THE FACTS

The facts of the case may be summarised as follows:

A.1. General Background

The applicant is an Austrian citizen born in 1914 and resident in Vienna. He has lodged with the Commission a previous application (No. 4517/70) (See Collection of Decisions, Vol. No. 38, pp. 90 and 99) relating to criminal proceedings against him. These proceedings concerned a number of charges brought in 1959 against the applicant and several other persons, for having defrauded the exchequer by fraudulently obtaining reimbursement of turnover tax to the extent of several million schillings. The indictment was filed with the Regional Criminal Court in Vienna on 17 March 1964. It contained altogether ten charges against the applicant who was accused of

a) fraud by improperly obtaining turnover tax refunds for the sham export of various goods (points I/6, I/7, I/8a, I/8b and I/9 of the indictment);
b) attempted fraud, by attempting improperly to obtain turnover tax refunds for the sham export of various goods (points II/1, II/2a, II/2b and II/3 of the indictment);
c) attempt to aid and abet defamation (Article 9 and 209 StG) (point V of the indictment).

2. Proceedings on two further charges which were not included in the indictment but were the subject matter of investigations were discontinued in August and September 1964; viz a) the charge of having been an accomplice in an offence of misuse of official powers within the meaning of Articles 5 and 101 of the Criminal Code and b) the charge of having made defamatory remarks about a lawyer and the Vice-Chancellor of Austria.

On 16 September 1964, the Vienna Court decided, upon an application by the Public Prosecutor's Office to discontinue, in accordance with Article 109 StPO, the proceedings against the applicant as regards the first-mentioned charges. The discontinuance was made subject to the reservation of the Public Prosecutor's Office under Article 34 (2) of the Code of Criminal Procedure to prosecute at a later date. The two accused in this case, Fuchshuber and Rafael, were later acquitted for lack of evidence against them. The second charge was similarly discontinued on 28 September 1964 in accordance with Articles 34 (2) and 363 (1) of the Code of Criminal Procedure.

3. The main trial against the applicant started before the Vienna Court in November 1964 but the proceedings were adjourned in June 1965 and the case was referred back to the Investigating Judge. On 8 March 1966 the Regional Criminal Court of Vienna decided that the proceedings against the applicant for fraud and attempted fraud as set out under points I/6, II/1, 2a, 2b and 3 of the indictment should be provisionally discontinued in accordance with Articles 109 and 34 (2) of the Code of Criminal Procedure. The charge under point V of the indictment was made the subject of separate proceedings. On 26 April 1967 the applicant and his co-accused were acquitted from this charge for lack of evidence against them. As regards the applicant this judgment became final.

4. The trial concerning the remaining charges (see points I/7, I/8a and b and I/9 of the indictment) opened on 4 December 1967 and continued until 2 July 1968. However, on 10 June 1968, at the Public Prosecutor's request, the charges set out under points I/8b and I/9 of the indictment were severed from the remainder.

5. On 2 July 1968, the Regional Criminal Court also severed the charge under point I/8a and convicted the applicant of fraud with regard to the improper obtaining of turnover tax refunds for the sham export of

running gears, as set out under point I/7 of the indictment of 17 March 1964. He was sentenced to three years' severe imprisonment. The written judgment comprising 80 pages, the applicant first criticised generally the terms of the judgment and the manner in which it had been drafted, as well as the fact that, under the relevant provision of the Austrian Code of Criminal Procedure, he had only had two weeks to submit his plea whereas it had taken the Court more than eight months to prepare the judgment. In this connection the applicant also invoked Article 6 (3) (b) of the Convention.

The applicant then stated his grounds of nullity and, first, relied on Article 281 (1) Nos. 3 and 4 of the Code of Criminal Procedure alleging that the Court should not have taken certain evidence under oath. He next challenged the Court's findings of fact invoking Article 281 (1), No. 5 of the Code of Criminal Procedure pointing to many passages in the judgment where the Court's findings, in his opinion, were either unclear or incomplete, or contradictory in themselves, or based on insufficient reasoning, or contrary to the contents of the case-file.

