THE FACTS

A. Whereas the basic facts presented by the parties and apparently not in dispute between them may be summarised as follows:

The applicant is a German citizen, born in 1927, and residing in Berlin. He is represented by Mrs. Ilona Blumenthal, a lawyer practising in Berlin.

The applicant has previously lodged two applications with the Commission. In his first application (No. 2122/64) the applicant complained, inter alia, of his long detention pending trial. That application, having been admitted by the Commission, was referred to the European Court of Human Rights, which on 27th June, 1968, pronounced its judgment, holding that there had been no breach of the Convention. The second application (No. 2868/66) relating to the applicant's conviction and sentence was declared inadmissible by the Commission on 31st May, 1967.

On 9th November, 1961, the applicant was arrested, on suspicion of being involved in offenses of breach of trust, and taken into detention on remand. On 7th April, 1965, the applicant was convicted by the Regional Court (Landgericht) of Berlin and sentenced to six years and six months' penal servitude (Zuchthaus). This decision was subsequently upheld on appeal by the Federal Court (Bundesgerichtshof) on 17th December, 1965. Pending appeal the applicant was detained in the Moabit prison in Berlin.

On 16th November, 1965, while he was still in detention on remand, the applicant's cell was to be searched. The officers concerned ordered the applicant to leave the cell for the search. The applicant demanded that the inspection should be carried out in his presence and refused to leave the cell. He was then removed by force from his cell and transferred to an isolation cell (Beruhigungszelle) where he remained until the morning of 19th November, 1965. When the applicant was removed from his cell he sustained certain injuries.

On 24th November, 1965, criminal proceedings were instituted ex officio against unknown persons for inflicting bodily harm in the exercise of their duty (Körperverletzung im Amt) after reports had appeared in a Berlin newspaper according to which the applicant had been ill-treated by warders in the Moabit prison.

On 20th November, 1965, the Prison Governor applied to the Regional Court for approval of the applicant's detention in the isolation cell. Invited to make observations in writing, on 2nd December, 1965, the applicant, through one of his lawyers, opposed the application and commented on the alleged ill-treatment and the subsequent detention.

On 2nd December, 1965, the applicant's three lawyers addressed themselves to the Department of Justice (Senator für Justiz) in Berlin, following statements made by the Department to the press whereby the applicant's injuries were said to be minimal. The lawyers emphasised the seriousness of the injuries inflicted on the applicant and pointed out, inter alia, that they had seen him shortly after he had been beaten.

The Senior Public Prosecutor (Generalstaatsanwalt) at the Regional Court decided, however, to discontinue the proceedings against the prison officers concerned. In a subsequent decree of 14th November, 1966, it was pointed out that the applicant's conduct when refusing to leave his cell had necessitated the use of force. The prison officers had denied that they had dealt any blows with their fists or kicked the applicant. The slight injuries the applicant had suffered during the violent fight did not confirm his statements to the effect that he had been totally smashed up (zusammengeschlagen) and it had not been shown

that the prison officers had used excessive force.

The applicant's appeal against this decision was rejected by the Attorney-General (Generalstaatsanwalt) at the Court of Appeal (Kammergericht) on 21st December, 1966.

On 30th January, 1967, the applicant lodged an application for a judicial decision with the Court of Appeal in accordance with Article 172 of the Code of Criminal Procedure (Klageerzwingungsverfahren) and at the same time applied for legal aid. In this application which comprised twelve pages, the applicant maintained that he had been ill-treated and requested that criminal proceedings should be opened against six prison officers mentioned by name. He referred to certain medical evidence and witnesses.

The application was, however, declared inadmissible by the Court on 17th March, 1967, on the ground that it did not comply with the formal provisions under Article 172, paragraph (3) of the Code. In particular, the Court found that the applicant had failed to submit a complete statement of the facts on which he founded his charge. Neither had he indicated what evidence the Public Prosecutor had considered or the evaluation of this evidence. The applicant had only attacked the legal conclusions in the decision but had not even specified what particular part each of the six officers had taken in the alleged ill-treatment.
The Court's decision was communicated to the applicant's lawyer on 5th April, 1967.

B. Whereas in his application form and observations of 8th January, 1969, the applicant complains of his mishandling by the prison officers, the conditions under which he was detained in the isolation cell and the refusal to provide him with adequate medical treatment. He alleges that this amounted to a violation of Article 3 of the Convention.

