CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF KAMASINSKI v. AUSTRIA

(Application no. 9783/82)

JUDGMENT

STRASBOURG

19 December 1989

In the Kamasinski case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 June and 23 November 1989,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 July 1988, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 9783/82) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) on 6 November 1981 by Mr Theodore Kamasinski, who is a citizen of the United States of America.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to Austria's declaration recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision from the Court as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6, 13 and 14 (art. 6, art. 13, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and sought leave to present his case himself, subject to his

* Note by the Registrar. The case is numbered 9/1988/153/207. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

being assisted by a named attorney from the United States of America. The President of the Court granted such leave on 1 September 1989 in relation to the written procedure (Rule 30 § 1).

3. The Chamber to be constituted included, as ex officio members, Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, President of the Court (Rule 21 § 3 (b)). On 29 September 1988 the President of the Court drew by lot, in the presence of the Registrar, the names of the other five members, namely Mr J. Pinheiro Farinha, Sir Vincent Evans, Mr R. Macdonald, Mr J.A. Carrillo Salcedo and Mrs E. Palm (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently Mr J. De Meyer, substitute judge, replaced Mrs Palm, who was unable to take further part in the consideration of the case (Rules 22 § 1 and 24 § 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5). He ascertained, through the Registrar, the views of the Agent of the Austrian Government ("the Government"), the Delegate of the Commission and the applicant as to the need for a written procedure (Rule 37 § 1). Thereafter, in accordance with the Orders and directions of the President, the memorial of the Government was lodged at the registry on 24 January 1989 and that of the applicant on 1 February 1989. By letter received on 9 March 1989 the Secretary to the Commission informed the Registrar that the Delegate would submit his comments at the oral hearing.

5. After consulting, through the Registrar, those who would be appearing before the Court, the President directed on 3 April 1989 that the oral proceedings should open on 19 June 1989 (Rule 38).

6. On 25 April the Chamber decided

(a) that it could take no action in regard to the applicant’s challenge of the member of the Commission appointed as Delegate (Rule 29 § 1);

(b) that it was not necessary for its consideration of the case to hear certain witnesses proposed by the applicant (Rule 40);

(c) to reject the applicant’s objection to the rendering public of his memorial prior to final judgment in his case (Rules 18 and 55).

7. On the same day the President

(a) at the applicant’s request, invited the Commission to produce various documents to the Court;

(b) refused the applicant leave to present his own case at the oral hearing (Rule 30 § 1).

Such of the requested documents as were in the Commission’s file were lodged at the registry on 7 June 1989, together with other material judged by the Commission to be of interest to the Court. On 8 June the President gave leave to the applicant to be represented at the oral proceedings by the American lawyer who had been assisting him.

8. The hearing took place in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately prior to its opening the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr H. TÜRK, Legal Adviser,
[2]Ministry of Foreign Affairs, *Agent*,
Mr W. OKRESEK, Federal Chancellery,
Mrs I. GARTNER, Federal Ministry of Justice, *Counsel*;

- for the Commission

Mr F. ERMACORA, *Delegate*;

- for the applicant

Mr A. D'AMATO, Professor of Law,
Northwestern University, Chicago, *Counsel*,
Mrs R. GORBACH, Rechtsanwältin,
Vienna, *Adviser*.

The Court heard addresses by Mr Türk, Mr Okresek and Mrs Gartner for the Government, by Mr Ermacora for the Commission and by Mr D'Amato for the applicant, as well as their replies to questions put by the Court and two judges.

At the beginning of the hearing the Court granted a request made by the counsel for the applicant to hear a short address from him in camera (Rule 18).

9. Numerous documents were filed by the Government and the applicant on dates between 14 June and 22 November 1989. On 23 November, in the light of the procedural directions given by the President at the hearing, the Chamber decided that the applicant's written reply to the questions put by the Court and submissions concerning his claims for just satisfaction under Article 50 (art. 50) of the Convention could be taken into account, but not the other, unsolicited material lodged by the applicant and the Government subsequent to the hearing.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

10. The applicant is a citizen of the United States, now residing in Connecticut, United States of America. He entered Austria in the summer of 1979 and was arrested in Mödling (Lower Austria) on 4 October 1980 on suspicion of fraud and misappropriation under a warrant issued by the Innsbruck Regional Court (Landesgericht). On the same day he was taken to

Vienna where, on 6 October 1980, the Vienna Regional Criminal Court (Landesgericht für Strafsachen) remanded him in custody. On 15 October he was transferred from Vienna to the Innsbruck Regional Court Prison (Landesgerichtliches Gefangenenhaus).

A. Pre-trial investigations

11. The applicant was interrogated by police officers on 15 October, 6 November and 16 December 1980. During the questioning on 15 October interpretation was provided by a prisoner who, however, had only a limited knowledge of English. The person who interpreted on 6 November, whilst not a registered interpreter, was someone regularly asked to assist at police interviews when no registered interpreter was available. It cannot be established from the evidence adduced whether the person who provided interpretation on 16 December 1980 was a registered interpreter or not. In accordance with the usual practice the applicant received neither copies nor written translations of the records of these interrogations.

12. Registered interpreters were present during the pre-trial interrogations by several investigating judges on 17 October, 27 October, 28 November and 1 December 1980. The procedure followed was that the investigating judge put a question or a series of questions in German to the applicant through the interpreter and the applicant replied in English through the interpreter. The judge then had the typist record a summary of the applicant's answers which he considered relevant. The extent to which the recorded version was interpreted for the applicant at the end of the interrogation was disputed. On at least two occasions the applicant refused to sign the record on the ground that it was written in a language he could not understand.

13. On the applicant's motion granted by the competent court, an official legal aid defence counsel was appointed for him by the Tyrol Bar Association. This lawyer set out in writing the applicant's objections to his detention on remand. However, the applicant wrote to the court on 31 October 1980 complaining that the lawyer did not speak English sufficiently well, and the lawyer asked to be relieved of his duties as counsel for the same reason. In view of this situation the remand review hearing of 19 November was adjourned at the applicant's request. The Review Chamber (Ratskammer) instructed the investigating judge, inter alia, to take steps for the appointment of another lawyer with sufficient command of English. As a result Dr Wilhelm Steidl, a lawyer who is also a registered interpreter for the English language, was nominated legal aid defence counsel on 26 November.

14. Dr Steidl visited the applicant for the first time on 3 December 1980 for at least fifteen minutes. On the same day he also appeared for the applicant at the adjourned remand review hearing before the Review

Chamber. Immediately thereafter he lodged a complaint on the applicant's behalf against the Review Chamber's decision to prolong the detention on remand. Subsequent visits by Dr Steidl were made on 19 and 30 December 1980 and 21 January and 9 February 1981.

15. On 16 February 1981 the indictment, a document of six pages, was served on the applicant at a session before the Innsbruck Regional Court. The applicant was charged with aggravated fraud (sections 146 and 147 § 3 of the Criminal Code) on seven counts and misappropriation (section 133 §§ 1 and 2 of the Criminal Code) on one count. The alleged offences consisted essentially of failure to pay certain bills, notably rent and telephone invoices. A registered interpreter was present, but the extent to which the indictment was interpreted is in dispute between the parties. The session lasted about an hour. The defence counsel did not appear and was eventually contacted by telephone, when he informed the applicant that he would not attend the session since this would serve no useful purpose and advised against raising any objection to the indictment.

The minutes of this session record that the defendant was given notice of the indictment, that he asked for it also to be served upon his defence counsel, and that he entered an objection (Einspruch) to it. His grounds for the objection included the following. He had already written nine letters presenting the evidence sought. Despite his repeated requests he had never received any of the telephone invoices he was accused of not having paid. He had also demanded to be confronted with incriminatory evidence but had never obtained this evidence for review. With the assistance of the judge he formulated a general objection that the indictment was defective and accordingly requested its review. According to a note appended to the minutes, Mr Kamasinski refused to confirm by his signature that he had been given notice of the indictment for the reason that he did not as a matter of principle sign documents drafted in German.

Neither on this occasion, nor later, was Mr Kamasinski provided with a written translation of the indictment.

16. Upon return to his cell, the applicant wrote the following letter to his defence counsel:

> "As you know I received the indictment today. Perhaps you would be kind enough to explain to me why you arranged to be telephoned instead of being present to give me advice? How in [deleted expletive] name can you advise me before ever seeing that which you are to advise about? The young doctor ?? told me I had to make up my mind instantly concerning whether or not to appeal. He typed something out and when I made a correction by inking out an obvious mistake, the ?? went [deleted expletives]. 'You cannot alter what I write for you to sign, it is forbidden'. I told him to do the then appropriate thing with the paper and he ordered the interpreter ... to sign it.
>
> ... I wish you to give me legal advice concerning the indictment:
>
> 1. Are there grounds for appeal?

2. What are the grounds available to appeal against an indictment?

3. Can I call witnesses on my behalf and compel them to attend the trial?

4. Will you assist me in a legal manner?

It certainly appears as though you believe the decision on my guilt is pre-ordained otherwise you would not advise others that I will be found guilty without ever seeing the evidence, discussing it with me or ever seeing the indictment. Of course, you have advised me I would be freed on the same basis ..."

17. Four days later, on 20 February 1981, Dr Steidl came to visit the applicant in prison and informed him that he would withdraw the objection to the indictment since it was bound to be rejected. This he did by a letter of the same day.

Dr Steidl paid further pre-trial visits to the applicant on 16 March, 27 March and 1 April. The applicant was absent from his cell for one hour, thirty minutes and twenty minutes respectively.

18. On 12 March 1981 the applicant wrote to Dr Steidl in the following terms:

"... I shall be writing Dr Braunias [the judge presiding over the Chamber of the Regional Court competent to hear the case] asking him to please help me to obtain EFFECTIVE legal counsel, in the event I do not see the evidence and file prior to 19 March, which is only two weeks before the trial! ..."

The applicant wrote another letter on 16 March instructing Dr Steidl to ensure the attendance at the trial of all witnesses against him and to summons two defence witnesses to appear.

The same day Dr Steidl filed a written motion for the hearing of five witnesses, including Mrs Rebecca Wellington, together with a motion for some of them to be enjoined to bring certain documents. He later filed additions to this evidentiary motion by telephone. In particular, he asked on 31 March for Mrs Theresia Hackl to be summonsed to testify at the trial.

19. On 16, 19, 23 (or 24) and 30 March 1981 the applicant sent letters to the presiding judge.

In his letter of 16 March the applicant asked for trial in camera because of fears concerning his personal security. The contents of this letter were also explained over the telephone to the presiding judge by the prison legal officer, Dr P. In view of these fears a detective officer in plain clothes was eventually asked to attend the trial.

The applicant’s letters of 19, 23 (or 24) and 30 March to the presiding judge, which were carried by hand from the Regional Court Prison to the Regional Court in the usual way, are now missing from the court file, and not indexed there. The Government are unable to give an explanation therefor.

The contents of these letters were a source of dispute. The applicant asserted that their essentials were as summarised in subsequent letters he

addressed to the presiding judge after the trial (see paragraph 23 below). According to the Government, on the other hand, as far as the presiding judge remembers the missing letters contained repetitions of matters already on the file. The presiding judge, so the Government stated, asked the applicant's counsel to read the letters and to discuss their contents with his client; the judge invited counsel to raise the arguments made in the letters at the trial and to introduce motions accordingly.