Finally, relying on Article 281 (1), No. 4 of the Code of Criminal Procedure and Article 6 (2) and (3) (b), (c) and (d) of the Convention, the applicant criticised the Court's refusal to hear certain evidence offered by him. He further alleged that this inter alia deprived him of his right to be presumed innocent until proved guilty.

On 16 June 1971 the Supreme Court rejected the plea of nullity insofar as the applicant had alleged violations of procedural law, and, on 4 November 1971 it rejected the appeal and the plea of nullity concerning the alleged violations of substantive law.

6. The Commission considered the admissibility of the previous application (No. 4517/70) on 19 December 1970. At that time the applicant's appeal and plea of nullity to the Supreme Court were still pending. By partial decision, it rejected all the applicant's complaints except that under Article 6 (1) of the Convention, relating to the length of the criminal proceedings. In particular, it found that with regard to the complaints concerning the alleged deprival of his right to a fair hearing by an independent and impartial tribunal in accordance with Article 6 (6.1, 6.2, 6.3, b, c, d) of the Convention, an alleged breach of his right to respect for private and family life and his correspondence, or an alleged inhuman treatment, domestic remedies had not been exhausted (Article 27 (3), of the Convention).
On 14 July 1971, the Commission declared admissible the applicant's only remaining complaint, namely that Article 6 (1) of the Convention had been violated by reason of the length of the criminal proceedings against him.

7. After unsuccessful attempts to reach a friendly settlement, the Commission adopted its report (Article 31) on 8 February 1973.

B. Complaints included in the present application

In the present application, the applicant again submits complaints relating to the above proceedings.

1. The applicant complains once more of the length of the criminal proceedings instituted against him. Referring to the statement made on 14 July 1971 at the hearing on admissibility by the representative of the Austrian Government (1), the applicant alleges that the authorities have failed to discontinue certain proceedings with regard to which preliminary investigations had been opened against him.

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(1) "I should inform the Commission that in respect of all the offenses involving the applicant in which severance occurred the Public Prosecutor's Office intends to discontinue (...) all further legal proceedings against the applicant when the proceedings now pending in the Supreme Court are concluded and its decision becomes final. I have

been authorised by the Public Prosecutor's Office to make this announcement here."

1.1 The applicant stresses that he had originally been charged in the indictment on ten counts. He was later (2 July 1968) convicted on one charge of fraud (point I/7 of the indictment) and (26 April 1967) acquitted on another point (point V). The proceedings against him on charges of fraud as set under points I/8a, I/8b and I/9 have been formally discontinued on 26 May 1972 by decision of the Regional Court. The applicant indicates however that the prosecution on charges of fraud and attempted fraud as set out under points I/6, II/1, 2a , 2b and 3 of the indictment, have only been provisionally discontinued on 8 March 1966 in accordance with Article 109 of the Code of Criminal Procedure, subject to a reservation of the Public Prosecutor's Office under Article 34 (2) of the same Code to prosecute at a later date (see A.3 above). The applicant submits that prosecution could be reopened at any time on these charges, since the proceedings have not been formally discontinued.

1.2 The applicant also complains that the proceedings have not been expressly terminated with regard to the separate charge brought against him of having been an accomplice in an offence of misuse of official powers. As stated above (see A.2.) the prosecution against him had only been provisionally discontinued (Article 109 and 34 (2) of the Code of Criminal Procedure). The applicant submits in this respect that his situation is not affected by the fact that his co-accused and, in particular, the civil servant Fuchshuber, had been acquitted on this charge of misuse of official powers by judgment of the Regional Court on 26 April 1967.

1.3 The applicant finally complains that, as a result and evidence of these pending proceedings, he is still subject to travel restrictions and his sister would still be bound, as a surety, by a recognisance she entered into in 1965, to pay 50,000 schillings in the event that the applicant, released on bail, would fail to appear in court. By decision of the Regional Court of 4 July 1968, the applicant has been given complete freedom to travel in Austria and abroad, provided that he would report to the judge when summoned within 8 days if in Austria, 30 days abroad.

The applicant indicated that on 23 June 1972 he orally asked Judge Koubek to be freed from these restrictions (bail and travel restrictions) but that the judge rejected this.

