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

COURT (CHAMBER)

CASE OF STÖGMÜLLER v. AUSTRIA

(Application n° 1602/62)

JUDGMENT

STRASBOURG

10 November 1969

In the Stögmüller 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 (hereinafter referred to as "the Convention") and with Rules 21 and 22 of the Rules of Court, as a Chamber composed of the following Judges:

Mr. H. ROLIN, *President*, and
MM. A. HOLMBÄCK
A. VERDROSS
G. BALLADORE PALLIERI
M. ZEKIA
J. CREMONA
S. BILGE,

and also MM. M.-A. EISSEN, *Registrar*, and J.F. SMYTH, *Deputy Registrar*,

Decides as follows:

PROCEDURE

1. The Stögmüller case was referred to the Court by the European Commission of Human Rights (hereinafter called "the Commission") and by the Government of the Republic of Austria (hereinafter called "the Government"). The case originated in an Application against the Republic of Austria submitted to the Commission on 1 August 1962 under Article 25 (art. 25) of the Convention by an Austrian national, Mr. Ernst Stögmüller.

The Commission's request, to which was attached the Report provided for in Article 31 (art. 31) of the Convention, was dated 29 May 1967 and the Application of the Government 7 June 1967. Both were lodged with the Registry of the Court within the period of three months laid down in Articles 32 (1) and 47 (art. 32-1, art. 47), the former on 30 May and the latter on 12 June 1967. These documents referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Republic of Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46).

2. By Order made on 6 June 1967 under Rule 21 (6) of the Rules of Court, the President of the Court referred the Stögmüller case to the Chamber set up to hear the Neumeister case. The Chamber was composed of seven titular judges, including Mr. Alfred Verdross, the elected Judge of Austrian nationality, sitting ex officio by virtue of Article 43 (art. 43) of the Convention, and two substitute judges. As from 31 January 1969, the first substitute judge was called upon to replace one of the judges who was unable to continue to sit.

3. The President of the Chamber consulted, on 23 June 1967, the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed (Rule 35 (1)). The same day he decided that the Agent should submit a memorial by 24 November 1967, on receipt of which it would be open to the Commission's Delegates to submit a memorial not later than 24 February 1968.

On 11 November 1967 the President of the Chamber extended the time allowed to the Government until 8 December 1967.

The Government's memorial, dated 4 December 1967, was received by the Registry on 6 December. By letter dated 18 January 1968 the Delegates of the Commission informed the President of the Chamber that they did not consider it necessary to reply to the memorial in writing but reserved the right to express themselves orally before the Court on certain particular aspects of the case.

4. On 5 February, 1 June, 8 and 22 July 1968, the President of the Chamber instructed the Registrar to invite the Commission or the Government, as appropriate, to produce various documents. These documents were filed on 8 February, 25 July, 24 September and 16 October 1968 and on 14 January 1969.

5. On 25 September 1968, the Court held a brief meeting in Strasbourg to prepare the oral part of the procedure.

6. By Order of 17 October 1968 the President fixed 10 February 1969 as the opening date for the oral hearings, having previously ascertained, through the Registrar, the views of the Agent of the Government and the Delegates of the Commission.

7. When informing the Agent and the Delegates of this decision the Registrar forwarded to them a list of questions on which the Court wished to receive further information or explanations at the oral hearings.

8. On 10 February 1969, the Court gave effect to a request of the Government to authorise the Agent, Counsel and Advisers of the Government to use the German language at the oral hearings: the Government undertook in particular to ensure the interpretation into French or English of their pleadings and statements (Rule 27 (2) of the Rules of Court).