20. The applicant wrote in the following terms on 25 March 1981 to the prison legal officer, Dr P.:

> "Dr P.,
>
> May I have an answer to my last note?? There is only 5 working days until the trial which is scheduled on the 2nd of April. I have not had an answer to any requests sent [to] Dr Braunias. Does he ignore me because I write only in English? Does he also ignore the Austrian law in the same way as the U-richter [investigating judge]? I have not yet seen the evidence irrespective of the fact I have an assigned lawyer. Having a lawyer that does nothing does not satisfy justice.
>
> You people must be crazy to think you can carry on a system of justice in such an oppressive manner.
>
> What do I have to do after six months to get the consideration I deserve? Must I hurt myself? Certainly you understand what is going on and you can easily telephone Dr Braunias and inquire.
>
> I will not write you or Dr Braunias again. If I do not have a satisfactory reply in accord with Austrian law and the European Human Rights Convention, Article 6 (art. 6) by the end of the day of March 26, Thursday, I shall take drastic steps! I have had enough of this charade."

21. As confirmed by the prison records, a letter from the applicant to the public prosecutor was transmitted in the usual way on 30 March 1981. However, the prosecutor's office has no note of ever receiving the letter. According to the applicant, in it he requested the prosecutor's assistance in obtaining defence evidence and was critical of the services of Dr Steidl.

22. On 1 April 1981, the day before the trial opened, the applicant was visited by two officers of the United States Embassy in Vienna. According to a memorandum subsequently drawn up by one of them for the files of the Embassy the applicant "complained that his public defender, Dr Steidl, had not discussed his defence with him yet and that he had had no chance to review the court file himself. (Dr Steidl had told me over the phone several days ago that he had spent a total of three hours discussing the defence with Mr K. and that he would see him again shortly before the trial)".

23. After the trial the applicant wrote a number of letters to the presiding judge.

In one, dated 4 May 1981, he said:

"Please note that on the 19th of March last, I wrote you requesting access to the records and informing you that Dr Steidl had not yet prepared me nor studied the records of the Court. I requested you to discharge Dr Steidl if his assignment was the basis to refuse me access to the records. On the 30th of March, I wrote you again to inform you that Dr Steidl had not prepared me for the trial nor provided or translated all the relevant witness statements. You ignored both letters and further did not answer a letter requesting permission to present certain documents in English. I realise surely that it was the duty for Dr Steidl to take up these matters with you but he refused to do anything."

In a subsequent letter dated 18 May he summarised the contents of his letters of 16, 19 and 30 March and complained about not having received any response. This letter, together with a German translation prepared by the prison legal officer, was forwarded to the presiding judge on 26 May. There, the applicant stated the "important elements" of his previous letters as follows:

"...

2. On the 19th of March, I wrote you a letter to request an inspection of the court records (Akteneinsicht) and informed you therein that I had little knowledge of any of the alleged evidence, documentary or testimonial. I specifically asked you to discharge Dr Steidl if his representation of me was to be a basis of denying me direct access to the evidence. I stated that it was more important for me to know of the basis of the allegations (so as to prepare a defence) than to be represented by a lawyer. I presume that you did not give me access to the evidence requested nor did you discharge Dr Steidl because you did not understand my letter. (To this date, I do not have knowledge of the majority of the evidence).

3. On the 19th of March I also requested permission to present documentary evidence in English, which request I presume was never answered because it was not understood.

4. On the 30th of March I wrote to inform you that my appointed lawyer, Dr Steidl, had still not prepared me for the trial on the 2nd of April nor given me access [to] or knowledge of the prosecution evidence. (The situation remained the same as reported in my letter of the 19th of March except that at 4:15 in the afternoon of April 1st, Dr Steidl came to inform me that no further preparation was necessary since 'nothing' would happen to me on April 2nd).

..."

B. The trial

24. The trial before the Innsbruck Regional Court, sitting as a court with lay assessors (Schöffengericht), took place on 2 April 1981. It was attended by two officers of the United States Embassy in Vienna as observers but apparently by no members of the public. The Court was composed of two professional judges and two lay assessors.

It is the applicant's contention, as corroborated by the United States consular observers, that the indictment read out at the beginning of the trial was not interpreted into English. However, according to the consular observers, the applicant, when asked, said that he understood the charges and he and his counsel waived interpretation of the indictment.

After the indictment was read out, Mr Kamasinski was invited to make a statement and was questioned by the presiding judge pursuant to section 245 of the Code of Criminal Procedure (Strafprozessordnung) (see paragraph 49 below). The record shows that he stated, among other things, that he was not guilty of any criminal charge.

25. About halfway through the trial, there was apparently a dispute between the applicant and his defence counsel as to whether requests should be made for the hearing of further witnesses including a lawyer, Dr E., who had been acting as the applicant's business agent responsible for settling his debts and whom the applicant suspected of double-representation. Dr Steidl, considering this suspicion as an attack against the reputation of Austrian lawyers in general, thereupon asked the court to be discharged from his functions as the applicant's defence counsel. However, the court rejected this request. Dr Steidl accordingly continued to represent the applicant until the end of the trial. There is no mention in the record of Mr Kamasinski's having asked for replacement of his legal aid defence counsel.

In his concluding address to the court Dr Steidl asked for a "lenient judgment" ("mildes Urteil") for Mr Kamasinski.

26. Mrs Rebecca Wellington and Mrs Theresia Hackl, two prosecution witnesses summonsed to attend at the request of the defence (see paragraph 18 above), did not appear at the trial. With the consent of the defence and the prosecution, the pre-trial deposition of Mrs Hackl was read out to the court pursuant to section 252 § 1.4 of the Code of Criminal Procedure. The applicant had not been provided with an English translation of this deposition. The applicant himself furnished evidence as to the payment of his debts to Mrs Wellington. A third witness, Mrs Hedda Bruck, did not appear because she had not been called by either the prosecution or the defence. Evidence on matters to which she could have spoken was taken from other witnesses who did testify.

The court refused a motion by both the prosecution and the defence to institute investigations into Mr Kamasinski's bank account in New York, as well as a motion, eventually submitted by defence counsel on Mr Kamasinski's insistence, for the lawyer, Dr E., to be called.

27. A registered interpreter was present, sitting next to the applicant's defence counsel to the left of the judges' bench, while the applicant was sitting at a distance of about 6 to 7 metres from his defence counsel facing the bench.

The record of the trial states that an interpreter attended but, in accordance with the usual practice, does not specify which of the statements

made during the trial were interpreted or the extent to which this was done. It is uncontested that questions put to prosecution witnesses by the court and the public prosecutor were not interpreted, whereas the extent to which witnesses' answers and other statements were interpreted is a subject of dispute. In accordance with the usual practice the interpretation provided was not simultaneous but consecutive and summarising.

According to the record of the trial, no formal objection was raised by the defence at the time with respect to the extent of the interpretation provided.

28. The minutes, which are fifteen pages long, record the applicant's opening declaration as to the various charges, the testimony of seven persons heard as witnesses, the motion made by the prosecution and the defence to institute investigations into the applicant's bank account in New York, the motion made by the defence to hear three more witnesses and to inquire through Interpol whether the applicant had previously been convicted in America, the United Kingdom and Belgium. According to the record a number of documents were read out, including the pre-trial deposition of Mrs Hackl. Finally, the minutes record the final submissions by the prosecution and the defence, the court's decision to refuse to take further evidence and the declaration made by the prosecution reserving its right to lodge a plea of nullity in respect of that decision. They conclude by stating that the court gave judgment, together with its reasons, and indicated possible means of appeal. The last sentence reads: "The parties made no comment."

29. Mr Kamasinski was found guilty of aggravated fraud and misappropriation and sentenced to eighteen months' imprisonment, inter alia on charges involving debts owed to Mrs Hackl, Mrs Wellington and Mrs Bruck. After recounting the facts found, the judgment records the defendant's declaration that he was not guilty of any criminal offence. According to the judgment, he essentially admitted having incurred the debts for rent and telephone covered by the first seven counts in the indictment but asserted that he had been willing and able to pay these debts. The court held that this defence was contradicted by the evidence before it. With regard to Mrs Wellington the court referred to the fact that the evidence adduced by the applicant himself showed that he had only partly settled his debt to her. He was also ordered to pay ATS 80,890 to two private parties (Privatbeteiligte) who had appeared as witnesses for the prosecution and who had claimed compensation (section 47 § 1 of the Code of Criminal Procedure). The applicant and the consular observers are agreed that only the verdict and the sentence, but not the reasons, were interpreted into English. The Government, on the other hand, concur with the finding of the Supreme Court (see paragraph 37 below) that the judgment, including the reasons, was orally translated in all essential parts.

The written judgment was served upon the defence counsel, Dr Steidl, on 19 May 1981. The following day, Dr Steidl visited the applicant in prison, but declined to translate the whole text of the judgment for him. The applicant received a copy thereof (in German) on 27 May but was not provided with a written translation.

30. On various dates between October 1980 and February 1981, Mr Kamasinski was served with invoices in respect of interpretation charges incurred during the course of the pre-trial investigation. However, following the intervention of the United States Embassy, the Austrian authorities eventually confirmed in September 1981 that he was not liable for interpretation costs.

C. The appeal and nullity proceedings

31. Subsequent to the trial, on 6 April 1981, the applicant wrote a letter to the prison legal officer asking him to convey to the presiding judge his request to have a new defence counsel appointed, as he did "not get along with Dr Steidl", and also asking for advice what to do in order to obtain a new lawyer. This letter was forwarded to the competent department of the Regional Court on 7 April where it was received the next day. The applicant also wrote to Dr Steidl informing him that he had asked for the appointment of another defence counsel. On 5 May he wrote in similar terms to the President of the Tyrol Bar Association.

32. In addition he sent a number of letters to the presiding judge (dated 6 and 21 April and 4 and 18 May 1981). In the letter of 21 April he said:

> "It is now almost three weeks since your judgment and I have not a copy nor has it been translated to me which is required by Austrian law and international law as I understand it. It would be proper for me to know what I have been tentatively convicted of so that I may write to the States and obtain the evidence (which Dr Steidl did not do) for the appeal to Vienna.
>
> Therefore, may I please have a copy of the judgment (Urteil) or in the alternative a translation of the Urteil.
>
> For six months I have been prevented from defending myself through the assignment of an attorney who did absolutely nothing to help me, but actually participated against me in the prosecution."

The letter of 4 May included the following:

> "It is now one month since I appeared before your Court and you pronounced judgment (Urteil) and I still do not know what you said or the legal basis. The translator (Dolmetscher) only stated that I was found guilty and sentenced to 18 months in prison. I have no knowledge beyond that and clearly I do not expect Dr Steidl to do more than he has in the past; absolutely nothing. Unfortunately, I am being additionally punished due to my lack of understanding of the German language. The appointment of Dr Steidl to defend me has been consistently utilised as the 'legal' basis to deny me rights available to any Austrian or to me if I understood German.

> One month is more than adequate time for me to be informed of what you said in Court or pronounced in the written 'Urteil'.
>
> I have advised you that I wish to appeal the 'Urteil' with a 'Nichtigkeitsbeschwerde' [plea of nullity] to the Supreme Court of Austria in accord with applicable laws. One of the grounds of the 'Nichtigkeitsbeschwerde' is that I was deprived of effective assistance of a defender in that Dr Steidl did absolutely nothing to prepare me for the trial and refused to obtain any evidence on my behalf. On the basis that Dr Steidl has failed to perform his explicit obligation to defend me correctly and that such is a ground of the appeal, it is therefore impossible for Dr Steidl to represent me in the prosecution of the 'Nichtigkeitsbeschwerde'. On this account, I have written to Dr Ernst Mayr, President of the Rechtsanwaltskammer [Bar Association], to request appointment of an English-speaking lawyer.
>
> [Passage reproduced in paragraph 23 above.]
>
> Because I am in the difficult position of not being effectively represented and not understanding the language, I can only attempt to do what I feel is correct legally and ethically. I am hereby informing you of the grounds for the appeal, which grounds are substantial, and which grounds should be properly presented by an experienced Austrian Attorney. (To date, I have not been visited by an Attorney for the purpose of preparing a 'Nichtigkeitsbeschwerde'.) If I am not presenting the grounds correctly, it is only due to lack of legal advice."