2. The applicant again submits various complaints under Article 6, which had been rejected by the Commission on 19 December 1970 for non-exhaustion of domestic remedies.

2.1 The Vienna Regional Criminal Court has not been an independent and impartial tribunal (Article 6 (1)) of the Convention for the following reasons:

2.1.1 Under Article 170 of the Code of Criminal Procedure, the Court should not have taken certain evidence under oath, especially from persons the applicant had requested to be prosecuted for having allegedly committed "investigation crimes" and misuse of official powers.

2.1.2 In many passages, the Court's findings are either unclear or incomplete, or contradictory in themselves, or based on insufficient reasoning, or contrary to the contents of the case-file.

2.2.1 The Regional Court has violated the principle of presumption of innocence (Article 6 (2) of the Convention) when stating in its reasoning that the applicant was not reliable (glaubwürdig). He submits that the Court has considered his guilt as a "thesis" and rejected all counter-submissions ("antitheses").

2.2.2 Furthermore, the applicant complains that his guilt was not only presumed but alleged in the various warrants of arrest, letters rogatory, and statements made before by Austrian officials in Switzerland and the Federal Republic of Germany. These documents contained false information designed for the misleading of the foreign authorities. In this respect, he specially refers to the warrant of arrest in view of the extradition issued on 21 February 1961 which reads, inter alia: ".... in order to avoid an examination by the fiscal authorities, the various co-accused decided to bribe the accountant of the Tax Office. This bribery has been successful ...". The applicant submits that his guilt was put forward in a very affirmative way, although proceedings on this charge were lasted discontinued.

2.3 The Regional Court has refused to hear certain evidence offered by the applicant who alleges a violation of Article 6, paragraph (3) (d) in this respect. On 17 and 18 June 1968, being the 78th and 79th day of the trial, counsel for the applicant's defence made substantial application for the taking of further evidence in connection with the only remaining charges at that time, namely those under points I/7 and I/8a of the indictment. However, on 2 July 1968 the Court also severed the charge under point I/8a, rejected the 34 applications to take evidence as being irrelevant, and convicted the applicant of fraud with regard to the remaining point (I/7) of the indictment.

The applicant complained of this Court's refusal to hear further evidence, in the introductory part of his plea of nullity. He referred to Article 281, paragraph 4 of the Code of Criminal Procedure.

After the Regional Court, the Supreme Court repeated that the obligation to hear evidence was in no way unlimited and that a Court may refuse to summon witnesses whose statements could not be of any relevance in the case. The Supreme Court shared the views of the Regional Court in finding that the application for the taking of further evidence was dilatory.

2.4 The applicant complains that he did not "have adequate time and facilities to prepare his defence" and alleges a violation of Article 6 (3) (b) of the Convention. He points out that under the relevant provision of Austrian law (Article 285 StPO) he had only two weeks to submit his plea of nullity whereas it had taken the Court more than eight months to prepare the judgment comprising 367 pages and based on 30 volumes of evidence.

He adds that his lawyer was prevented from examining all necessary documents at the same time in order to compare them. He submits that his lawyer should have been given opportunities to make himself acquainted with the reasoning of the Regional Court before the judgment was served.

The applicant raised this complaint in his plea of nullity, alleging a breach of Article 6 (3) (b) of the Convention. The Supreme Court rejected it as follows:

Article 6, paragraph 3 (b) is not a "self-executing provision". The 14 days' period running from the service of the judgment is a preclusion period; the courts are not competent to prorogate it in any way. The law does not provide a right to enquire into the Court's reasoning before the service of the judgment.

3. The applicant heavily criticises the judgment of the Supreme Court. He submits that this Court does not constitute an independent and impartial tribunal, since it appears to be bound by the Attorney General's (Generalprokurator) submissions. In this respect the applicant stresses that on 5 May 1971, when drafting his submissions concerning the applicant's appeal and plea of nullity based on alleged

violations of substantive law, the Attorney General mentioned that the plea of nullity had "already been rejected on..." insofar as violation of the procedural law was at issue. The application points out that the Supreme Court rejected his plea of nullity based on alleged violations of procedural law only on 16 June 1971. He therefore comes to the conclusion that the Supreme Court is bound by the Attorney General's instructions" since he knows in advance which judgment the court will pronounce.