9. The public hearings were held at the Human Rights Building at Strasbourg on 10 and 11 February 1969.

There appeared before the Court:

- for the Commission:
  Mr. C.T. EUSTATHIADES, *Principal Delegate*, and
  Mr. F. ERMACORA and Mr. J.E.S. FAWCETT, *Delegates*;
- for the Government:
  Mr. E. NETTEL, Legationsrat at
  the Federal Ministry of Foreign Affairs, *Agent*, assisted by
  Mr. W. PAHR, Head of the International Division in

the Constitutional Department of the Federal Chancellery,
and
Mr. R. LINKE, Ministerialrat in the
Federal Ministry of Justice, *Counsel*.

The Court heard the statements and conclusions of these representatives. On 10 February 1969, the Government replied to the questions mentioned above at para. 7; the Commission communicated to the Court a document dated 23 December 1967 containing the Applicant's observations on the Government's memorial. On 11 February 1969, the Court put two questions to the persons appearing before it, and these were answered the same day. The Government also produced a document requested by the Court. The hearings were closed on 11 February 1969 at 5.15 p.m.

10. On 15 February 1969, the Court instructed the Registrar to obtain from the Agent of the Government certain additional information and documents, which were provided on 28 April.

11. After deliberating in private, the Court gave the present judgment.

THE FACTS

1. The object of the Commission's request and of the Government's Application is to have the Stögmüller case referred to the Court so that the latter may decide whether the facts of the case reveal any violation by the Republic of Austria of its obligations under Article 5, paragraph (3) (art. 5-3), of the Convention.

2. The facts of the case as stated in the Commission's Report, the Government's memorial, the other documentary evidence produced and the oral statements by the representatives of the Commission and of the Government may be summarised s follows:

3. Mr. Ernst Stögmüller, an Austrian citizen, was born in Vienna on 19 June 1934. In 1955, Stögmüller was employed as an inspector for the "Heimat" Insurance Company in Vienna. While thus engaged, he began, both on his own account and for the company, to negotiate loans to the company's clients and he finally became a full-time independent financial agent.

On 10 January 1958, he founded with two other persons, Karl Hammerling and Franz Beyer, the private limited company of Stögmüller and Co. This company, whose registered office was in Linz, had an initial capital of 100,000 schillings. Its activities consisted of transactions relating to real property, including negotiating and advancing loans secured on real property or otherwise, the management of property for reward, the negotiation of settlements in and out of court, as well as an estate agency and commission business. The company also carried on the business of

wholesale and retail trading goods of all kinds, including in particular import and export. All three members were directors. The company's business could be transacted by any two of them, but in practice Stögmüller, who owned 80 per cent of the capital stock, managed the business alone.

For the transaction of contracts for loans, Stögmüller advertised in the newspapers and sent circulars to solicitors and notaries. In his advertisements, he promised loans on particularly favourable terms which, however, he did not as a general rule observe. Moreover, he had one of his assistants follow the list of court notices in order to ascertain the identity of property-owners threatened with foreclosure, to whom he then offered credit. Although Article 2 of the Regulation on Usury (Verordnung der Bundesregierung vom 11.3.1933 gegen die Ausbeutung Kreditsuchender) only allows in such cases a rate of commission equal to or less than 2 per cent, Stögmüller usually obtained commission from 6 per cent to 7 per cent and sometimes even at 15 per cent.

Furthermore, only one of the three members of the company, namely Karl Hammerling, held the business licence required by the law in these matters.

4. In connection with a civil action brought by the "Heimat" Insurance Co. before the District Court (Bezirksgericht) of Ferlach, the judge felt obliged, in view of the disclosure of certain of these business practices of the Applicant, to bring the facts of the case to the attention of the Public Prosecution. The consequent investigations resulted in the Public Prosecution at Klagenfurt charging the Applicant with aggravated fraud on five counts under Articles 197, 200, 201 (d), 203 and 199 of the Criminal Code.