The letter of 18 May (passages of which are set out at paragraph 23 above) was accompanied by a translation into German. In it the applicant reiterated that "on the 4th of May I wrote to you to inform you of some of the grounds of the Nichtigkeitsbeschwerde as well as the grounds for appointment of a new lawyer".

As before, the applicant received no response from the presiding judge.

33. On 20 May 1981 the applicant was once more visited in prison by Dr Steidl. At the applicant's request this meeting was attended by the prison legal officer. The applicant repeated his request to have another defence counsel appointed.

By letter of 21 May 1981 Dr Steidl asked the Tyrol Bar Association to be discharged of his duties as defence counsel. On 22 May the Bar Association appointed Dr Schwank as new defence counsel for the applicant. Dr Schwank was notified thereof on 26 May.

34. On 29 May 1981 a partner of Dr Steidl came to see Dr Schwank in his office and gave him a draft appeal (Berufung) and plea of nullity (Nichtigkeitsbeschwerde) prepared by Dr Steidl (consisting of three pages) and also some copies from the court file. On 1 June Dr Schwank visited the applicant in prison. The statement setting out the plea of nullity and the appeal (against sentence and the compensation order) was then drawn up and filed on 2 June, the day on which the time-limit for filing expired. Dr Schwank also prepared a translation of the judgment for the applicant.

35. The plea of nullity was essentially based on the following grounds:

(a) (under section 281 § 1.1a of the Code of Criminal Procedure - see paragraph 51 below) that the applicant was not adequately represented by counsel during the proceedings and in particular during the trial;

(b) (under section 281 § 1.3, taken together with sections 244, 250 and 252, of the Code - ibid.) that the interpretation during the trial was insufficient, and in particular that neither the indictment nor the written depositions nor the oral testimony of certain witnesses nor the questions put to witnesses by the presiding judge and the public prosecutor were interpreted into English;

(c) (under section 281 § 1.3, taken together with section 260, of the Code - ibid.) that save for its operative part the judgment was neither interpreted on the spot nor translated thereafter;

(d) (under section 281 § 1.4 of the Code - ibid.) that the trial court had not granted either the prosecution or the defence motions to have investigations carried out with the defendant's bankers or the defence motions for the hearing of evidence from two witnesses;

(e) (under section 281 § 1.5 - ibid.) that the judgment was not sufficiently reasoned;

(f) (under section 281 § 1.9a and b - ibid.) that the trial court had incorrectly interpreted certain facts which established lack of fraudulent intent.

36. With regard to the factual allegations concerning the scope of interpretation during the trial, the Supreme Court (Oberster Gerichtshof) conducted an inquiry in accordance with section 285f of the Code of Criminal Procedure (see paragraph 52 below). The presiding judge of the Innsbruck Regional Court was questioned by the reporting judge of the Supreme Court over the telephone. A note on this conversation, which was placed in the Supreme Court's file on 31 August 1981, reads as follows (translation into English provided by the Government):

> "The presiding judge, Regional Court Justice Dr Braunias, replied as follows to an inquiry by telephone:
>
> Contrary to the allegations made in the plea of nullity, all essential points of the indictment, of the witnesses' depositions, of the contents of the documents read out in court as well as of the judgment, including its reasoning, were translated by the interpreter who had been summoned and by counsel for the defence, Barrister Dr Steidl (who is a qualified English interpreter), at the trial which was attended by two members of the United States Embassy. The defendant was also permitted to comment on the charges and on each piece of evidence without any time-limit, as well as to put questions to the witnesses."

Neither the applicant nor his counsel was given notice of this inquiry or advised of its results.

37. On 1 September 1981, after having obtained the view of the Procurator General (Generalprokurator), the Supreme Court, sitting in

chambers (see paragraph 52 below), rejected the plea of nullity, essentially on the following grounds.

As to the complaint that the applicant had not been adequately represented by counsel during the trial, the Supreme Court found that the Regional Court was only under a duty to appoint a defence counsel and to invite him to attend the trial as well as any other proceedings in which the defendant was allowed to participate. It was not, however, for the Regional Court to supervise the activities of the defence counsel, who was not subject to the control of the Court but to the disciplinary authority of the appropriate bar association. Accordingly, no ground for nullity could be derived from any insufficient performance by the defence counsel of his duties.

With respect to the interpretation during the trial, the Supreme Court observed that the Regional Court had not only appointed an interpreter to assist during the trial but that it had also appointed, at the applicant's request, a defence counsel who was at the same time an English interpreter and with whom the applicant could communicate in his mother tongue. As a matter of law, neither an incomplete translation nor a failure to appoint an interpreter as such constituted a ground for nullity. They could at best be a source of challenge, under section 281 § 1.4 of the Code of Criminal Procedure (see paragraph 51 below), if a corresponding motion had been denied at the trial. Besides (im übrigen), the inquiry carried out by the Supreme Court pursuant to section 285f of the Code of Criminal Procedure had shown that, contrary to the allegations in the applicant's plea of nullity, all essential parts of the indictment, of the testimony of witnesses, of the documents read out during the trial and also of the judgment, including its reasons, had been interpreted by the registered interpreter. Furthermore, the applicant had had the opportunity to comment on the charges and the evidence without any time restriction and also to put questions to witnesses.

38. The date of the public hearing for the appeal against sentence and the compensation order was notified to Mr Kamasinski pursuant to section 286 § 2 of the Code of Criminal Procedure and his counsel, Dr Schwank, was summoned to attend.

On 11 November 1981 Mr Kamasinski lodged an application for his personal attendance before the Supreme Court, arguing, inter alia, that the determination of the sentence necessitated an assessment of his personality and that this required his presence. Moreover, the file before the Supreme Court included articles from the daily newspaper "Kurier" which were prejudicial to him and might adversely influence the Supreme Court. The articles, which had been published on 14, 15 and 16 November 1980 and which described him as an American espionage agent dangerous to the Republic of Austria, had also been in the file of the trial court. Lastly, he submitted, as his appeal concerned also the civil-law aspects of the judgment, it would be unfair if the private parties to whom he had to pay compensation could appear before the Supreme Court but not himself.

This application was rejected by decision of the Supreme Court on 20 November 1981 on the ground that no concrete indications suggesting a need for the accused's personal attendance at the hearing on the appeal lodged solely for his benefit were apparent from the court files or from his application. If he harboured the belief that his personal presence would enable him to argue that the criminal proceedings had come about essentially as a result of a chain of unfortunate circumstances and misunderstandings, above all of a linguistic nature, he was unaware of the rule that the question of guilt can no longer be canvassed in the appeal proceedings. Moreover, all further circumstances set forth in his application could be put forward by his lawyer at the hearing. The Supreme Court's ruling was served on Mr Kamasinski's counsel.

39. The grounds for appeal against sentence were essentially that the trial court had failed to take into account a number of mitigating considerations, such as Mr Kamasinski's lack of criminal record, his maintenance obligations to his wife and child, his error in not realising the criminal character of his conduct and the fact that the monetary qualifying limit for aggravated fraud (ATS 100,000) had been exceeded by only a small amount.

The appeal was dismissed by the Supreme Court on 24 November 1981 after a hearing at which the applicant was represented by defence counsel. The Supreme Court considered that the sentence imposed by the Regional Court was adequate and that the relative weight of mitigating and aggravating circumstances had been correctly assessed. The adjudication of compensation to two private parties had been in accordance with the law and therefore there was no reason to refer the decision on this issue to the civil courts as requested by the applicant. The Supreme Court's judgment also lists those present at the appeal hearing and there is no indication that the private parties whose compensation claims the Regional Court had upheld were present or represented at that hearing.

40. The applicant was released from prison on 16 December 1981 and subsequently detained with a view to his deportation to the United States of America. He was eventually deported in January 1982.

II. RELEVANT DOMESTIC LAW

A. Interpretation

41. Section 100 of the Austrian Code of Criminal Procedure provides as follows:

> "The investigating judge shall have translated by a registered interpreter any documents drawn up in a language other than the one used in court (nicht

gerichtsüblich) if they are relevant to the investigation and have them put in the file together with the translation."

Under the terms of section 163 of the Code:

"Where a witness does not have knowledge of the language used in court (Gerichtssprache), an interpreter shall be called in unless both the investigating judge and the court clerk have a command of the foreign language. In the official record of the hearing or an annex thereto the depositions of the witness shall be recorded in that language only where it is necessary to quote the actual expressions used by the person examined (section 104 § 3)."

According to section 104 § 3, such a necessity exists if the expressions used are important for judging the matter or if it is to be expected that the official record will be read out at the trial.

By virtue of section 198 § 3 of the Code, section 163 also governs, mutatis mutandis, interrogations of a person charged with an offence (Beschuldigter) if that person does not have knowledge of the language used in court.

42. It follows from the context of the above provisions that they relate to the pre-trial investigations conducted by the investigating judge (Voruntersuchung). However, by virtue of section 248 § 1 of the Code, the rules to be observed by the investigating judge shall also be applied by the presiding judge when examining witnesses or experts at the trial. There is no express provision concerning the rules to be followed for the examination of the accused at the trial if he does not have knowledge of the language used in court, but it appears that in practice the rules governing the examination of witnesses are applied by analogy.

43. The qualifications of registered interpreters (allgemein beeidete gerichtliche Dolmetscher) are specified in the Court Experts and Interpreters Act 1975 (Bundesgesetz über den allgemein beeideten gerichtlichen Sachverständigen und Dolmetscher, Bundesgesetzblatt für Österreich No. 137/1975). According to section 14 of this Act, the provisions regarding experts and requiring, inter alia, special knowledge (Sachkunde) and trustworthiness (Vertrauenswürdigkeit) (cf. section 2 § 2 (a) and (e)) are also applicable to interpreters.

B. Official defence counsel

44. Section 39 § 1 of the Code of Criminal Procedure provides that in all criminal cases the accused has the right to have a defence lawyer (Verteidiger) whom he may choose among the persons included in a list kept by the Court of Appeal.

45. Under certain conditions an official defence lawyer (beigegebener Verteidiger) must be assigned to the accused. He may either be a legal aid lawyer to be paid by the State or an ex officio lawyer to be appointed in cases of necessary representation at the expense of the accused. The

procedure to be followed is set out in section 41 of the Code, which, in so far as relevant, reads:

> "(2) If the person charged with a criminal offence (the accused) is unable ... to bear the costs of his defence, the court shall at [his] request decide that he will be given a defence lawyer whose costs [he] will not have to bear if and in so far as this is necessary in the interests of justice, in particular the interests of an appropriate defence. ...
>
> (3) If, for a trial before an assize court or a court with lay assessors, the accused or his legal representative has not chosen a defence lawyer, and if no defence lawyer has been assigned under paragraph 2 above, the court shall of its own motion appoint a defence lawyer whose fees will have to be borne by the accused unless the conditions for appointing a defence lawyer under paragraph 2 above are satisfied. ..."

