal Code) with Heinrich Tappe, as a member of a criminal association with the participation (Section 12 of the Criminal Code) of another member of a criminal association, by using threats with actual danger for the physical integrity and life (Section 89 of the Criminal Code) and by using arms (so-called pump guns)?

(eight) yes

Main question No. 2

Is Heinrich Tappe guilty of having taken from H. Z. as the responsible person of the savings bank (Raiffeisenkasse) in Seekirchen am Wallersee money in an amount of 2 352 000 AS as well as 4 golden bracelets of a value of 6 300 AS in order to retain unlawful possession of these items for himself or a third person, offence intentionally committed

in association (Section 12 of the Criminal Code) with S., as a member of a criminal association with the participation (Section 12 of the Criminal Code) of another member of a criminal association, by using threats with actual danger for the physical integrity and life (Section 89 of the Criminal Code) and by using arms (so-called pump guns)?

7 (seven) yes, 1 (one) no"

The same questions were put to the members of the jury with regard to a robbery committed on 16 July 1987 in St. Johann in Tirol and with regard to an attempted robbery committed on 15 October 1987 in Saalfelden. The replies of the jury were identical.

The following reasons for the jury's verdict were stated in the memorandum (Niederschrift) on the jury's deliberations, prepared in accordance with Section 331 para. 3 of the Code of Criminal Procedure:

With regard to S.

"Robberies committed the same way as in Germany. Possession of part of the robbed items. Forgery of documents. Possession of VW bus. Fleeing to Brazil. Testimony of policeman."

With regard to the applicant

"Possession of part of the robbed items. Acquisition of the VW bus. Letters to his girl-friend. Rent of safe deposits containing forged documents. Contradictions concerning his alibi 2 October 1987. Close friendship with S."

On the basis of this verdict the Court sentenced the applicant to 14 years' and S. to 12 years' imprisonment, taking into account the judgment of the Nice Court (tribunal de grande instance) of 6 December 1989 by which S. had been sentenced to two years' imprisonment.

The judgment of the Innsbruck Regional Court was founded inter alia on the testimony of witnesses, including two members of the German Federal Criminal Office who had participated at the search of the applicant's car, an expert opinion as well as on documentary evidence.

The applicant and S. filed a plea of nullity (Nichtigkeits-beschwerde) and an appeal (Berufung) against sentence to the Supreme Court (Oberster Gerichtshof).

On 11 November 1993 the applicant lodged an application for his personal attendance before the Supreme Court.

On 15 February 1994 the Supreme Court rejected this application on the ground that the law did not provide for the personal attendance of an accused at the hearing on the plea of nullity and that the applicant's presence did not appear necessary in the interests of the proper administration of justice or for other reasons. Indeed, no concrete indications suggesting a need for the applicant's personal attendance at the hearing on the appeal lodged solely for his benefit were apparent from the court files or from his application which, in any event, had been filed out of time.

On 17 May 1994 the Supreme Court rejected the applicant's plea of nullity after a hearing at which the applicant was represented by defence counsel.

With regard to the applicant's complaint that prior to the trial the presiding judge had exercised functions of an investigating judge, the Supreme Court pointed out that the applicant had failed to challenge the presiding judge at the beginning of the trial. In

addition, the Supreme Court considered that in any event the applicant's complaint was ill-founded. The previous activities of the presiding judge, consisting in the transmission of documents, could not be considered as preliminary inquiries, such as the investigation of criminal offences or the examination of criminal charges or facts which had been carried out by the investigating judge who was in charge of the case.

Insofar as the applicant challenged the reading out of the declarations of the German undercover agent, the Supreme Court noted that the applicant had failed to raise this issue at the hearing of 30 June 1993 before the Innsbruck Regional Court and did not allow this complaint.

As to the jury's verdict, the Supreme Court considered that the difference in the number of votes on the question of the applicant's and his accomplice's guilt was not in itself contradictory. The Supreme Court recalled that the verdict of a jury, unlike the judgments of a single judge or a district court sitting with two lay assessors (Schöffengericht), did not require any reasoning. Moreover, there was no indication that the members of the jury had not correctly understood the questions or had disregarded procedural rules or substantive criminal law. The evaluation of the evidence and in particular the appreciation of the credibility of witnesses was exclusively within the competence of the lay judges. The applicant's complaints were an inadmissible attempt to challenge the findings of fact and the assessment of evidence made by the first instance court.

On the applicant's appeal, the Supreme Court reduced his sentence to 12 years' imprisonment. It considered that the applicant's previous convictions in Germany in 1979 and in Spain in 1971 did not meet the legal conditions for considering him a recidivist. The Court also had regard to the fact that the criminal proceedings were pending since 1989.

On 29 September 1993 the applicant lodged a constitutional appeal which was rejected by the Constitutional Court (Verfassungsgerichtshof) on 29 November 1993 for reasons of competence.