The applicant further complains that the inspection of a cell occupied by a person on remand in the detainee's absence constitutes a violation of Article 8 of the Convention.

Whereas the respondent Government has replied to these allegations in its written observations of 9th and 12th December, 1968.

Whereas the arguments of the parties may be summarised as follows:

I. As to the question of exhaustion of domestic remedies (Article 26 of the Convention)

1. As regards the alleged ill-treatment of the applicant when he was removed from his cell, the respondent Government submitted that the obligation to exhaust the domestic remedies under German law require that proceedings under Article 172 of the Code of Criminal Procedure have been carried through. In the Government's opinion the applicant had not satisfied this condition as he failed to submit his application to the Court of Appeal in the form prescribed by the said Article 172, paragraph (3), whereby the Court was prevented from admitting the application.

The respondent Government further referred to the Commission's jurisprudence according to which the time-limits laid down in domestic law for the introduction of appeals must be observed by applicants to the Commission. It seemed justified that the violation of provisions as to form should be equated with the failure to observe time-limits because both these defects lead to the inability of domestic courts to make a decision on the merits. Article 26 of the Convention, however, exactly purported to ensure that the complaint submitted should be examined by the domestic authorities to the greatest extent possible before the Commission could be applied to. If an applicant prevented domestic examination by failing to observe provisions as to form or

time-limits, his application must be regarded as inadmissible. In proceedings under Article 172 of the Code, German law made no requirements that the applicant could not reasonably be expected to fulfil and consequently even on this ground there would be no justification for taking a different view.

The applicant maintained that he had exhausted the domestic remedies within the meaning of Article 26 of the Convention as regards this complaint. According to him, rejection as inadmissible, as was the case with his application to the Court of Appeal, was not the same thing as rejection on the ground of non-observance of a prescribed time-limit. Whether a time-limit was respected or not could not be a matter of argument, since it was virtually absolute. By contrast, the question whether the prescribed procedure was observed, e.g. the presentation of the facts in a complete form was relative and in certain circumstances depended on interpretation and would leave the way open to arbitrary decisions. It would be perfectly possible for a domestic court taking a final decision to assume or affirm inadmissibility, where this was not the case.

Even if one accepted that, as a general rule, the violation of the procedural provisions did not entitle the domestic courts to take a decision on the merits, this did not apply in the present case. Regardless of the inadmissibility of the application under Article 172 of the Code, the possibility of a decision on the merits, namely an order to reopen investigations, would always have existed.

In any event, the applicant maintained that the Court of Appeal's rejection of his application was unjustified, as his application, in fact, did contain a clear factual statement of the incidents concerned, describing the offenses attributed to the accused officers and to other officers whose names were unknown, and tendered evidence. The Commission could, and must, examine whether the Court of Appeal's decision of 17th March, 1967, was correct. Such examination would show that all the formalities required under Article 172, paragraph (3), of the Code were complied with.

Even assuming that the procedural requirements concerned were not fulfilled, this could not in the applicant's opinion preclude recourse to the Commission, owing to non-exhaustion of domestic remedies. The applicant himself had no means of influencing the observance of procedural rules by his lawyer who had been directed to file the application to enforce prosecution. Even if the formalities had not been observed, the investigations could have been continued in the interest of a complete clarification of the incidents and the discontinuance of the proceedings must be qualified as unfair.

2. As regards the applicant's complaint concerning his detention in the isolation cell and the conditions under which he was confined, the respondent Government also submitted that the applicant had not exhausted the domestic remedies available to him. The applicant could have applied to the Regional Court to have the order given by the competent prison officer that he be taken into an isolation cell set aside in accordance with Rule 75, paragraph (1), in conjunction with Rules 62, paragraph (1), and 63, paragraph (1), of the Regulations on Detention on Remand (Untersuchungshaftsvollzugsordnung).

Moreover, the applicant could have made an application for a judicial decision by the Court of Appeal in accordance with Article 23 of the Introductory Act to the Judicature Act (Einführungsgesetz zum Gerichtsverfassungsgesetz) on the ground that his rights had been violated by the order to take him into the isolation cell. The applicant took, however, none of these courses which were open to him.