Section 42 § 2 further provides:

> "If the court has decided to assign a defence lawyer, it shall notify the Committee of the Bar Association competent for the area in which the court is situated so that this Committee may appoint a practising lawyer (Rechtsanwalt) as defence lawyer."

46. The replacement of a defence lawyer in the course of the proceedings is governed by section 44 § 2 of the Code, which reads:

> "The person charged with a criminal offence may at any time transfer the mandate of a freely chosen defence lawyer to another defence lawyer. Likewise, the mandate of an officially assigned defence lawyer shall be terminated as soon as the person charged designates another defence lawyer. However, in such cases the change in the person of the defence lawyer must not lead to any delay in the proceedings."

The Practising Lawyers Act (Rechtsanwaltsordnung, Imp. Law Gazette No. 96/1868 as amended) now provides that, in certain cases including conflict of interest or bias, the officially assigned defence lawyer shall be replaced by another defence lawyer (section 45 § 4 in the version of Bundesgesetzblatt für Österreich No. 383/1983). This provision did not exist at the relevant time. However, in practice an officially assigned defence lawyer could be replaced by the Committee of the Bar Association if this seemed appropriate.

47. Section 9 § 1 of the Practising Lawyers Act requires a practising lawyer to perform his mandate in accordance with the law and to defend the rights of the party he is representing attentively, in good faith and conscientiously ("mit Eifer, Treue und Gewissenhaftigkeit"). Under section 11 § 1, he is obliged to carry out his mandate as long as it has not been terminated and he is responsible for failure to do so. However, according to established case-law (Österreichische Juristen-Zeitung, Evidenzblatt, 1969, no. 353) he is not subject to control by the court as to whether he has performed his tasks correctly and reasonably ("richtig und zweckmässig"). On the other hand the Government pointed out at the public hearing on 19 June 1989 that the Convention has the status of constitutional law in Austria, with the consequence that the courts are under a duty to secure

compliance with Article 6 § 3 (c) (art. 6-3-c) which guarantees a defendant's right to legal assistance.

There is no provision requiring the appointment of a defence lawyer with a knowledge of the language of the accused if the accused does not understand or speak the language used in court, but in practice, if requested by the defendant and if possible, a lawyer with sufficient command of the defendant's language will be nominated.

C. Inspection of court files

48. Inspection of the court files by the defendant or by his defence counsel is governed by section 45 § 2 of the Code of Criminal Procedure, which provides:

> "The investigating judge shall permit the defence lawyer on request to inspect the court files, except the records of deliberations, on the premises of the court and to make copies thereof; alternatively the investigating judge may also deliver photocopies to the lawyer. Where the defendant is not legally represented, he himself is entitled to these rights of defence counsel, and a defendant who is in detention may be permitted to inspect the files on the premises of the detention centre or prison. ..."

D. Opening statement by the defendant

49. Section 245 of the Code of Criminal Procedure enables the defendant to make an initial statement. Immediately after the opening of the trial the defendant is questioned by the presiding judge as to the contents of the indictment. If the defendant pleads not guilty to the indictment, the presiding judge must explain to him that he is entitled to counter the charges with a coherent statement of the facts and to submit his observations with regard to each individual item of evidence. The defendant is not obliged to answer any questions put by the judge.

E. Keeping of records

50. Section 271 of the Code of Criminal Procedure deals with the keeping of records of the trial:

> "(1) On pain of nullity a record shall be kept of the trial which shall be signed by the president and by the clerk of the court. It should contain the names of the members of the court present, of the parties and of their representatives, document all essential formalities of the proceedings, in particular set out what witnesses and experts were heard and which parts of the files were read out, whether the witnesses and experts were sworn and for what reason they were sworn, and finally all motions submitted by the parties and the decisions taken by the president or the court thereon. The parties are free to demand the setting down of specific points in the record in order to preserve their rights.

(2) Where the actual words used are of importance, the president shall at the request of a party at once order individual passages to be read out.

(3) The answers of the defendant and the depositions of the witnesses or experts shall only be mentioned if they contain deviations from, alterations of or additions to the statements set down in the files or if the witnesses or experts are heard for the first time at the public session.

(4) If the president or court thinks fit, they can order all depositions and pleadings to be taken down in shorthand; this shall always be ordered where a party requests it in good time and deposits the costs in advance. The shorthand notes shall, however, be transcribed into ordinary script within 48 hours, shall be submitted for verification by the president or a judge delegated by him, and shall be attached to the record.

(5) The parties are free to inspect the finished record and its enclosures, and to make copies thereof."

F. Nullity proceedings before the Supreme Court

51. A plea of nullity before the Supreme Court can only be based on the specific grounds enumerated in section 281 § 1 of the Code of Criminal Procedure. Thus a plea of nullity may be lodged

"1a. if the defendant was not represented throughout the trial hearing by counsel although such representation was obligatory;

...

3. where during the trial hearing there has been a breach of, or a failure to comply with, a provision in respect of which it is expressly provided that such breach or failure shall entail nullity;

...

4. if no decision has been taken at the trial on a motion of the person lodging the plea of nullity or if an interim decision rejecting a motion or objection of the person lodging the plea of nullity has been taken in a manner which disregarded or incorrectly applied legal provisions or procedural principles whose observance is necessary for securing a procedure in conformity with essential requirements of the prosecution and of the defence;

5. if the judgment of the trial court ... gives no or manifestly insufficient reasons for its decision;

...

9. if the judgment was rendered in breach or misapplication of a statute in relation to the issue

(a) whether the act with which the defendant is charged amounts to a criminal offence within the jurisdiction of the courts;

(b) whether there are circumstances which exclude punishment or prosecution in respect of the act ...;

(c) ..."

Examples of the kind of ground referred to in paragraph 1.3 are failure to recite the indictment at the commencement of the trial (as required by section 244 of the Code of Criminal Procedure), failure to bring to the knowledge of the defendant the testimony of witnesses heard in his absence (as required by section 250 of the Code), and failure to state in the judgment the grounds supporting any finding of guilt (as required by section 260 of the Code). However the failure to make such recitals in a language which a non-German speaking defendant can understand does not constitute a fatal error requiring a verdict of guilty to be nullified (see the judgment of the Supreme Court in the present case - paragraph 37 above).

52. According to section 285c of the Code of Criminal Procedure, the Supreme Court, after having obtained the view of the Procurator General, shall deliberate in private if the Procurator General or the reporting judge has proposed the application of, inter alia, section 285d or f of the Code. Section 285d provides for, inter alia, rejection of a plea of nullity by a decision in private if the Supreme Court unanimously considers that pleas based on sub-paragraphs 1 to 8 of section 281 § 1 are manifestly ill-founded.

By virtue of section 285f the Supreme Court, "when deliberating in private, may ... order that inquiries be made as to facts relating to alleged procedural defects (section 281 § 1.1-4)".

Where the Supreme Court does not render its decision in private, an unrepresented defendant in custody has to be informed of the date set down for the hearing and advised that he may only appear through a lawyer (section 286 § 2). In the case of a represented defendant only the defence lawyer is informed of the date (section 286 § 3). Under the terms of section 287 § 3 the defendant or his lawyer is always entitled to the last word (letzte Äusserung) at the hearing.

G. Appeal proceedings before the Supreme Court

53. In principle Supreme Court proceedings in respect of an appeal against sentence are public (see section 294 §§ 4 and 5 of the Code of Criminal Procedure). The question of guilt or innocence may not be canvassed in such appeal proceedings. When the appeal has been lodged solely by the defendant, the Supreme Court has no power to impose a severer sentence than that passed at first instance (section 295 § 2 of the Code).

54. The defendant's presence at the public hearing of his appeal is governed by section 296 § 3, second sentence, which at the relevant time provided:

> "As regards the fixing of a day for the public hearing and the procedure, sections 286 and 287 are applicable mutatis mutandis, provided that the defendant not in custody shall always be summoned and that the defendant in custody may be caused to be brought before the court."

Section 296 § 3 was amended in 1983 and 1987. The second sentence now provides that the defendant in custody shall be brought before the court if he so requests in his appeal or in his counter-statement or if his presence appears to be necessary in the interests of the proper administration of justice or for other reasons.

Section 296 § 3, last sentence, further specifies that "if the appeal is directed against the adjudication of civil claims, the private party concerned shall also be summoned" (translation from German).

PROCEEDINGS BEFORE THE COMMISSION

55. Mr Kamasinski's application (no. 9783/82) was lodged with the Commission on 6 November 1981. The numerous complaints made in his application included the following. During the proceedings at first instance he had been denied the rights guaranteed to the defence by Article 6 §§ 2 and 3 (art. 6-2, art. 6-3) of the Convention. In addition, he had not received a fair trial in accordance with the requirements of Article 6 § 1 (art. 6-1) and he had been the victim of discrimination in breach of Article 14 (art. 14), notably because of differential treatment between German-speaking and non-German-speaking defendants. The nullity proceedings had been unfair because he had not had the opportunity of commenting on the evidence obtained by the Supreme Court in its inquiry. There had been discrimination in the appeal proceedings since, unlike an accused at liberty and the "civil parties" in his own case, he had not been allowed to attend the public hearing before the Supreme Court. Contrary to Article 13 (art. 13), he had not had available to him under Austrian law an effective remedy to redress alleged violations of Article 6 (art. 6).

56. The Commission declared the application admissible on 8 May 1985. In its report adopted on 5 May 1988 (Article 31) (art. 31) the Commission expressed the opinion

(a) as regards the Regional Court proceedings, that there had been no violation of the applicant's rights to

(i) be informed, in a language he understood and in detail, of the accusation against him (Article 6 § 3 (a)) (art. 6-3-a) (eleven votes to six);

(ii) have adequate facilities for the preparation of his defence (Article § 3 (b)) (art. 6-3-b) (fourteen votes to three);

(iii) legal assistance (Article 6 § 3 (c)) (art. 6-3-c) (unanimously);

(iv) examine witnesses (Article 6 § 3 (d)) (art. 6-3-d) (unanimously);

(v) have the assistance of an interpreter (Article 6 § 3 (e)) (art. 6-3-e) (fifteen votes, with two abstentions);

(vi) a fair hearing (Article 6 § 1) (art. 6-1) (eleven votes to six);

(vii) be presumed innocent (Article 6 § 2) (art. 6-2) (unanimously);

(b) as regards the Supreme Court proceedings on the plea of nullity, that there had been a violation of Article 6 § 1 (art. 6-1) (unanimously);

(c) as regards the Supreme Court proceedings on the appeal, that there had been a violation of Article 14 read in conjunction with Article 6 § 1 (art. 14+6-1) and Article 6 § 3 (c) (art. 14+6-3-c) (right to defend oneself in person) (ten votes to one, with six abstentions);

(d) as regards the case as a whole, that no separate issue arose under Article 13 (art. 13) (unanimously).

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

57. At the public hearing on 19 June 1989 the Agent of the Government requested the Court

> "to hold that in the present case the provisions of Article 13 (art. 13) ... and also of Article 6 §§ 1, 2 and 3 (a) to (e) (art. 6-1, art. 6-2, art. 6-3-a, art. 6-3-b, art. 6-3-c, art. 6-3-d, art. 6-3-e) and Article 6 § 1 taken in conjunction with Article 14 (art. 14+6-1) have not been violated, and that therefore the facts underlying the dispute do not indicate any breach of the Convention".