The applicant alleges a violation of Article 6 (1) of the Convention in this respect.

4. The applicant complains that his right for private and family life and his correspondence has been violated by reason of the fact that, during his detention on remand, the Investigating Judge had communicated the contents of his correspondence to his co-accused and thus caused him damage. The applicant alleges in this respect violations of Article 8 (1).

5. The applicant complains under Article 3 of the length of the proceedings, of the partiality of the judges, of the prosecuting authorities' refusal to institute criminal proceedings against a judge and governmental official.

6. The applicant finally complains under Article 13 that he had no effective remedy against violations committed by the judges of the Vienna Regional Criminal Court. An appeal to the Supreme Court could not have been such remedy, since this tribunal appears to be bound by the Public Prosecutor's conclusions.

THE LAW

1. The applicant again complains of the length of criminal proceedings instituted against him.

He submits that he is still subject to criminal prosecution because the authorities and courts had failed to discontinue certain proceedings with regard to which preliminary investigations had been opened against him, but no decision had been taken at a later stage.

a) It is indeed true that proceedings against the applicant on various charges of fraud and attempted fraud (points I/6, 1, 2a, 2b and 3 in the indictment of 17 March 1964) had only been provisionally discontinued on 8 March 1966, subject to a reservation by the Public Prosecutor's Office to prosecute at a later date (case number 6 bvr 573/62). Further prosecution on all such charges have, however, been barred by operation of Article 363 (1) Section 3 of the Code of Criminal Procedure, three months after the final decision of the Supreme Court on 4 November 1971.

b) Proceedings against the applicant on the charge of having been an accomplice in an offence of misuse of official powers had likewise been provisionally discontinued on 16 September 1964 (case number 26 DVR 2287/64). According to a letter from the Public Prosecutor to the Regional Court, dated 17 October 1972, further proceedings on this charge have also been discontinued by operation of Article 363 (1) Section 3 of the Code of Criminal Procedure.

c) With regard to the so-called "travel restrictions", the applicant who is very often abroad, failed to show that the last court's decision in this respect - that of 4 July 1968 - is still valid. In particular, his alleged talk with Judge Koubek on 23 June 1972 took place prior to the Public Prosecutor's letter of 17 October 1972 in which it was stated that further proceedings against the applicant in the above charges (case numbers 6 bVR 5730/62 and dVR 2287/64) had been discontinued.

d) With regard to the surety by his sister to an amount of 50,000 schillings for his not absconding, Article 195, paragraph 2 of the Code of Criminal Procedure provides that the surety's recognisance expires as soon as the criminal proceedings are closed by a final decision or a decision to discontinue criminal prosecution.

The applicant failed to indicate that, in contravention of this provision, the surety's undertaking had not expired.

The Commission concludes that the applicant's situation is not adversely affected as no criminal charges are pending against him since 4 November 1971, when the Supreme Court confirmed his conviction and sentence.

On this point the application thus contains no relevant new element and is therefore essentially the same as a previous application (No. 4517/70) within the meaning of Article 27 paragraph (1) (b) (Art. 27-1-b), of the Convention.

2. The applicant first complains that the Court refused to hear certain evidence offered by him.

a) According to the Commission's constant jurisprudence, Article 6 (3) (d) (Art. 6-3-d) of the Convention is intended to place the accused on an equal footing with the prosecutor as regards the hearing of witnesses but not to give him a right to call witnesses without restriction.

The competent judicial authorities accordingly remain free, provided that they comply with the provisions of the Convention, to establish whether the hearing of witnesses can contribute to the finding of the truth and, if not, to decide against calling such witnesses.

In the present case the Regional Court, in refusing to hear the witnesses and experts in question, and the Supreme Court in confirming this decision, found that some evidence proposed did not concern the facts of the case, some had already been heard, some referred to counts of the indictment which had already been separated, some was "hearsay" evidence and some concentrated on facts which, even if proved true, would not establish the applicant's innocence. Most of this evidence, at any rate, could, and should, have been proposed in the course of the proceedings two or three years earlier.