COMPLAINTS

1. The applicant complains under Article 5 paras. 1 (c), 3 and 4 of the Convention that his arrest in France was illegally requested by the Austrian authorities in the absence of any reasonable ground for suspecting him of having committed a criminal offence.

The Innsbruck Regional Court issued an unlawful and arbitrary warrant of arrest on 22 September 1989. Neither did the description of a witness correspond to his person nor did the police find traveller cheques in his possession.

The applicant also complains that the Austrian courts refused to examine the lawfulness of his arrest in France.

2. The applicant further complains of his conviction and sentence and the proceedings before the Austrian courts. He alleges a violation of Article 6 of the Convention in several respects.

a) His first complaint concerns the alleged lack of impartiality of the presiding judge of the first instance court. The applicant maintains that this judge had acted during the preliminary inquiries as an investigating judge and later as a trial judge in the same case. He had consulted the case-file and had consequently acquired, before the trial, a particularly detailed knowledge of the case. He thus had a predetermined view on his guilt and should have been excluded from participating at the trial. Furthermore, the presiding judge himself had first considered himself as being precluded from taking part in the

case. The applicant also alleges that the presiding judge had exercised a negative influence on the jury.

b) The applicant next complains that no reasons were given for the jury's verdict and that he was consequently deprived of the possibility of effectively preparing an appeal as he did not know which consideration led the jury to affirm his guilt. He furthermore complains that the votes of the jury were contradictory. He refers in this context to the fact that the jury found him guilty by a seven to one majority whereas his accomplice was found guilty for the same offences by an unanimous vote.

c) The applicant also complains that his sentence and conviction were based on an erroneous evaluation of the evidence. The traveller cheques had been hidden in his car by a German undercover agent before they were found by the police. They have never been submitted to the Regional Court as evidence.

d) The applicant complains that the proceedings before the Innsbruck Regional Court were not conducted in public since the main door of the court room was locked and only a small side-entrance openend.

e) The applicant further complains that the Supreme Court decided on his plea of nullity and his appeal in his absence.

f) The applicant complains that the evidence against him was essentially based on the false declarations of a German undercover agent, according to him a well-known criminal, who was paid by the Austrian Federal Ministry of Justice. The undercover agent did not give evidence to the court in person. His statements were read out at the trial, preventing the defence from questioning him. The Austrian police officers who were heard by the Innsbruck Regional Court, invoked their professional secrecy and refused to answer questions of the defence concerning the credibility of the undercover agent.

3. The applicant finally complains that there was no appeal against the decision by which the President of the Innsbruck Regional Court refused to exclude the presiding judge from participating at the trial. The applicant alleges in this respect a violation of Article 13 of the Convention.

THE LAW

1. The applicant complains that his arrest and detention by the French authorities were illegal and contrary to article 5 (Art. 5) of the Convention.

The Commission notes that the applicant was arrested by the French police on 20 September 1989, kept first in police custody and thereafter in detention pending extradition until 8 August 1991. It was for the French authorities to ensure whether the set of facts underlying the offences charged constituted a valid basis for the applicant's detention and extradition. The Commission therefore finds that, as far as Article 5 (Art. 5) of the Convention is concerned, the French Government are exclusively responsible under the Convention for the applicant's arrest and detention and that the applicant's deprivation of liberty in France can in no way engage the responsibility of the Austrian Government under this provision. However, the present application is only directed against Austria.

It follows that this part of the application is incompatible ratione personae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains of his conviction and sentence and under Article 6 (Art. 6) of the Convention of the unfairness of the criminal proceedings which led to his conviction.

Article 6 (Art. 6) of the Convention, insofar as is relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> c. to defend himself in person ...
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

Insofar as the applicant complains about the decisions of the courts, the Commission recalls that under Article 19 (Art. 19) of the Convention its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers on this point to its established case-law (see e.g. No. 21283/93, Dec. 5.4.94, D.R. 77-A pp. 81, 82 and 88).

The applicant has referred not only to Article 6 para. 1 (Art. 6-1) of the Convention but also to para. 3 of this Article. In this respect the Commission reiterates that the requirements of para. 3 of Article 6 (Art. 6-3) are specific aspects of the general concept of a fair hearing guaranteed in para. 1 of the same Article (cf., e.g., Eur. Court H.R., Lüdi judgment of 15 June 1992, Series A no. 238, p. 20, para. 43). The Commission will therefore examine the applicant's complaints from the point of view of these two provisions in conjunction.

a) The applicant's first complains that he was not given a fair hearing by an impartial tribunal contrary to Article 6 para. 1 (Art. 6-1) of the Convention. He contends that the presiding judge had first exercised the functions of an investigating judge and later acted as trial judge in his case. The presiding judge's influence on the jury was prejudicial to his case.