58. For his part counsel for the applicant maintained in substance the concluding submissions set out in the applicant's memorial, whereby the Court was requested to find that

> "1. Your applicant was denied the right to defend himself in person or through legal assistance of his choice, in violation of Article 6 § 3 (c) (art. 6-3-c).
>
> 2. Your applicant was denied the right to adequate and effective legal assistance, for the purpose of securing his right to a fair trial, in violation of Article 6 § 3 (c) (art. 6-3-c) when construed in light of Article 6 § 1 (art. 6-1) (right to a fair trial).

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume no 168 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

3. Your applicant was denied the right to be informed, in a language he understood, of the causes and details of the criminal charges against him in violation of Article 6 § 3 (a) (art. 6-3-a).

4. Your applicant was denied the right to enjoy an opportunity to prepare a defence in violation of Article 6 § 3 (b) (art. 6-3-b).

5. Your applicant was denied an effective remedy for the purpose of obtaining relief from the effects of the violations cited above (1-4) in violation of Article 13 (art. 13) of the Convention.

6. Your applicant was denied the right to adequate and effective assistance of an interpreter for the purpose of securing his right to a fair trial, in violation of Article 6 § 3 (e) (art. 6-3-e) when considered with Article 6 § 1 (art. 6-1) (right to a fair trial).

7. Your applicant was denied the right to effectively question prosecution witnesses (attending the trial) concerning the veracity and accuracy of recollection of their testimony, in violation of Article 6 § 3 (d) (art. 6-3-d) when considered with the violation of Article 6 § 3 (e) (art. 6-3-e) as described above.

8. Your applicant was denied an effective remedy for the purpose of obtaining relief from the effects of the violations cited above (6-7), in violation of Article 13 (art. 13) of the Convention.

9. Your applicant was denied the right to question prosecution witness Theresia Hackl concerning the veracity and accuracy of recollection regarding her testimony, in violation of Article 6 § 3 (d) (art. 6-3-d) of the Convention.

10. Your applicant was denied the right to be informed, in a language he understood, of the causes in detail of the criminal charges brought against him by the witness Theresia Hackl, in violation of Article 6 § 3 (a), (d), (e) (art. 6-3-a, art. 6-3-d, art. 6-3-e).

11. Your applicant was denied an effective remedy for the purpose of obtaining relief from the effects of the violations cited above (violations 9 and 10), in violation of Article 13 (art. 13) of the Convention.

12. Your applicant was denied the right to resolve any contradictions that may have been the result of faulty interpretation and this denial of the right to defend violates Article 6 § 3 (b), (c) and (e) (art. 6-3-b, art. 6-3-c, art. 6-3-e) (when construed individually or in consideration of Article 6 § 1 and Article 14) (art. 6-1, art. 14).

13. Your applicant was denied the right to a fair trial due to the violation cited above as 12 and the reliance on evidence derived in light of the said violation to support a finding of culpability; the combination of factors being offensive against Article 6 § 1 (art. 6-1) (right to a fair trial).

14. Your applicant further claims that he was the victim of discriminatory treatment in violation of Article 14 (art. 14) due to his inability to understand the language of the court and therefore could not exercise the rights guaranteed by the terms of Article 6 § 3 (b) (art. 6-3-b) to the same degree as a defendant understanding the language of the court.

15. Your applicant was denied an effective remedy for the purpose of obtaining relief from the effects of the violations cited above (12-14), in violation of Article 13 (art. 13).

16. Your applicant was denied the right to obtain the attendance and examination of defence witnesses under the same conditions as prosecution witnesses, in violation of Article 6 § 3 (d) (art. 6-3-d).

17. Your applicant was denied the right to examine the prosecution witnesses named Wellington and Bruck concerning the veracity and accuracy of recollection of any unsworn evidence they offered against him, in violation of Article 6 § 3 (d) (art. 6-3-d) of the Convention.

18. Your applicant was denied the right to be informed, in a language he understood, of the causes and details of the criminal charges against him, brought by the witnesses Bruck and Wellington, in violation of Article 6 § 3 (a) (art. 6-3-a) of the Convention.

19. Your applicant was denied an effective remedy for the purpose of obtaining relief from the effects of the violations cited above (as violations 16-18), in violation of Article 13 (art. 13) of the Convention.

20. Your applicant was denied the right to be presumed innocent by an impartial judiciary prior to a finding of guilt according to law, in violation of Article 6 §§ 1 and 2 (art. 6-1, art. 6-2) of the Convention.

21. Your applicant was denied the right to be presumed innocent until such time as he was proved guilty according to law, in violation of Article 6 § 2 (art. 6-2).

22. Your applicant was denied the right to be tried by an impartial tribunal, in violation of Article 6 § 1 (art. 6-1).

23. Your applicant was denied an effective remedy for the purpose of obtaining relief from the effects of the violations cited above (violations 20-22), in violation of Article 13 (art. 13) of the Convention.

24. Your applicant was denied the right to enjoy the free assistance of an interpreter, in violation of Article 6 § 3 (e) (art. 6-3-e).

25. Your applicant was denied the right to believe that he would not be liable for interpreter’s fees irrespective of the issue of guilt, in violation of Article 6 § 3 (e) and Article 6 § 1 (art. 6-3-e, art. 6-1) (right to a fair trial).

26. Your applicant was denied the enjoyment of the right to defend as set forth by Article 6 § 3 (art. 6-3) and he was denied the enjoyment of the right to remedy violations of the Convention pursuant to Article 13 (art. 13); the denial of the enjoyment of the said rights occasioned by discriminatory application of the Austrian Code of Criminal Procedure, in violation of Article 14 (art. 14) of the Convention.

27. Your applicant was denied the right to a public trial fully consistent with principles of democracy, in violation of Article 6 § 1 (art. 6-1) of the Convention."

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

59. In its decision of 8 May 1985, which delimits the compass of the case before the Court (see, as the most recent authority, the Soering judgment of 7 July 1989, Series A no. 161, p. 46, § 115 in fine), the Commission declared Mr Kamasinski's application as a whole admissible (see paragraph 56 above). The Court therefore has jurisdiction to entertain all the complaints submitted by Mr Kamasinski at the admissibility stage, whether or not they were specifically addressed in the Commission's report. Indeed, the Delegate of the Commission did not dispute this.

II. PRELIMINARY OBJECTION OF NON-EXHAUSTION OF DOMESTIC REMEDIES

60. The Government maintained, as they had already done before the Commission, that the applicant had not exhausted his domestic remedies in so far as he had not submitted certain of his complaints at the appropriate moment before the Austrian courts. This preliminary objection must however be rejected as out of time since the Government raised it only at the public hearing on 19 June 1989 and not, as required by Rule 47 § 1 of the Rules of Court, before the expiry of the time-limit laid down for the filing of their memorial.

III. ALLEGED VIOLATIONS OF ARTICLE 6 (art. 6), TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 14 (art. 14+6)

61. In the submission of the applicant, in numerous respects during the course of the criminal proceedings taken against him in Austria he was denied a fair trial, his rights of defence were violated and he was the victim of discrimination, contrary to all the different provisions of Article 6 (art. 6) of the Convention, taken on their own, together or in conjunction with Article 14 (art. 14+6). Articles 6 and 14 (art. 6, art. 14) read as follows:

Article 6 (art. 6)

> "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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly

necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(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;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Article 14 (art. 14)

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

62. The guarantees in paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3) represent constituent elements of the general concept of a fair trial embodied in paragraph 1 (art. 6-1) (see, as the most recent authority, the Kostovski judgment of 20 November 1989, Series A no. 166, p. 19, § 39). At the public hearing on 19 June 1989 counsel for Mr Kamasinski likewise described the foundation premise of his submissions as being that his client was denied a fair trial, many of the specific complaints forming part of a general complaint of deprivation of the defendant's right to tell the trial court his side of the story. In view of the nature of the violations alleged by the applicant, the Court considers it appropriate to group related matters of complaint and to take the relevant paragraphs of Article 6 (art. 6) together and, in so far as necessary, in conjunction with Article 14 (art. 14+6).

A. Proceedings before the Regional Court

1. Legal assistance

63. One of Mr Kamasinski's main contentions was that his court-appointed legal aid defence counsel, Dr Steidl, had not provided effective legal assistance to him in the preparation and conduct of the case, with the result that he had been denied the benefit of a fair trial.

He cited the non-attendance of the lawyer at the indictment hearing (see paragraph 15 above) and the brevity of the lawyer's pre-trial visits to the prison (see paragraphs 14 and 17 above). He accused the lawyer of failing to acquaint him with the prosecution evidence prior to the trial. He criticised the lawyer's performance at the trial on a number of counts, for example in agreeing to the introduction of written statements by out-of-court witnesses, in omitting to make certain motions in order to preserve the right to lodge a plea of nullity and in asking in the concluding speech for a "lenient judgment" ("mildes Urteil") (see paragraphs 25 to 27 above). In his submission, after the incident following which defence counsel made an unsuccessful request to withdraw from the case (see paragraph 25 above), he was "without the benefit of any legal assistance at all". The lack of tangible evidence of effective assistance was, so he contended, demonstrated by the incomplete file which Dr Steidl had handed over to Dr Schwank, the legal aid defence lawyer appointed for the purpose of the appeal and nullity proceedings (see paragraph 34 above).

He alleged violation of paragraphs 1 and 3 (c) of Article 6 (art. 6-1, art. 6-3-c).

64. The Government drew attention to the services rendered by Dr Steidl. In their view, the Austrian authorities had met their obligations under Article 6 § 3 (c) (art. 6-3-c) by the appointment and replacement of legal aid defence lawyers at the different stages of the procedure.

On its evaluation of the evidence the Commission likewise did not find any violation of Article 6 § 3 (c) (art. 6-3-c).

65. Mr Kamasinski was at no point unrepresented before the Austrian courts. Dr Steidl, a lawyer who is also a registered interpreter for the English language, was appointed legal aid counsel when it became clear that the lawyer initially assigned had an insufficient command of English to communicate with his client (see paragraph 13 above). Following the trial Dr Steidl was himself replaced by Dr Schwank shortly after asking the Bar Association to be discharged from his duties as defence counsel (see paragraph 33 above).

Certainly, in itself the appointment of a legal aid defence counsel does not necessarily settle the issue of compliance with the requirements of Article 6 § 3 (c) (art. 6-3-c). As the Court stated in its Artico judgment of 13 May 1980:

> "The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... . [M]ere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations." (Series A no. 37, p. 16, § 33)

Nevertheless, "a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes" (ibid., p. 18, § 36). It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6 § 3 (c) (art. 6-3-c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.

66. Unlike the lawyer in the Artico case, who, "from the very outset, ... stated that he was unable to act" (ibid., p. 16, § 33), Dr Steidl took a number of steps prior to the trial in his capacity as Mr Kamasinski's defence counsel. Thus, he visited Mr Kamasinski in prison on nine occasions, he lodged a complaint against the decision to remand in custody and he filed written and telephone motions for the attendance of witnesses (see paragraphs 14, 17 and 18 above). These actions were clearly not such as to put the competent authorities on notice of ineffective legal representation.

67. Mr Kamasinski contended however that in the period before his trial he had exerted considerable efforts to bring his lawyer's shortcomings to the attention of the authorities, in particular by writing to the presiding judge of the trial court.

68. Like the Commission, the Court is prepared to assume in the applicant's favour that the letters of 19, 23 (or 24) and 30 March 1981 to the presiding judge now missing from the official court file were substantially as summarised in the letters he sent to the presiding judge on 4 and 18 May 1981 after the trial (see paragraphs 19 and 23 above).