On 9 July 1959, these prosecutions were transferred, at Stögmüller's request, to the Regional Criminal Court (Landesgericht für Strafsachen) of Vienna which acquitted him on 15 June 1960 (2b Vr 5328/59). In its decision of 31 January 1961 on a plea of nullity (Nichtigkeitsbeschwerde) lodged by the Public Prosecution, the Supreme Court (Oberster Gerichtshof) upheld the Regional Court's judgment on two of the counts and referred the case back to the court for retrial on the other three. On 28 May 1963, the court sentenced the Applicant to five months' imprisonment for perjury committed before the District Court of Vienna on 12 December 1957 in connection with a charge of aggravated fraud (Articles 197 and 199 sub-paragraph (a) of the Criminal Code). Stögmüller was acquitted on the other charges. By decision of 5 March 1964, the Supreme Court reduced that sentence to four months, as a result of an appeal entered by Stögmüller.

However, the latter's Application is not directed against those proceedings.

5. Suspected of having committed offences against the Usury Act (Wuchergesetz), Stögmüller was arrested on 3 March 1958 pursuant to a decision of the Linz District Court. On the following day, that court

remanded him in custody (Verwahrungshaft) under Article 175, paragraph 1, sub-paragraphs 2 (danger of absconding) and 3 (danger of suppression of evidence - Verdunkelungsgefahr) of the Code of Criminal Procedure. When he was brought before the District Court at Linz on 5 March 1958, the Applicant stated that he had been informed of that decision against which he did not propose to appeal (beschwerdelos), but asked that the file be transmitted to the Investigating Judge at Wels.

This transmission took place and, on 10 March 1958, a preliminary investigation (Voruntersuchung) was opened by the Wels Court against the Applicant who was suspected of having committed the crime of usury within the meaning of Section 3, sub-section 4, of the Usury Act and of Article 2 of the Regulation on Usury. At the same time, the court ordered the remand of the Applicant in custody (Untersuchungshaft) under Articles 175, paragraph 1, sub-paragraph 3 (danger of suppression of evidence - Verdunkelungsgefahr) and 180 of the Code of Criminal Procedure. When he appeared before the Investigating Judge of the Wels Court on the same day, Stögmüller stated that he had been notified of the two above-mentioned decisions of the Court, that he did not propose to appeal against them (beschwerdelos) and that he withdrew an application for his release which he had made earlier. He protested his innocence and noted that he would be interrogated in detail on the facts as soon as the charges were made against him.

At the request of the Applicant (15 and 17 March 1958) the case was transferred to the Regional Court of Linz.

On 21st April 1958, Stögmüller was released provisionally on parole: he gave a solemn undertaking (Gelöbnis), as provided for in Article 191 of the Code of Criminal Procedure, but was not required to provide any security. His detention while on remand has thus lasted, without interruption, for one month and eighteen days. According to the minute of that hearing, the Applicant made the following declaration:

> "I have been advised of the decision to release me on parole in pursuance of Article 191 of the Code of Criminal Procedure and I hereby give the prescribed solemn undertaking in full knowledge of the consequences of breaking that undertaking. I acknowledge that I must henceforth inform the Court immediately of any change of address. On my release I shall go to No. 255 Auhofgasse, Vienna XIII."

6. In June 1958, further information were laid with the Public Prosecutor’s Office in Linz, alleging fraud, misappropriation of funds and profiteering by the Applicant and also by a solicitor, Dr. S. Stögmüller was suspected, in particular, of having, from 1957 onwards, made a practice of demanding exorbitant security for loans from a large number of persons who were apparently in difficult financial circumstances and, further, of having, alone or together with other persons, obtained money from numerous other persons by fraudulent practices and of having misappropriated capital entrusted to him.

The Investigating Judge at the Regional Court of Linz had just begun extensive enquiries (Untersuchungshandlungen) when the Applicant submitted a request, on 23 October 1958, for the case to be transferred to the Regional Criminal Court of Vienna. Since the persons charged with him agreed to this, the case was duly transferred. The file was numbered 26 d Vr 1105/59.