The Government submitted that it was true that the applicant opposed the Prison Governor's application of 20th November, 1965, subsequently to approve his detention in the isolation cell. In the Government's

opinion, the fact that he took part in these approval proceedings could not, however, be regarded as a proper exhaustion of the domestic remedies. It could not be left out of consideration that the execution of the order complained of had been terminated when the approval proceedings started. Therefore the Regional Court refused to decide on the justification of the order and merely took cognisance of the application as is shown by the Court's decision to this effect of 30th December, 1966. In January 1967, the applicant lodged an appeal against this decision, mainly on the ground that the prison authorities claimed damages from him. On 7th July, 1967, the Court of Appeal rejected this appeal being lodged out of time.

The Government stated that the only way in which the applicant could have wholly or partly avoided the consequences of the order he impugned would have been to cause a court decision to be made about his detention before he was released from the isolation cell.

Finally, to the extent that the applicant's detention could give rise to a claim for damages, domestic remedies had not been exhausted wither, as such claims could be brought by way of a civil action before the ordinary courts.

In reply, the applicant submitted that it was true that, apart from the statements made in the approval proceedings, he did not apply to the Court for redress against his confinement in the isolation cell. Considering that the applicant could only have done so during the period of his confinement, he had no opportunity either to seek legal redress or to inform anyone, in particular his defence counsel, of his confinement in the isolation cell. Nor did anyone inform him of the rights of which he could have availed himself during that period alone. To blame the applicant for this would be quite unfair and would even be tantamount to a venire contra factum proprium. The applicant therefore considered that he had fulfilled the requirements as to exhaustion of domestic remedies. He asked that account should be taken also of the fact that his lawyer discussed his detention in the isolation cell and the attendant circumstances, particularly the failure to provide medical attention, in the proceedings before the Public Prosecutor and in his application under Article 172 of the Code of Criminal Procedure.

II. As to the allegations under Article 3 of the Convention

As regards the details of the incidents concerned, the applicant submitted that while he was in detention on remand, his cell and the possession he kept there were repeatedly inspected. In the summer of 1965 he learned that documents and correspondence had been confiscated from other detainees and handed over to the police. He was advised by his counsel that such interference was not permitted and that he was entitled to be present when his cell was being searched in order to ascertain that valuables or documents relating to his defence were not removed. On 16th November, 1965, he was requested by a warder, Aufseher X., to leave his cell which was to be inspected. The applicant demanded that the inspection should be carried out in his presence and pointed out that Polizeiinspektor Y., a senior prison officer, had previously ordered that the applicant should be allowed to attend such inspections. X then summoned several other prison officers, including Y, to the cell. Y ordered the applicant to leave his cell and, when the applicant tried to argue his point of view, tried to push him out of the cell.

The applicant then let himself fall to the floor and seized hold of his bed whereupon Y ordered that the applicant should be removed by force. He was then brutally beaten and ill-treated in various ways but managed to hang on to the bed. When a warder hit the applicant's fingers with a bunch of keys, the applicant was forced to loosen his grip of the bed. He thought that his fingers had been broken. The applicant was then taken out into the corridor outside his cell where he was further

beaten and kicked. He shrieked with pain and in order to silence him Y pressed a towel against his mouth. As a result the applicant became unconscious.

When the applicant recovered consciousness, he had been brought to a 2 metre x 3 metre isolation cell in the cellar. He was ordered to put on light clothes in spite of the cold. The cell contained no furniture and he was forced to eat like an animal on the floor.

The applicant asked to see a doctor. In the afternoon a medical orderly appeared and dressed his wounded hand which was bleeding heavily. In the evening he was supplied with three thin mattresses and two thin blankets. Because of his pains and the cold he was unable to sleep or eat during the two days he spent in this cell. He also acquired a serious cold.

On 17th November, 1965, the applicant saw a doctor who gave him some medicaments for his throat and kidneys which were aching. The bedclothes were again removed from the cell and, although he was hardly able to stand up because of a foot injury, he was not provided with a chair.

The following day the applicant was released from the isolation cell and told by a warder that he would be charged with assault and violent resistance, if he lodged a complaint.

The respondent Government first submitted that the applicant's subsequent conduct seemed to be inconsistent with his allegations that he was ill-treated by prison officers and thereafter detained in an isolation cell under degrading circumstances.

In this respect the Government referred to a statement made by the applicant himself in his submission to the Regional Court of 2nd December, 1965, according to which the applicant apologised to the warder X, for the trouble immediately after his release from the isolation cell on 18th November, 1965, declaring that he regretted the fuss.