According to the terms of these two subsequent letters, Mr Kamasinski had in his letter of 19 March specifically requested the presiding judge to discharge Dr Steidl if the lawyer's assignment was the basis for denying Mr Kamasinski himself direct access to the evidence recorded in the court file. This request cannot be regarded as tantamount to notifying the trial court that there were grounds to intervene as regards his legal representation. In contrast, after the trial and his conviction Mr Kamasinski made a written request on 6 April 1981 for the appointment of a new lawyer on the ground that he did "not get along with Dr Steidl". This post-trial request was repeated in, inter alia, letters of 21 April and 4 May 1981 to the presiding judge, where Mr Kamasinski alleged that Dr Steidl had not correctly defended him (see paragraphs 31 and 32 above).

There remains the complaint said to have been made to the presiding judge by Mr Kamasinski in his letter of 30 March that "Dr Steidl had not prepared [him] for the trial, nor provided or translated all the relevant witness statements" (see paragraphs 19 and 23 above). Although the presiding judge did not reply directly to Mr Kamasinski's pre-trial letters, the Court has no reason to doubt that he did discuss them with Dr Steidl (see paragraph 19 in fine above). Evidently the presiding judge did not consider that a replacement of legal aid counsel was called for. It cannot be said that this was unreasonable.

69. As shown by his letters of 12 and 25 March 1981 to Dr Steidl and the prison legal officer and by his statements to the United States Embassy officials (see paragraphs 18, 20 and 22 above), Mr Kamasinski was dissatisfied with the preparation of his defence. There is no indication, however, that in the pre-trial stage the Austrian authorities had cause to intervene as concerns the applicant's legal representation. It cannot be found on the evidence that they disregarded the specific safeguard of legal assistance under paragraph 3 (c) of Article 6 (art. 6-3-c) or the general safeguard of a fair trial under paragraph 1 (art. 6-1).

70. At the trial itself a dispute occurred between the applicant and Dr Steidl, as a result of which Dr Steidl asked the trial court to discharge him from his functions as defence counsel; his request was however refused (see paragraph 25 above). Although the record does not state that Mr Kamasinski himself asked for his counsel to be replaced (ibid.), the Austrian judicial authorities were thus put on notice that, in Mr Kamasinski's opinion, the conditions for the conduct of the defence were not ideal. However, the material before the Court does not warrant a finding that the decision at the trial not to discharge Dr Steidl in itself had the consequence of thereafter depriving Mr Kamasinski of the effective assistance of counsel.

It may also be correct that the defence at the trial could have been conducted in another way, or even that Dr Steidl in some respects acted contrary to what Mr Kamasinski at the time or subsequently considered to be in his own best interests. Nevertheless, despite Mr Kamasinski's criticisms, the circumstances of his representation at the trial do not reveal a failure to provide legal assistance as required by paragraph 3 (c) (art. 6-3-c) or a denial of a fair hearing under paragraph 1 (art. 6-1).

71. In conclusion, no breach by the respondent State of its obligations under Article 6 §§ 1 and 3 (c) (art. 6-1, art. 6-3-c) has been established in relation to the legal assistance received by Mr Kamasinski from his legal aid defence counsel, Dr Steidl, before and during the trial at first instance.

2. Interpretation and translation

72. The applicant's other principal source of grievance derived from his inability to understand or speak German, the language used in the criminal proceedings brought against him in Austria. He contended, firstly, that the

Austrian law providing for court-certification of interpreters (see paragraph 43 above) was excessively vague and did not prescribe a reasonable standard of proficiency ensuring effective assistance of an interpreter. Secondly, he alleged inadequate interpretation of oral statements and complained of the lack of written translation of official documents at the different stages of the procedure. Thirdly, he objected that several notices of interpretation charges had been served on him. He relied on Article 6 §§ 1 and 3 (a), (b), (d) and (e) (art. 6-1, art. 6-3-a, art. 6-3-b, art. 6-3-d, art. 6-3-e), as well as on Article 14 (art. 14) on the ground that as a non-German-speaking defendant he was denied advantages available to a German-speaking defendant.

73. The Court is not called on to adjudicate on the Austrian system of registered interpreters as such, but solely on the issue whether the interpretation assistance in fact received by Mr Kamasinski satisfied the requirements of Article 6 (art. 6).

74. The right, stated in paragraph 3 (e) of Article 6 (art. 6-3-e), to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. Paragraph 3 (e) (art. 6-3-e) signifies that a person "charged with a criminal offence" who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial (see the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, p. 20, § 48).

However, paragraph 3 (e) (art. 6-3-e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.

In view of the need for the right guaranteed by paragraph 3 (e) (art. 6-3-e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (see, mutatis mutandis, the Artico judgment previously cited, Series A no. 37, pp. 16 and 18, §§ 33 and 36 - quoted above at paragraph 65).

75. The Court judges it superfluous to examine the contested facts also under Article 14 (art. 14) since in the present context the rule of non-discrimination laid down in that provision is already embodied in Article 6 § 3 (e) (art. 6-3-e) (see the Luedicke, Belkacem and Koç judgment previously cited, Series A no. 29, p. 21, § 53).

(a) Pre-trial investigations

76. Mr Kamasinski contended that no registered interpreter was present at the police interrogations and that the interpretation at his interviews with the investigating judges was insufficient in quality and scope (see paragraphs 11 and 12 above). He complained that, despite his protests, he was never provided with written translations of the records of his questioning by the police or the investigating judges so as to be able to check the accuracy of the records. For this reason, he had refused to sign any interrogation records written only in German. In so far as the trial court relied on inconsistencies or contradictions in his own testimony, this was doubtless due, he submitted, to the unreliability of the interpretation as reflected in the German summaries of his depositions.

These claims were disputed by the Government.

77. The applicability of Article 6 § 3 (e) (art. 6-3-e) was not contested. However, the Court, like the Commission, finds no indication in the evidence before it that the requirements of this provision were not met during Mr Kamasinski's pre-trial questioning by the police and the investigating judges. An interpreter was present on each occasion. It does not appear that Mr Kamasinski was unable to comprehend the questions put to him or to make himself understood in his replies. Neither is the Court satisfied that, despite the lack of written translations into English, the interpretation as provided led to results compromising his entitlement to a fair trial or his ability to defend himself.

(b) The indictment

78. Mr Kamasinski claimed that at the hearing on 16 February 1981 at which the indictment was served on him (see paragraph 15 above) only the titles of the crimes alleged were made known to him in English, but not the material substance upon which the charges were grounded. Most of the time during which the hearing lasted (one hour) was spent, he said, awaiting the arrival of defence counsel, who, when eventually contacted by telephone, announced that he would not be attending. Mr Kamasinski relied on paragraph 3 (a) of Article 6 (art. 6-3-a).

The Government replied that, as the length of the hearing suggested, all the essential parts of the indictment were interpreted. In their view the facts underlying the indictment, notably the failure to pay rent and telephone bills, were not so complex that an oral explanation to the defendant was insufficient. Furthermore, neither the applicant nor his lawyer had asked for a written translation.

The Commission for its part was satisfied on the evidence that Mr Kamasinski had been informed of the charges against him by at least mid-February 1981, some six weeks before the trial.

79. Paragraph 3 (a) of Article 6 (art. 6-3-a) clarifies the extent of interpretation required in this context by securing to every defendant the

right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". Whilst this provision does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, it does point to the need for special attention to be paid to the notification of the "accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him. A defendant not conversant with the court's language may in fact be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands.

80. The eight charges listed in the indictment were not complex as regards either the facts or the law (see paragraph 15 above). The indictment itself is a relatively uncomplicated document of six pages (ibid.). Previously Mr Kamasinski had been questioned at length and in the presence of interpreters about the suspected offences, firstly by the police and then by the investigating judges (see paragraphs 11 and 12 above). On this basis alone he must have been made aware in sufficient detail of the accusations levelled against him.

The minutes of the hearing held on 16 February 1981 record that the defendant was given notice of the indictment (see paragraph 15 above). The interpretation provided did not prevent him from challenging the indictment. With the assistance of the judge he lodged an objection, not on the ground of inability to understand the indictment but on the ground that it was defective by reason of not being supported by sufficient evidence (ibid.). The minutes further show that he asked for the indictment also to be served on his defence counsel, but they make no mention of a complaint about inadequate interpretation or of a request for a written translation (ibid.). Neither did the letter he wrote to his defence counsel immediately after the indictment hearing contain any such complaint or request (see paragraph 16 above). At the opening of the trial hearing on 2 April 1981 Mr Kamasinski, when asked, stated that he understood the charges and he and his counsel waived interpretation of the indictment into English (see paragraph 24 above).

81. The Court infers from the evidence that, as a result of the oral explanations given to him in English, Mr Kamasinski had been sufficiently informed of "the nature and cause of the accusation against him", for the purposes of paragraph 3 (a) of Article 6 (art. 6-3-a). In the Court's view, in the particular circumstances the absence of a written translation of the indictment neither prevented him from defending himself nor denied him a fair trial. Accordingly no breach of Article 6 (art. 6) can be found under this head.

(c) The trial hearing

82. The applicant contended that the interpretation during his trial on 2 April 1981 was incomplete and insufficient. In particular, questions to witnesses and the full text of their answers and of documents read out were not interpreted into English. Furthermore the layout of the courtroom rendered it impossible for him, without requesting the bench to interrupt the proceedings, to consult his English-speaking counsel or the interpreter for explanations of what was being said in German. The record of the trial, which he described as being "virtually devoid of details", failed to mention his loud complaints in this connection. He claimed that, in breach of sub-paragraph (d) of Article 6 § 3 (art. 6-3-d) taken in conjunction with sub-paragraph (e) (art. 6-3-e), he was thereby prevented from exercising his rights to the effective assistance of an interpreter and to examine and have examined witnesses.

The Government vigorously rejected the applicant's allegations.

The Commission likewise concluded that neither sub-paragraph (d) (art. 6-3-d) nor sub-paragraph (e) (art. 6-3-e) had been violated.

83. The interpretation at the trial was not simultaneous but consecutive and summarising; in particular, questions put to the witnesses were not interpreted (see paragraph 27 above). This in itself does not suffice to establish a violation of sub-paragraphs (d) or (e) of Article 6 § 3 (art. 6-3-d, art. 6-3-e), but is one factor along with others to be considered.

The record of the trial, which is seventeen pages long, notes the attendance throughout of a registered interpreter, without however specifying the extent of the interpretation provided (see paragraph 27 above). On the other hand, it summarises in some detail the substance of the evidence given as well as various declarations made by or on behalf of Mr Kamasinski. Those declarations do not include any objection, formal or informal, by Mr Kamasinski or his lawyer regarding the quality or scope of the interpretation.

The Court does not find it substantiated on the evidence taken as a whole that Mr Kamasinski was unable because of deficient interpretation either to understand the evidence being given against him or to have witnesses examined or cross-examined on his behalf.

(d) The judgment

84. Mr Kamasinski did not receive an English translation of the judgment delivered by the Regional Court on 2 April 1981 (see paragraph 29 above). He further contended that only the verdict and the sentence but not the reasons were interpreted into English at the close of the trial. This contention was disputed by the Government.