7. In accordance with the provisions of Austrian law (ständige Geschäftsverteilung), the conduct of the preliminary investigation was assigned automatically, on 13 February 1959, to Investigating Judge Leonhard, who was already dealing with other cases to which was added, on 17 August 1959, the case of Rafael, Neumeister and others (see the judgment of the Court in the Neumeister case, Publications of the Court, 1968, Series A, p. 7).

8. On 15 November 1960, the Regional Criminal Court of Vienna decided:

- to continue the preliminary investigation in a series of charges relating to thirty or thirty-one cases of aggravated fraudulent conversion (Veruntreuung-Article 183 of the Criminal Code), twenty cases of aggravated fraud (Betrug-Articles 197, 200 and 203 of the Criminal Code), one other case of fraud (Articles 197, 199 sub-paragraph (d) and 5 of the Criminal Code) and twenty-one cases of the crime of usury (Sections 2 and 3, sub-section 4, of the Usury Act);

- to extend the preliminary investigation to five charges relating to cases of aggravated fraudulent conversion (Article 183 of the Criminal Code), fraud (Articles 197 et seqq. of the Criminal Code) and embezzlement (Untreue-Article 205 (c) of the Criminal Code);

- to suspend, in accordance with Article 109 of the Code of Criminal Procedure, the preliminary investigation in respect of eight or ten charges.

Under Article 184 of the Criminal Code, embezzlement is punishable by five to ten years' severe imprisonment (schwerer Kerker) if the amount involved exceeds 10,000 schillings. Fraud and fraudulent conversion become crimes if the amount of the loss caused or so intended exceeds 1,500 schillings (Articles 200 and 205 (c) of the Criminal Code). The penalty incurred is "severe imprisonment" from five to ten years where such amount exceeds 10,000 schillings, or, in cases of fraud, where the criminal has displayed "exceptional audacity or cunning" or where he is an habitual swindler (Articles 203 and 205 (c) of the Criminal Code). The amounts mentioned above have been altered since: they are fixed at present at 2,500 and 25,000 schillings respectively. Section 2 of the Usury Act lays down a sentence of from three months' to one year's strict detention (strenger Arrest); a criminal who has practised usury professionally is punished by one to five years' imprisonment where several persons have suffered serious financial loss (Section 3, sub-section 4, of the Usury Act).

On 10 February 1961, the Applicant, who was then at liberty, was notified of the facts which were being held against him; he stated that he did not propose to appeal against the prosecution and the extension of the preliminary investigation. The Investigating Judge then examined him in respect of an instance of aggravated fraud against Gertrude Kucik.

9. On his release in April 1958, Stögmüller had continued to manage his business. When the competent authorities refused to transfer the licence from Karl Hammerling to the company Stögmüller and Co., the two other members left the company and Stögmüller became the sole shareholder and director in August 1959. He then transferred the seat of the company to Vienna.

Having decided to change his occupation, he began to take flying lessons in the summer of 1959; after having produced the documents required by law, he obtained his amateur pilot's licence on 10 December 1959 and a restricted radio-telephonic certificate on 25 February 1960. In order to become a professional pilot, he made, by the summer of 1961, almost four hundred flights over a total distance of 40,000 miles with landings on fifty different airports including Vienna, Linz, Wels, Salzburg, Graz, Innsbruck, Klagenfurt, Munich, Würzburg, Pöcking, Fulda, Hanover, Copenhagen, Malmö, Norköpping, Lugano, Bologne, Florence, Rome, Naples, Palermo, Alghero (Sardinia), Brindisi, Corfù, Salonica, Athens, Héraclion (Crete), Cavalla, Belgrade and Zagreb. In July 1961, he piloted on two occasions a plane carrying tourists between Austria, Switzerland, Italy, Greece and Yugoslavia.

On 14 August 1961, the Applicant sold his company and his name was removed from the commercial register.

10. At the request of the Public Prosecutor's Office, the preliminary investigation was extended, on 2 August 1961, in respect of facts concerning Alois Holzknecht, to offences under Articles 183, 197 and 205 (c) of the Criminal Code.