The Government further pointed out that contrary to the applicant's original allegation on his application form, the criminal proceedings against the staff of the Moabit Prison were not the result of charges laid by him but had been instituted ex officio. Reference was further made to statements by the applicant that he was not interested in any criminal prosecution of the officers concerned until, in February 1966, claims for damages had been made against him. His subsequent conduct showed that he did not attach any particular importance to the alleged ill-treatment.

The Government stated that in view of these circumstances the version of the events of 16th to 18th November, 1965, now given by the applicant seemed to be incredible. Instead the Government referred to the findings by the Department of Justice in Berlin according to which the applicant had staged a fit of rage when asked to leave the cell and struck about him, and acted like mad. In doing so he had kicked an officer in the belly, the officer then was unfit for duty on this account for ten days. By reason of his conduct it had been necessary to take him to an isolation cell to quieten him down. In order to remove him judo techniques had to be used. No disproportionate force was used. Nor was the applicant beaten. The applicant - like any other inmate in a similar situation - had to take off all his clothes and receive special underwear and outer garments. When this happened, the officers did not notice any bruises on the applicant's body. An abrasion on his right hand was dressed by a medical orderly. On 17th November, 1965, the applicant, when seen by a doctor, complained of his throat and kidneys, but mentioned, however, nothing about any injuries.

On 20th November, 1965, the prison doctor, on an examination, found

three haematoma on the applicant's arms and chest and several superficial abrasions on the back of the hand. A further examination by another doctor on 24th November, 1965, showed haematoma traces and small skin wounds on the fingers of the right hand and on the outside of the right leg. With a high degree of probability, these injuries had been caused by the conduct of the applicant and the necessary breaking of his resistance, but not by any blows on the part of the officers.

The Government further referred to the investigations by the Public Prosecutor in the course of which all the prison staff concerned were interrogated as well as eleven other remand prisoners before the decision to discontinue the proceeding was taken.

The Government concluded by asking that this part of the application should in any event be declared inadmissible as being manifestly ill-founded. The forcible removal of the applicant from his cell was a measure necessary for the maintenance of discipline; this measure was not disproportionate and could not be regarded as inhuman or degrading treatment within the meaning of Article 3 of the Convention.

In his observations in reply the applicant argued that it was obvious from the injuries he had sustained that these had not been caused merely by the breaking down of his resistance. Moreover, he stated that there was nothing which would necessitate the inspection of his cell in his absence, contrary to the long-standing practice. If such absence was nevertheless enforced it was unlawful. Therefore resistance to such measure could not be unlawful and the applicant's action was clearly justified.

The applicant denied that he had ever "apologised" for his behaviour but merely said that if he had been more intelligent he would have given in. It was true that in February, 1966 he had stated that he was not interested in criminal prosecution of the officers concerned. However at the time he was still of the opinion that a proper enquiry would be carried out in the public interest. It was only when he realised that this public interest was apparently not so great that he endeavoured to have the investigations reopened.

As regards the respondent Government's argument that the applicant was unreliable, he referred to conflicting statements made to the press by the Senator for Justice and the Prison Governor, as to the injuries the applicant had sustained.

As regards the inaction imputed to him after the incident concerned, the applicant has submitted that shortly afterwards his appeal was dismissed and he was transferred to another prison where he was, inter alia, deprived of his typewriter. He was further depressed over the rejection of his appeal and the fact that his wife had filed a petition for divorce.

III. As to the allegations under Article 8 of the Convention

As regards the complaint that the inspection of a cell occupied by a person in detention on remand in the detainee's absence constituted a violation of Article 8 of the Convention, the applicant has submitted that no valid reasons could be given for such a measure. In particular the applicant stated that prison security could not be endangered by the prisoner being present at the inspection. A prisoner should be entitled to check that the search was carried out correctly. In this respect the applicant referred, inter alia, to the right of witnesses and occupants to be present when their premises were being searched under German law (Article 106 of the Code of Criminal Procedure and Article 759 of the Code of Civil Procedure) and submitted that a person in detention on remand should not be treated differently.