85. The Court agrees with the Commission that the absence of a written translation of the judgment does not in itself entail violation of Article 6 § 3 (e) (art. 6-3-e). Despite the protestations voiced in his letters of 21 April and

4 May 1981 to the presiding judge of the trial court (see paragraph 32 above), it is clear that, as a result of the oral explanations given to him, Mr Kamasinski sufficiently understood the judgment and its reasoning to be able to lodge, with the assistance of Dr Schwank, his newly-appointed defence counsel, an appeal against sentence and an extensive plea of nullity challenging many aspects of the trial and the judgment (see paragraphs 34, 35 and 39 above). Consequently, no breach of Article 6 § 3 (e) (art. 6-3-e) has been substantiated in this respect.

(e) Interpretation charges

86. Mr Kamasinski objected that for several months he had been led by the Austrian authorities to believe that he would have to pay interpretation charges in the event of being convicted (see paragraph 30 above). In his submission this was in violation of his right to the "free assistance" of an interpreter under paragraph 3 (e) of Article 6 (art. 6-3-e) and of his right to a fair trial under paragraph 1 (art. 6-1).

Whilst the attitude of the accused towards the appointment of an interpreter might "in some borderline cases" be influenced by the fear of financial consequences (see the Luedicke, Belkacem and Koç judgment previously cited, Series A no. 29, p. 18, § 42), the temporary concern occasioned to Mr Kamasinski because of the initial error of the Austrian authorities was not such as to have had any repercussions on the exercise of his right to a fair trial as safeguarded by Article 6 (art. 6).

3. Access to the trial-court file

87. By virtue of section 45 § 2 of the Austrian Code of Criminal Procedure, the right to inspect and make copies of the court file is restricted to the defendant’s lawyer, the defendant himself only having such access if he is legally unrepresented (see paragraph 48 above). Mr Kamasinski argued that, contrary to paragraph 3 (b) of Article 6 (art. 6-3-b), he had not been able to prepare his defence because, unlike his counsel, he had not himself been permitted to inspect the court file and thereby review the evidence against him. He further contended that the operation of section 45 § 2 of the Code in his case, since it constituted an improper application of Article 6 § 3 (c) (art. 6-3-c) "aimed at the destruction of" the rights guaranteed to him under Article 6 §§ 1 and 3 (a) and (b) (art. 6-1, art. 6-3-a, art. 6-3-b), also amounted to a violation of Article 17 (art. 17), which provides:

> "Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

88. The Court is prepared to assume that in his letter of 19 March 1981 to the presiding judge, now missing from the court file, Mr Kamasinski asked to inspect the records even if that meant discharging his defence lawyer, Dr Steidl (see paragraphs 19, 23 and 68 above). Although this request was not granted, Dr Steidl was afforded adequate access to the court files, including the possibility of making copies thereof, and adequate facilities for consulting his client.

The system provided for under section 45 § 2 of the Austrian Code of Criminal Procedure is not in itself incompatible with the right of the defence safeguarded under Article 6 § 3 (b) (art. 6-3-b). Neither, in the Court's view, did the consequences of its operation in the present case involve violation of any of the Convention provisions relied on by Mr Kamasinski. The related complaint that his counsel failed to acquaint him with the prosecution evidence fails for the reasons given above (see paragraphs 66 to 69).

4. Non-attendance of witnesses at the trial

89. In the applicant's submission, he was prevented from exercising his right under Article 6 § 3 (d) (art. 6-3-d) to cross-examine prosecution witnesses as a result of the non-attendance at the trial of Mrs Hackl, Mrs Wellington and Mrs Bruck.

90. The written deposition of Mrs Hackl, who like Mrs Wellington had been summonsed to appear at the request of the defence, was read out pursuant to section 252 § 1.4 of the Code of Criminal Procedure, which requires the consent of the defence (see paragraphs 18 and 26 above). According to Mr Kamasinski this consent must have been given, contrary to his knowledge and his interests, by his counsel. Mrs Bruck did not appear because she had not been called by either the prosecution or the defence (see paragraph 26 above). Mr Kamasinski was convicted on the counts relating to Mrs Wellington and Mrs Bruck on the basis of evidence from other sources (see paragraphs 26 and 29 above).

91. In so far as the applicant's conviction was not attributable to evidence by Mrs Wellington or Mrs Bruck, their absence from the trial raises no issue under Article 6 (art. 6). For the rest Mr Kamasinski is in effect complaining that his own desire to question witnesses at the trial was not acted on by his legal aid defence counsel. However, the allegation as to inadequate legal representation has not been held to be substantiated (see paragraphs 63 to 71 above). For the purposes of Article 6 § 3 (d) (art. 6-3-d) Mr Kamasinski must be identified with the counsel who acted on his behalf, and he cannot therefore attribute to the respondent State any liability for his counsel's decisions in this respect.

The Court concludes that no violation of Article 6 § 3 (d) (art. 6-3-d) has been established under this head.

5. "Civil parties"

92. Mr Kamasinski argued that the criminal proceedings against him were tainted because some of the prosecution witnesses constituted themselves "civil parties" (see paragraph 29 above). In his submission his trial was not fair, as required by Article 6 § 1 (art. 6-1), because these witnesses had a direct financial interest in seeing him convicted and, contrary to Article 14 (art. 14), he was discriminated against because in civil proceedings proper he would have enjoyed greater procedural safeguards as a defendant.

Neither the Government nor the Commission expressed any views on these contentions.

93. Mr Kamasinski's complaint is essentially directed against the provisions under Austrian law allowing individuals, including prosecution witnesses, to be joined to criminal proceedings as "civil parties" with a view to recovering compensation from the accused in the event of a finding of guilt. Whilst procedures of this kind may be unknown in the legal systems with which Mr Kamasinski is familiar, they are an established feature in a number of continental legal systems in Europe.

In the Court's view, the provisions in question are in themselves not inconsistent with the principles of a fair trial as embodied in Article 6 § 1 (art. 6-1); and, in so far as any difference of treatment exists between defendants in civil actions and defendants to civil claims in criminal proceedings, the interests of the proper administration of justice provide an objective and reasonable justification for the purposes of Article 14 (art. 14) (see, mutatis mutandis, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 34, § 10). Neither, on the facts, can the application of these provisions in Mr Kamasinski's case be found to have given rise to a violation of the Convention.

6. Defendant's reply to the indictment

94. Mr Kamasinski submitted that the questions put to him by the presiding judge, pursuant to section 245 of the Code of Criminal Procedure, after the reading out of the indictment (see paragraph 49 above) had the effect of shifting the burden of proof on to him as defendant before any evidence was given, thereby depriving him at the outset of the presumption of innocence to which he was entitled under Article 6 § 2 (art. 6-2).

95. Section 245 provides an option available to the defendant to use in his own interest, but it imposes no obligation to speak or reply to questions. The material before the Court contains no indication that in practice the position is otherwise or that the presumption of innocence was undermined by the actual operation of section 245 of the Code in Mr Kamasinski's case.

7. Miscellaneous matters

96. Mr Kamasinski maintained that in several other respects the procedure in his case before the Innsbruck Regional Court infringed the Convention. In particular, in his submission the inclusion in the file of the Regional Court and subsequently that of the Supreme Court of newspaper articles prejudicial to his case (see paragraph 38 above) destroyed the presumption of innocence to which he was entitled under paragraph 2 of Article 6 (art. 6-2) and his right under paragraph 1 (art. 6-1) to be tried by an "independent and impartial tribunal"; an alleged inadequate knowledge of English on the part of the presiding judge contributed to the violation of his rights under Article 6 (art. 6) both before and during the trial; the refusal by the trial court to accede to requests to summon the lawyer, Dr E., as a witness and to carry out inquiries into his (Mr Kamasinski's) bank balances (see paragraphs 25 and 26 above) prevented him from telling his side of the story and thus deprived him of his right to a fair trial under Article 6 § 1 (art. 6-1); he had not received a "public hearing" in accordance with Article 6 § 1 (art. 6-1) notably because of the absence of any members of the public in the court room and an allegedly incomplete record of the trial (see paragraphs 24 and 28 above).

97. The Court does not consider it necessary to go in detail into these various complaints since none of them has been substantiated by the evidence adduced.

8. Conclusion

98. Taken individually none of the many matters complained of by Mr Kamasinski in relation to the proceedings before the Innsbruck Regional Court has been found to be inconsistent with the rights of the defence under Article 6 (art. 6), whether taken alone or together with Article 14 (art. 14+6).

The Court, like the Commission, finds no cause for holding that taken cumulatively the procedural deficiencies alleged by Mr Kamasinski resulted in rendering unfair, for the purposes of Article 6 § 1 (art. 6-1), the proceedings at first instance considered as a whole.

B. Proceedings before the Supreme Court

1. Nullity proceedings

99. The applicant argued that he had been the victim of discrimination, contrary to Article 14 (art. 14), in the enjoyment of his rights of defence under Article 6 (art. 6) since various grounds for nullity were not available with equal effect to a defendant such as himself who did not understand

German, the language used in court (see, for example, paragraphs 37 and 51 above).

Neither the Government nor the Commission commented directly on this complaint.

100. Whilst Article 6 (art. 6) is applicable to nullity proceedings of the kind brought by Mr Kamasinski (see the Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15, § 25), the operation of section 281 § 1 of the Code of Criminal Procedure in his case did not, in the Court's view, entail any discrimination in the enjoyment of the fundamental rights protected by Article 6 (art. 6). Even assuming that the provisions on introducing a plea of nullity established any difference of treatment between German-speaking defendants and non-German-speaking defendants, it cannot be regarded as unreasonable to limit challenges on the ground of inadequate interpretation to those instances where it appears from the official record that a motion was made at the trial.

101. In the applicant's further submission he was denied a fair hearing in the nullity proceedings by reason of firstly the allegedly incomplete nature of the record of the trial, secondly the unilateral inquiry undertaken by the Supreme Court to obtain evidence from the presiding judge of the trial court as to the degree of interpretation provided, and thirdly the role of the Procurator General (Generalprokurator) before the Supreme Court (see paragraphs 28, 36, 37 and 52 above).

On the second count the Government replied that the results of the inquiry carried out by the Supreme Court were "not of essential significance" for its judgment and were probably only mentioned there "for the sake of completeness", the decisive reason in law for rejecting the plea of inadequate interpretation being the formal one that no recognised ground for nullity had been shown (see paragraph 37 above). On the third count the Government explained that the Procurator General is not the representative of the prosecution but is entrusted with the independent task of upholding the law, so that his participation before the Supreme Court did not affect the principle of equality of arms. The Government, like the Commission, did not specifically answer the argument concerning the trial record.

The Commission did not find it necessary to consider the position of the Procurator General but concluded that the Supreme Court had acted contrary to the requirements of a fair trial in relation to its inquiry concerning interpretation.

102. The Court observes that neither the applicant nor his counsel was given notice of the inquiry undertaken by the Supreme Court in virtue of section 285f of the Code of Criminal Procedure or advised of its results (see paragraphs 36 and 52 above). The reporting judge's note of his conversation with the presiding judge was then quoted almost literally in the Supreme Court's judgment of 1 September 1981 as disproving the applicant's factual allegations (see paragraph 37 above).

It is an inherent part of a "fair hearing" in criminal proceedings as guaranteed by Article 6 § 1 (art. 6-1) that the defendant should be given an opportunity to comment on evidence obtained in regard to disputed facts even if the facts relate to a point of procedure rather than the alleged offence as such. As the Commission pointed out, the author of the statement cited was a judicial official - the presiding judge of the Regional Court - who, according to the applicant, had been responsible for failing to ensure adequate interpretation at the trial. Admittedly, as the Government stressed, the information obtained from the presiding judge was not, as a matter of Austrian law, the primary reason for rejecting the plea of inadequate interpretation. Nevertheless, in conducting the factual inquiry the Supreme Court did not observe the principle that contending parties should be heard (le principe du contradictoire), this being one of the principal guarantees of a judicial procedure (see, mutatis mutandis, the Feldbrugge judgment of 29 May 1986, Series A no. 99, pp. 17-18, § 44).