11. By order dated the same day and served on 4 August 1961, the Investigating Judge summoned the Applicant for 18 August 1961 for further examination. Stögmüller, however, did not appear: on August 7, he had arrived in Greece on board a plane which he said belong[ed] to his father; he did not return to Vienna until 21 August 1961.

From Thasos in Greece, Stögmüller had, however, sent, on 14 August 1961, a postcard to his father in which he said he could be reached at Cavalla airport. He asked his father to send him a telegram in case of need and to telephone his lawyer, Mr. Tuma, to get him to have the examination adjourned ("damit die Terminverlegung vom 18.VIII klappt").

According to the statements made to the Sub-Commission by the Applicant's counsel, Mr. Tuma, on 30 September 1965 - and these were not disputed by the Government - Mrs. Tuma, his wife and secretary, had, on 17 August 1961, applied for an adjournment of the examination, and the

Investigating Judge had granted her application. When she appeared before the Sub-Commission as a witness on 1 October 1965, Mrs. Tuma, although not questioned on this point despite the request made by Mr. Tuma, stated that the Investigating Judge had accepted the excuses she had made to him verbally in explanation of the Applicant's non-appearance.

On 21 August 1961, immediately on his return, Stögmüller – again according to the undisputed statements of Mr. Tuma – accompanied Mrs. Tuma to the chambers of the Investigating Judge who, however, refused to examine the Applicant, saying that he did not have time to hear him and would carry out the examination in September 1961.

12. Again on 21 August 1961, the Public Prosecutor's Office made an application dated 18 August 1961 to the Investigating Judge to enlarge the scope of the preliminary investigation opened against Stögmüller, to issue a warrant for his arrest and to remand him in custody under Articles 175, paragraph 1, sub-paragraphs 2 and 4, and 180 of the Code of Criminal Procedure. The Public Prosecutor's Office alleged that there was a danger of absconding (Fluchtgefahr-Article 175, paragraph 1, sub-paragraph 2) and a danger of repetition of offences (Wiederholungsgefahr-Article 175, paragraph 1, sub-paragraph 4), because the Applicant had, by his unauthorised journey to Greece, broken the solemn undertaking given on his release (see paragraph 5 above) and had committed other offences in the years 1960 and 1961.

13. On 24 August 1961, the Investigating Judge ordered Stögmüller's arrest.

The warrant (Haftbefehl) stated that the Applicant had travelled abroad without permission of the court which constituted a breach of his undertaking of 21 April 1958 (paragraph 5 above), and that he had committed further offences in 1960 and 1961 at the expense of borrowers.

The warrant emphasised that a breach of undertaking entailed the remand in custody of the person charged (Article 191 in fine of the Code of Criminal Procedure) and that the Applicant's conduct after his release also proved that there was a danger of repetition of offences.

14. On the same day, the preliminary investigation against Stögmüller was extended, in respect of the facts concerning Hans Burgmüller, Josef and Maria Reichel and Karl Schumlitsch, to offences under Articles 197 et seqq, 205 (c) and 5 of the Criminal Code.

15. The Applicant was arrested on 25 August 1961. On the following day he was examined about his personal situation by a judge of the Regional Criminal Court of Vienna and was remanded in custody (Verwahrungshaft) under Article 175, paragraph 1, sub-paragraphs 2 (danger of absconding) and 3 (danger of suppression of evidence) of the Code of Criminal Procedure.

On 29 August 1961, Stögmüller was notified that the preliminary investigation had been extended by orders of the Regional Criminal Court

of Vienna of 2 and 24 August 1961 (see paragraphs 10 and 14 above). On the same day he was notified of that court's decision to remand him in custody (Untersuchungshaft) for the reasons stated in the warrant of arrest.