The Commission recalls that extensive measures had been taken at an earlier stage of the proceedings in order to summon and hear witnesses proposed by the applicant both in Austria and abroad.

It notes that the Court made a very detailed analysis of the applicant's proposals for new evidence and is satisfied with the above reasons put forward by the judge when refusing to hear this new evidence. The Commission therefore finds that the applicant's complaint under Article 6 (3) (d) (Art. 6-3-d) is manifestly ill-founded under Article 27 paragraph (2) (Art. 27-2), of the Convention.

b) The applicant complains that Article 6 (2) (Art. 6-2) of the Convention has been violated two different ways, in the course of the preliminary investigations and before the Regional Court:

(i) in that the warrants of arrest against him presented the charges as if they were proved.

In this respect, according to the Commission's previous findings (see report of the Commission in application No. 788/63, Austria against Italy, Vol. VI, p. 782), Article 6, paragraph 2 (Art. 6-2) is primarily concerned with the spirit in which the judges carry out their task. It may be asked however whether the authorities' behaviour, during the preliminary investigations could not, in certain circumstances, amount

to a violation of this provision, namely if the Court subsequently accept as conclusive evidence, without further evaluation, any admission unlawfully obtained.

The problem does not arise in this case; even if one could sustain that various warrants of arrest did present the charges as if they were proved, this does not affect the applicant's position before the courts, since proceedings on these charges were discontinued or culminated in his acquittal.

This complaint is therefore manifestly ill-founded under Article 27 paragraph (2) (Art. 27-2), of the Convention.

(ii) in that the Regional Court stated in its reasoning that he was not reliable.

Article 6 (2) (Art. 6-2) of the Convention requires basically that court judges in fulfilling their duties should not start with the assumption that the accused committed the act with which he is charged. A careful examination of the Regional Court's decision does not disclose any violation of this principle. In particular, the fact that the Court did not follow the applicant's submissions, after having found that they were in contradiction with statements made by both the fiscal authorities and co-accused, does not as such indicate any appearance of a violation of the principle of presumption of innocence.

This complaint is also manifestly ill-founded under Article 27, paragraph (2) (Art. 27-2), of the Convention.

c) The applicant complains that he has not been given adequate time and facilities to prepare his defence, and that this constituted a violation of Article 6 (3) (b) (Art. 6-3-b) of the Convention.

In accordance with Article 285 of the Code of Criminal Procedure, the applicant had to submit the full text of his plea of nullity within fourteen days after service of the judgment.

This period is under Austrian law a time-limit which cannot be extended by courts. Moreover, the plea of nullity must comprise the detailed grounds underlying the motions for revision; no other ground, no substantial information would be taken into consideration by the court after that period has elapsed (see O.G.H. 11.9.64, OZ 165 Evidenzblatt 121).

The task of the Commission is to find whether this period did constitute an "adequate time" according to the kind of proceedings involved and the facts of the particular case.

The time necessary to prepare a defence must indeed be estimated on a different basis at the various stages of the proceedings. When lodging an appeal or a plea of nullity, a defendant is already familiar with the contents of the file, and in particular the nature of the charges and the evidence on which they rely. It must be stressed, in this respect, that the lawyer who had represented Huber before the Regional Court, drafted the plea of nullity.

The facts of the case were obviously complex since they included export-import transactions through middlemen, transfer of foreign currencies through various banking channels in order to maintain the appearance of genuine business transactions and so on. All these aspects of the facts had however been examined at length in the course of the trial which has lasted for some 90 days.

Turning to the applicant's plea of nullity the Commission notes that it contained 80 pages of well-argued detailed material. The basic ground of nullity invoked was that the court's findings were unclear, contradictory in themselves, based on insufficient reasoning, or

contrary to the contents of the case-file. In support of this allegation the applicant made altogether 173 detailed comments concerning the 150 pages of the judgment in his case.

The Commission considers that the 14 days time-limit is rather short, particularly as it cannot be extended and no submissions are admissible after it has passed.