There was therefore a breach of Article 6 § 1 (art. 6-1) in this respect.

103. The Court does not consider it necessary to go into the applicant's other two complaints under this head, save to note that the allegation of an incomplete record of the trial has already been rejected as unsubstantiated (see paragraphs 96 and 97 above).

2. Appeal proceedings

104. Mr Kamasinski objected to the Supreme Court's decision of 20 November 1981 refusing him leave to attend the public hearing of his appeal against sentence and against the compensation order (see paragraph 38 above). In his submission this constituted unjustified differential treatment in procedural rights as between appellants in custody, such as himself, and appellants at liberty and the "civil parties" in his own case, neither of which categories was under such a disability. He alleged discrimination in contravention of Article 14 taken in conjunction with Article 6 §§ 1 and 3 (c) (art. 14+6-1, art. 14+6-3-c).

The Government argued in reply that the nature of the review carried out by the Supreme Court in the appeal proceedings did not render the applicant's attendance necessary. In their submission, no right of personal attendance derived from Article 6 (art. 6) and in consequence there could be no violation of Article 14 taken in conjunction with that Article (art. 14+6).

The Commission expressed the opinion that the Supreme Court's decision not to authorise the applicant's attendance at the appeal hearing was discriminatory, within the meaning of Article 14 (art. 14), vis-à-vis appellants at liberty.

105. The applicant framed his complaint in terms of Article 14 considered in conjunction with Article 6 (art. 14+6). Like the Commission, the Court does not propose to examine whether the facts complained of violated Article 6 (art. 6) taken on its own.

106. The right to a fair trial extends to appeal proceedings such as those brought by Mr Kamasinski (see the Delcourt judgment previously cited, Series A no. 11, pp. 14-15, § 25), with the consequence that the supplementary protection afforded by Article 14 (art. 14) also applies (see, for example, the Marckx judgment of 13 June 1979, Series A no. 31, pp. 15-16, § 32).

However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing (see the Ekbatani judgment of 26 May 1988, Series A no. 134, p. 14, § 31) as it does for the trial hearing (see the Colozza judgment of 12 February 1985, Series A no. 89, p. 14, § 27). Consequently, this is an area where the national authorities enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see the Rasmussen judgment of 28 November 1984, Series A no. 87, p. 15, § 40, and the precedents cited there). The special features of the appeal procedure before the Supreme Court and the particular circumstances of Mr Kamasinski's appeal must be taken into account in determining whether Mr Kamasinski was the victim of discrimination as alleged (see, mutatis mutandis, the Monnell and Morris judgment of 2 March 1987, Series A no. 115, p. 22, § 56).

107. Under Austrian law hearings on appeal do not involve retrial of the evidence or a reassessment of the defendant's guilt or innocence (see paragraph 53 above). The grounds of appeal lodged by Mr Kamasinski (see paragraph 39 above) did not in themselves raise issues going to his personality and character. Mr Kamasinski was represented by counsel at the appeal hearing on 24 November 1981, having himself attended the trial hearing (see paragraphs 24 to 29 and 39 above). As the appeal had been lodged solely by the defendant, the Supreme Court had no power to impose a severer sentence than that passed at first instance (see paragraphs 34 and 53 above).

A detained appellant in the nature of things lacks the ability that an appellant at liberty or a "civil party" in criminal proceedings has to attend an appeal hearing. As the Commission noted, special technical arrangements, including security measures, have to be made if a convicted person is to be brought before an appeal court.

108. In the light of all the above circumstances, the decision of the Austrian Supreme Court refusing Mr Kamasinski leave to be brought before the Court on 24 November 1981 did not fall outside the respondent State's margin of appreciation. Even assuming that Mr Kamasinski was in a comparable position to appellants at liberty or the "civil parties" in his own case, the national authorities had good grounds for believing that there existed an objective and reasonable justification for any difference of treatment in regard to attendance at the appeal hearing.

Accordingly, no discrimination contrary to Article 14 (art. 14) can be held to have occurred.

IV. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

109. In the applicant's submission he had not had available to him effective remedies to redress the various alleged violations of the right to a fair trial, as guaranteed by Article 6 (art. 6), which had occurred to his detriment during the proceedings before the Innsbruck Regional Court. He contended that there had been a breach of Article 13 (art. 13), which provides:

> "Everyone whose rights and freedoms as set forth in [the] 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."

110. The arguments relied on by the applicant were essentially the same as those he adduced in the context of Article 6 (art. 6) in denying the adequacy of the nullity proceedings, in the circumstances of his case, to remedy these alleged violations. The requirements of Article 13 (art. 13) are less strict than, and are here absorbed by, those of Article 6 (art. 6) (see, inter alia, the Allan Jacobsson judgment of 25 October 1989, Series A no. 163, p. 21, § 78). This being so, having regard to its conclusions under Article 6 (art. 6), the Court, like the Commission, does not consider it necessary also to examine the case under Article 13 (art. 13).

V. APPLICATION OF ARTICLE 50 (art. 50)

111. The applicant sought financial compensation for alleged prejudice sustained and reimbursement of his costs and expenses incurred. He relied on Article 50 (art. 50), which provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

112. Mr Kamasinski asked the Court to award him USD 1,000 a day for each day of his incarceration in Austria, making a total of USD 435,000.

The Government denied the possibility of any causal link between the violations alleged by the applicant and the prejudice flowing from his imprisonment in Austria. In the alternative, in the opinion of the

Government, as well as that of the Delegate of the Commission, the amount claimed was excessive.

113. The Court has rejected the applicant's main contention that he was deprived of his right to tell his side of the story, in violation of all the provisions of Article 6 (art. 6). Only on one sole count have the criminal proceedings taken against Mr Kamasinski in Austria been held to be contrary to the requirements of a fair trial under Article 6 (art. 6) (see paragraph 102 in fine above). In this connection, it would appear that as a strict matter of Austrian law the applicant's plea of nullity on the ground of inadequate interpretation was doomed to failure whatever the results of the factual inquiry carried out by the Supreme Court (see paragraph 37 above).

Having regard to the nature and limited extent of the breach found, the Court considers that in relation to any damage sustained the present judgment constitutes in itself adequate just satisfaction for the purposes of Article 50 (art. 50), without it being "necessary" to afford financial compensation (see, for example, the Brogan and Others judgment of 30 May 1989, Series A no. 152-B, p. 45, § 9).

B. Costs and expenses

114. Mr Kamasinski itemised his personal expenses as consisting in USD 2,868 for publications purchased to assist with research required for his application to the Commission and USD 2,440 for reproduction of documents, telephone calls, telex and mailing charges. He sought USD 19,453.46 to cover the legal fees of Dr Schwank for services rendered in connection with the preparation of the case before the Convention institutions, including the attendance "in an advisory capacity" of Dr Gorbach, Dr Schwank's assistant, at the public hearing before the Court. USD 2,485 were claimed for the out-of-pocket expenses of Mr D'Amato, his counsel at the public hearing. As to his legal fees, Mr D'Amato informed the Court that he had entered into a contingency arrangement with Mr Kamasinski to receive twenty-five per cent of any amount awarded by the Court in financial compensation.

The Government contested the necessity of the applicant's own research expenses and of Dr Gorbach's attendance at the public hearing, as well as the reasonableness of the amount claimed as Dr Schwank's fees.

115. Contingency agreements (that is, agreements fixing legal fees at a certain percentage of the sum, if any, awarded by the court to the party concerned) are enforceable under the law of the United States of America. The Court therefore recognises the lawfulness of the arrangement entered into between Mr Kamasinski and his counsel, Mr D'Amato (contrast with the Dudgeon judgment of 24 February 1983, Series A no. 59, p. 10, § 22). However, no financial compensation having been awarded, no reimbursement is due under this head.

As to the remaining claims, costs and expenses incurred by the injured party inhering violation of the Convention established by the Court are recoverable, provided that they were actually incurred, necessarily incurred and reasonable as to quantum (see, as the most recent authority, the H. v. France judgment of 24 October 1989, Series A no. 162, p. 27, § 77). Only in relation to one of the "plethora of issues raised by [the] applicant as potential violations of the Convention", to use the applicant's own words, has the Court held in his favour. His numerous other complaints have been rejected as unsubstantiated. Furthermore, the sole instance of violation found was far from being one of the main sources of the applicant's grievances. This being so, quite apart from doubts as to the necessity and reasonableness of a number of the heads of claim, the Court considers that only a small proportion of the sums sought should be reimbursed (see, mutatis mutandis, the Olsson judgment of 24 March 1988, Series A no. 130, p. 43, § 105 in fine). Making an assessment on an equitable basis, as required by Article 50 (art. 50), the Court awards Mr Kamasinski USD 5,000 in respect of costs and expenses.

FOR THESE REASONS, THE COURT

1. Rejects unanimously the Government's preliminary objection of non-exhaustion of domestic remedies;

2. Holds unanimously that there has been a violation of Article 6 § 1 (art. 6-1) by reason of the unilateral character (caractère non contradictoire) of the factual inquiry carried out by the Supreme Court in examining the applicant's plea of nullity;

3. Holds by six votes to one that there has been no violation of Article 14 taken together with Article 6 §§ 1 and 3 (c) (art. 14+6-1, art. 14+6-3-c) by reason of the refusal to grant the applicant leave to attend the appeal hearing before the Supreme Court;

4. Holds unanimously that there has been no other violation of Article 6 (art. 6), whether taken on its own or in conjunction with Article 14 (art. 14+6);

5. Holds unanimously that it is not necessary also to examine the case under Article 13 (art. 13);

6. Holds unanimously that Austria is to pay to the applicant, in respect of costs and expenses, the sum of USD 5,000 (five thousand United States dollars);

7. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 December 1989.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the separate opinion of Mr De Meyer is annexed to this judgment.

R.R.
M.-A.E.

SEPARATE OPINION OF JUDGE DE MEYER

(Translation)

I cannot agree with paragraphs 106-108 of the reasons or with paragraph 3 of the judgment's operative provisions.

I consider that the applicant's fundamental rights were also violated before the Supreme Court in that he was not allowed to appear in person at the appeal hearing, whereas the "civil parties" were summoned to appear and he would have had to be summoned himself if he had not been in custody[1].

In my opinion, this difference of treatment was justified neither by "the special features of the appeal procedure ... and the particular circumstances of Mr Kamasinski's appeal"[2], nor by the "nature of things"[3], nor by the "special technical arrangements" that have to be made if a "convicted person"[4] is to appear in court.

In the instant case the appeal related to questions of fact which were potentially of some importance for assessing the degree of the applicant's guilt and for fixing his sentence[5].

The "nature of things" requires rather that a defendant in custody should have as much opportunity as a defendant not in custody or a "civil party" to be present at a hearing relating to matters of this kind.

Lastly, the "special technical arrangements" needed for a prisoner to be able to appear personally before an appeal court are not essentially different from those needed for the personal appearance of a prisoner during a preliminary judicial investigation or at trial.

[1] Paragraphs 38 and 54 of the judgment.
[2] Paragraph 106 of the judgment.
[3] Paragraph 107 of the judgment.
[4] Ibid.
[5] Paragraph 39 of the judgment.