As regards the substance of this complaint, the Commission recalls that the existence of impartiality for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (Eur. Court H.R., Hauschildt judgment of 24 May 1989, Series A no. 154, p. 21, para. 46; Padovani judgment of 26 February 1993, Series A no. 257-B, p. 20, para. 25).

With regard to the personal impartiality of the presiding judge of the Innsbruck Regional Court and in particular to the applicant's complaint that the presiding judge has exercised a negative influence

on the jury, the Commission finds that the applicant does not adduce any argument in support of his allegation.

As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. It follows that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the opinion of the accused is important but not decisive. What is decisive is whether his fear can be regarded as objectively justified (Padovani judgment, loc. cit., p. 20, para. 27).

The mere fact that a judge has also made pre-trial decisions in a case, including those concerning detention on remand, cannot be held as justifying fears concerning his impartiality, but special circumstances may, in a given case, be such as to warrant a different conclusion" (Hauschildt judgment, loc. cit., p. 22, paras. 50-52).

In the present case the question arises whether or not the presiding judge of the Innsbruck Regional Court, when replacing the investigating judge, did have to answer the same questions as those which were decisive for the Court's judgment, namely whether the evidence placed before the Court was sufficient to find the applicant guilty of the offences he was charged with and to convict him of these offences (cf. No. 13157/87, Dec. 27.5.91, D.R. 70 p. 167). However, as appears from the decision of the President of the Innsbruck Regional Court of 28 December 1992 and the judgment of the Supreme Court of 17 May 1994, the acts carried out by the presiding judge of the Court of Assizes during the preliminary proceedings consisted in the mere transmission of documents and the fixing of expert fees. Accordingly, the Commission considers that the nature and extent of the pre-trial measures taken by the judge were so limited that any fears the applicant may have had as to the judge's impartiality were not objectively justified (cf. Eur Court H.R., Fey judgment of 24 February 1993, Series A no. 255, pp. 11-14, paras. 25-36).

Consequently, in the circumstances of the present case, the Commission cannot find that the applicant's fear as to the impartiality of the presiding judge can be regarded as objectively justified and, therefore, finds no appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention in this respect.

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

b) The applicant further complains that no sufficient reasons are stated in the Regional Court's judgment as to the verdict of the members of the jury and consequently an effective control of the judgment was impossible. Referring to the circumstance that the jury found him guilty by a seven to one majority whereas its verdict was unanimous with regard to his accomplice shows, in the applicant's opinion, that the jury's verdict was also inconsistent.

The Commission recalls that national courts must indicate with sufficient clarity the grounds on which they base their decision (Eur. H.R., Hadjianastassiou judgment of 16 December 1992, Series A no. 252, p. 16, para. 33). The extent to which reasons need to be given depends on the circumstances of the case (No. 15957/90, Dec. 30.3.92, D.R. 72 p. 195).

The Commission considers that the requirement that reasons be given must be qualified by the specific features of the procedure before the Court of Assizes at the Innsbruck Regional Court where

jurors are not required to give reasons for their findings as this is excluded by Section 342 of the Code of Criminal Procedure.

While the jury may reply only by "yes" or "no" to the questions put by the presiding judge, these questions, which were very precise in the applicant's case, formed the framework for the jury's verdict. The questions and answers given by the jury were reproduced in the judgment of the Innsbruck Regional Court of 1 July 1993. The Commission further notes that under Section 331 para. 3 of the Austrian Code of Criminal Procedure the jury's spokesman has to indicate in writing the jury's considerations which were decisive for their answers to the questions put to them by the Court. This provision was complied with in the applicant's case and the jury's notes were available to him. The Commission also refers to the Supreme Court's findings in this case to the effect that the jury's verdict satisfied the legal requirements as to the reasoning. The Commission finds that the questions put to the jury together with the jury's notes, in spite of the brevity of the jury's replies, were adequate and enabled the applicant, in fact, to submit detailed grounds for his plea of nullity.

The Commission considers that in these circumstances there is no appearance of the proceedings having been unfair and contrary to Article 6 para. 1 (Art. 6-1) of the Convention.

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

c) The applicant further complains that his conviction was based on illegal evidence and an erroneous evaluation of evidence.

The Commission stresses that the admissibility of evidence and its probative value are primarily governed by the rules of domestic law. The Convention organs' task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was submitted, were fair (Eur. Court H.R., Lüdi judgment, loc. cit., p. 20, para. 43). The Commission is therefore not required to decide on the question of whether the domestic courts correctly assessed the evidence (see, e.g., No. 12013/86, Dec. 10.3.89, D.R. 59 pp. 100, 111).