16. On 29 August 1961, the Applicant lodged a first appeal against this decision. He maintained that, on his release, he had informed the Investigating Judge of the Regional Criminal Court of Linz that he was obliged to travel a great deal as his residence was in Vienna but his office in Linz, and that he had asked whether the court had to be advised in advance of each of these journeys. According to the Applicant, the Investigating Judge replied that he need only leave his address at his office or with his parents. Stögmüller claimed that he had always complied with this condition in respect of his numerous journeys in Austria and abroad, and in particular after he had obtained his pilot's licence. He added that he also travelled abroad frequently as a member of the Austrian national judo team. In spring 1961 he is also said to have informed the Investigating Judge of the Regional Criminal Court of Vienna that he intended to change his occupation and become a pilot. The judge had raised no objection, although he might have been expected to deduce that the Applicant had made, and planned to make, many flights in Austria and abroad. As to his failure to appear before the Investigating Judge on 18 August 1961, Mrs. Tuma had explained the reasons to the judge and after Stögmüller's return (21 August 1961) is said to have also asked the Investigating Judge to set a new date for the examination to which the judge replied that he was overwhelmed with work at the time but would summon the Applicant after 14 September. From these various circumstances Stögmüller deduced that he had not committed any breach of the solemn undertaking he had made on 21 April 1958.

Stögmüller also claimed that he had sold his business by notarial deed on 14 August 1961 on the advice of the Investigating Judge himself and had begun to earn his living as a pilot. From that he drew the conclusion that there was no danger of repetition of offences.

17. On 6 September 1961, the Investigating Judge sent to the Public Prosecutor's Office a copy of the appeal, asking for a detailed opinion on the statements of Stögmüller relevant to the danger of repetition of offences. The Judge added:

> "This on the lines of our conversation. The accused's contention - which is not yet proved - that he had given up the business of money-lender since 14 August 1961 is irrelevant in this respect."

In answer to this request, the Public Prosecutor's Office replied on 11 September that it was of opinion that the reasons for detention continued to exist. Recalling that the subject-matter of the preliminary investigation opened against the Applicant had been extended in 1960 (see paragraph 8 above) and that following the laying of substantiated information (fundierte Anzeigen) a further extension had been ordered in 1961 (see paragraphs 10

and 14 above), the Public Prosecutor's Office concluded that a danger of repetition of offences remained. As regards the danger of absconding, the Public Prosecutor's Office pointed out, inter alia, that since his release the Applicant had broken his solemn undertaking made in 1958, had obtained his pilot's licence, had gone to Greece without the consent of the judge, on board a plane belonging to his father, had gone on frequent journeys abroad, and had to expect, in the light of the results of the preliminary investigation, a heavy sentence which might run, under the relevant legislation, from five to ten years' severe imprisonment (schwerer Kerker). Furthermore, the Public Prosecutor's Office asked the Investigating Judge to close the preliminary investigation as soon as possible.

18. By decision of 7 September 1961, the Judges' Chamber of the Regional Criminal Court of Vienna instructed the Investigating Judge to obtain from Judge Thurner, of Linz, who had released Stögmüller in 1958, information on the directions which he had given to the Applicant on that occasion.

19. On 16 September 1961, Stögmüller submitted to the Regional Criminal Court of Vienna a letter which Mr. Otto Bittner, the lawyer who had represented him at the time he was first remanded in custody in 1958, had written to Mr. Tuma on 11 September 1961. In reply to Mr. Tuma's questions, Mr. Bittner explained in that letter that, when Stögmüller was released in 1958, it was understood from the beginning that he would go to Vienna. This was the reason why the Applicant had not been obliged to report to the authorities (Meldepflicht) at Linz. Another reason why such an obligation had not been imposed on the Applicant was that he had undertaken to leave his address at Mr. Bittner's office so that he could be contacted within a week. These arrangements had in fact worked satisfactorily until the case had been transferred to Vienna. In the years 1958-59, Miss Ingrid Lintinger, Stögmüller's secretary, had always kept Mr. Bittner informed of the whereabouts of her employer.