The Commission comes, however, to the conclusion that, even if Article 285 of the Austrian Code of Criminal Procedure could in some circumstances raise a problem under Article 6 (3) (b) (Art. 6-3-b), a careful examination of the circumstances of this case does not disclose any appearance of a violation of the Convention.

This complaint is thus manifestly ill-founded under Article 27, paragraph (2) (Art. 27-2), of the Convention.

d) The applicant also challenges the Court's findings and reasoning.

With regard to the judicial decisions of which the applicant complains, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant jurisprudence (see e.g. decisions on the admissibility of applications No. 458/59, Yearbook, Vol. 3, pp. 222, 236 and No. 1140/61, Collection of Decisions, Vol. 8, pp. 57, 62).

It is true that in this case the applicant also complains that he was not given all the procedural guarantees of an accused before the Court. In this connection he alleges a violation of Article 6 (2), 3 (b) and (d) (Art. 6-2, 6-3-b, 6-3-d) of the Convention.

However, as explained above, the Commission has found that there is no appearance of a violation of these provisions in the proceedings complained of.

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

e) The same ground of inadmissibility applies to his further submission that the Court did not correctly apply Article 170 of the Code of Criminal Procedure in that it had certain evidence under oath.

3. The applicant alleges that the Supreme Court was bound by the Attorney General's "instructions" and this did not constitute an independent and impartial tribunal within the meaning of Article 6 (1) (Art. 6-1) of the Convention. He points out that, on 5 May 1971, when drafting his submissions concerning the applicant's substantial" plea of nullity, the Attorney General mentioned that the "formal" plea of nullity had already been rejected. A blank space was left for the date of this decision which, in fact, was only given on 16 June 1971.

The Commission has previously studied the position and functions of the Attorney General under Austrian law, in particular in proceedings on a plea of nullity alleging violations of procedural law (Applications Nos. 524/59 and 617/59, Ofner and Hopfinger against Austria). It might be generally recalled that, although the Attorney General belongs to the prosecuting authorities, his functions are different from those of a public prosecutor. "His task is in a more objective way to ensure respect of the law in criminal proceedings and he does not, like a prosecutor, have the additional task to see that reasonably suspected

persons are convicted and adequately punished" (Report of the Commission in the case of Ofner and Hopfinger v. Austria , p. 79). In respect of cases where such a plea of nullity has been raised by the accused, "the Attorney General is not a party to the proceedings, but is required to examine the plea of nullity independently of the Judge Rapporteur" (ibid. p. 80) in the interest of the law. Therefore, the case-file, generally including a draft decision by the Judge Rapporteur is submitted to the Attorney General for his observations. If he expresses his agreement with the report the Supreme Court usually adopts the draft decision in a non-public sitting in the absence of both the applicant and the Attorney General. If, on the other hand, he disagrees with the report, to the disadvantage of the appealing party, the plea of nullity must be examined by the Court in an oral hearing.

In this context, the facts of the present case are that the Attorney General, having read the draft decision submitted by the Judge Rapporteur, anticipated its adoption by the Supreme Court. This circumstance is certainly not of itself even prima facie evidence that the court sitting in private was subject to any discretion by the Attorney General, and thus not an independent or impartial tribunal within the meaning of Article 6 (1) (Art. 6-1) of the Convention. Furthermore, a careful examination of the proceedings before the Supreme Court, in the light of the above findings of the Commission, does not disclose any appearance of a violation of Article 6 (1) (Art. 6-1) as a whole.

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

4. The applicant complains that, during his detention on remand, his right to respect of his correspondence has been violated.

However, such complaint constitutes the same matter as was already before the Commission in Application No. 4517/70. The applicant having failed to introduce any new remedy in this respect, the present application contains no relevant new information of this point and is therefore essentially the same as a previous application within the meaning of Article 27, paragraph (1) (b) (Art. 27-1-b).

5. The Commission has also examined the applicant's other complaints.

However, a careful examination of these complaints does not disclose any appearance of a violation of the rights and freedoms set out in the Convention, in particular in its Articles 3 and 13 (Art. 3, 13).

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

For these reasons, the Commission DECLARES THIS APPLICATION INADMISSIBLE