The respondent Government referred to Rule 61 of the Regulations for Detention on Remand according to which the room and personal effects

of a remand prisoner may be searched at any time, and emphasised that there was no provision to the effect that such search must be made only in the prisoner's presence. In the Government's opinion such a restriction would be inconsistent with the purpose of detention on remand. It was in the interest of security that the prisoner should not notice where and in what manner his personal effects and, above all, the security installation of his cell were checked.

Nor did any restriction of the right of search follow from the provisions of Article 106 of the Code of Criminal Procedure and Article 759 of the Code of Civil Procedure cited by the applicant, according to which the persons concerned are entitled to be present in their rooms when those rooms are searched or in their home when execution measures are taken. An analogous application of these provisions was out of the question if only for the reason that it would be inconsistent with the purpose of detention on remand, i.e. to prevent the prisoner from escaping.

Nor did any right of the applicant to be present when his cell was searched follow from any permission granted on previous occasions.

The German domestic Regulation applied when the applicant's cell was searched was in consonance with Article 8 of the Convention. This provision could not be construed as prohibiting the limitations of the private sphere of a remand prisoner where they necessarily followed from the purpose of the detention on remand. At least, however, the search of the cell of a remand prisoner in his absence fell under the limitations admissible under Article 8, paragraph (2), of the Convention.

The Government left open the question whether Article 8 of the Convention would be violated if, during the search of the cell of a remand prisoner, his mail were read by officers of the institution. According to the applicant's own statement his mail was not examined. The applicant's mention of alleged seizure of material for the defence in the cases of other prisoners was irrelevant as far as his case was concerned.

THE LAW

Whereas, in so far as the applicant complains of ill-treatment by prison officers when refusing to leave his cell, it is to be observed first 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 the respondent Government has submitted that, in order to comply with Article 26 (Art. 26), the applicant was obliged to lodge an application under Article 172 of the Code of Criminal Procedure following the Public Prosecutor's refusal to institute criminal proceedings against the prison officers concerned; whereas the respondent Government has further alleged that the applicant did not satisfy this condition as he failed to submit his application to the Court of Appeal in the form prescribed by the said Article 172 of the Code and the Court was thereby prevented from admitting the application;

Whereas the applicant has maintained that the Court of Appeal's rejection of his application was unjustified as it did, in fact, comply with all the formalities required under Article 172, paragraph (3), of the Code.

Whereas, however, the Commission does not consider it necessary in particular circumstances of the present case to determine the question whether the application to the Court of Appeal was sufficient in order to satisfy the obligation to exhaust all domestic remedies laid down

in Article 26 (Art. 26) of the Convention, nor is it necessary to
decide whether the applicant should have availed himself of any further
remedy;

Whereas, even assuming that the applicant has complied with the
conditions of Article 26 (Art. 26), the Commission finds that an
examination of the case, as it has been submitted, does not lead to the
conclusion that, in the circumstances, the force which was used against
the applicant was excessive and amounted to "inhuman or degrading
treatment" within the meaning of Article 3 (Art. 3) of the Convention;

Whereas 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;

Whereas, in so far as the applicant's complaints relate to his
detention in the isolation cell and the alleged failure to provide him
with adequate medical care, the question again arises whether the
applicant can be considered to have exhausted all domestic remedies
available to him;

Whereas the Commission once more does not feel called upon to determine
this question since, in any event, an examination of the case as it has
been submitted, including an examination made ex officio, does not lead
to the conclusion that, in the circumstances, the applicant's detention
in the isolation cell during the period concerned involved a breach of
Article 3 (Art. 3) of the Convention; neither does the Commission find
that there is sufficient evidence to support the applicant's
allegations that he was denied adequate medical care for his injuries;

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

Whereas, in so far as the applicant alleges that the inspection of his
cell in his absence amounted to a violation of his rights under Article
8 (Art. 8) of the Convention, it is to be observed that paragraph (2)
of the said Article (Art. 8-2) permits interference with these rights
when such interference is in accordance with the law or is necessary
in a democratic society, inter alia, for the prevention of disorder or
crime;

Whereas in this connection the Commission has had regard to the
respondent Government's submission that interests of security require
that a remand prisoner should not have knowledge of the manner by which
his personal effects and the security installations of his cell are
checked; whereas the Commission is satisfied that the limitations on
the applicant's private life in this respect were fully justified under
Article 8, paragraph (2) (Art. 8-2), of the Convention;

Whereas it again 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;

Now therefore the Commission DECLARES THIS APPLICATION INADMISSIBLE