In the present case there is no indication that the proceedings were unfairly conducted or that the applicant, who was represented by a lawyer, could not adduce any evidence which he regarded as being pertinent, or to put forward any argument he considered relevant. Moreover, the Commission notes that the Supreme Court undertook a detailed analysis of the applicant's complaints, addressing the issue of the assessment of evidence by the first instance court. It concluded that the lower court had not overstepped the limits of appreciation of evidence or established facts in a arbitrary manner. The Commission does not consider these conclusions arbitrary or otherwise unfair.

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

d) The applicant also alleges that the public was excluded from the first instance trial since the main door of the court room was locked.

However, the Commission recalls that under the terms of Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. This condition is not met by the mere fact that an applicant has submitted his case to the various competent courts. It recalls that domestic remedies within the meaning of Article 26 (Art. 26) of the Convention have only been exhausted if, before the highest domestic body, the applicant has submitted, at least in substance, the complaint he puts before the

Commission, even without particular reference to the Convention (cf., e.g., No. 6861/75, Dec. 14.7.75, D.R. 3 p. 147; Nos. 5573/72 and 5670/72, Dec. 16.7.76, D.R. 7 p. 8; No. 7299/75 and 7496/76, Dec. 4.12.79, D.R. 18 p. 5; No. 12164/86, Dec. 12.10.88, D.R. 58 p. 63).

In this case the applicant failed to raise the issues mentioned above in his plea of nullity before the Supreme Court. Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from raising his complaints in the proceedings referred to.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and this part of the application must accordingly be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

e) The applicant next complains that he could not attend the public hearing before the Supreme Court.

As regards the applicant's plea of nullity, the Commission points out that under Austrian law the Supreme Court, in dealing with nullity proceedings, is primarily concerned with questions of law that arise in regard to the conduct of the trial and other matters. While the Supreme Court is bound by the findings of fact made by lower courts, it may be required to examine whether a motion to take evidence has been properly refused by the trial court and whether the excluded facts might have influenced the jury's verdict. If the accused is represented by counsel, as in the present case, neither paragraph 1 nor paragraph 3 c) of Article 6 (Art. 6-3-c) require his presence at such proceedings (see Eur. Court H.R., Kremzow judgment of 21 September 1993, Series A no. 268-B, p. 44, para. 63).

As regards the appeal proceedings before the Supreme Court, it is essential that the appellant be present during the hearing of the appeal and afforded the opportunity to participate in it together with his counsel, if the court is called upon to examine whether the sentence should be increased and thereby has to assess not only the appellant's character and state of mind at the time of the offence but also his motive (Kremzow judgment, loc. cit., p. 45, para. 67).

In the present case, however, there was no question of increasing the applicant's sentence. Moreover, the grounds of appeal submitted by the applicant, did not give rise to an assessment of his motive or of his character or state of mind at the time of the offence. The Supreme Court reduced his sentence on the ground that the legal conditions for considering him a recidivist were not satisfied and on account of the length of the criminal proceedings.

In these circumstances, the Commission finds that the applicant's presence at the Supreme Court's hearing was not required by Article 6 para. 1 or para. 3 (c) (Art. 6-1, 6-3-c) of the Convention. There is, thus, no appearance of a violation of the applicant's right to a fair hearing in this respect.

f) The applicant complains that the declaration of the undercover agent was read out at the trial and that he did not have the possibility to question the undercover agent in person on his incriminating statement.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 6 (Art. 6) of the Convention as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The Commission observes that the Supreme Court had declared inadmissible the applicant's complaint at issue on the ground that the applicant's lawyer failed to raise this matter at the beginning of the hearing of 30 June 1993. The Commission recalls its constant jurisprudence according to which there is no exhaustion of domestic remedies where a domestic law appeal is not admitted because of a procedural mistake (cf. No. 10107/82, Dec. 12.7.84, D.R. 38 p. 90; No. 23256/94, Dec. 29.6.94, D.R. 78-B p. 139).

It follows that the applicant has not complied with the requirement as to the exhaustion of domestic remedies contained in Article 26 (Art. 26) of the Convention.

This part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. Under Article 13 (Art. 13) of the Convention the applicant lastly complains that there was no appeal against the decision of 28 December 1992 by which the President of the Innsbruck Regional Court decided not to exclude the presiding judge from the applicant's trial.

Article 13 (Art. 13) provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls that the requirements of Article 13 (Art. 13) of the Convention are less strict than, and accordingly absorbed by Article 6 (Art. 6) of the Convention (see Eur. Court H.R., Philis judgment of 27 August 1991, Series A no. 209, p. 23, para. 67). It follows that no separate issue arises under Article 13 (Art. 13) of the Convention.

Moreover, the Commission observes that the applicant had made use of the possibility of raising this matter before the Supreme Court, an appellate body with jurisdiction to quash or modify the decisions of the lower courts. There is no indication on the facts as presented in this case that this avenue of appeal is not an effective remedy for the purposes of Article 13 (Art. 13) of the Convention.

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

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)