20. In a written statement of 20 September 1961 made to Judge Leonhard (see paragraph 18 above), Mr. Thurner, formerly Investigating Judge at the Court of Linz, emphasised for his part that:

- if his memory were correct, there had been no mention in 1958, at the time of the release of Stögmüller, of anything except his address at Vienna;

- it was nonetheless possible that the Applicant had informed him that he would not be able to give immediate notice to the court of each of the many journeys he would have to make;

- even if this were true, Mr. Thurner had certainly not replied to Stögmüller that it would be enough for him to leave his address at his office at Linz or with his parents at Vienna; but more likely he had told him, as was usual in such cases, to ensure that summonses from the court reached him as soon as possible; this reply did not mean that the court was under a

duty to find out for itself the whereabouts of the Applicant if he were needed;

- that Mr. Thurner had not insisted, however, on being informed of every departure or return of the person charged - which was, anyway, in his opinion, a practice unknown at the Court of Linz.

21. On 20 September 1961, Judge Leonhard asked that Mr. Bittner - released beforehand by Stögmüller from the obligation to observe professional secrecy - be questioned on the following points:

(a) what persons were present at the time of Stögmüller's release, when mention was made of his going to Vienna (see paragraph 19 above)?

(b) when it was decided to waive the obligation for Stögmüller to notify the authorities of every journey, had it been specified that the waiver also covered journeys other than those between Vienna and Linz and, for example, journeys abroad?

On 9 October 1961, Mr. Bittner was heard as a witness by a judge of the Regional Court of Linz and stated that he had not attended, on 21 April 1958, at the release of Stögmüller, but Stögmüller had told him of his intention to go to Vienna, saying that the Investigating Judge was aware of it. Mr. Bittner added that Judge Thurner had asked him, on 30 April 1958, to see to it that the Applicant would be present when he was needed; furthermore, Stögmüller's secretary kept herself informed regularly through Mr. Bittner about the progress of the proceedings. On 29 May and 7 July 1959, Judge Thurner had asked Mr. Bittner to have his client attend and Stögmüller did in fact appear within the prescribed times. At the request of the Applicant, Mr. Bittner notified, on 12 January 1959, the Regional Court of Linz that Stögmüller intended to go to Egypt: the court made no objection. Express permission to travel was never given.

22. On 19 October 1961, the Judges' Chamber (Ratskammer) of the Regional Court of Vienna refused the appeal of 29 August 1961 (see paragraph 16 above). The Chamber held first that Stögmüller had gone to Greece without obtaining permission from the Investigating Judge. Basing its findings on the depositions made by Messrs Thurner and Bittner, it came to the conclusion that no general permission had been given by Mr. Thurner to the Applicant to cover travel in Austria or abroad. There was no doubt that Stögmüller had always returned from his travels but the Chamber considered that this fact was not relevant: in its view, it was clear from Article 191 of the Code of Criminal Procedure that any breach of the solemn undertaking was liable to entail the remand in custody of the person concerned.

For reasons very close to those set out in the unfavourable opinion given by the Public Prosecutor's Office on 11 September 1961 (paragraph 17 above), the decision of 19 October 1961 found, in addition, that there was a danger of absconding and a danger of repetition of offences. On this last

point, the Judges' Chamber considered that it was of little importance to know whether Stögmüller had in fact sold his business on 14 August 1961.

The Applicant attacked this decision on 25 October 1961. He began by stressing the fact that neither he nor his lawyer had yet had an opportunity to consult the case-file (Akteneinsicht) and that they were therefore only able to give their views on the results of the enquiry and the preliminary investigation in the light of the elements contained in the decisions of the Court.

Stögmüller furthermore maintained that as far as he could recall the only ground for his first remand in custody had been a danger of suppression of evidence and that, on the occasion of his release, the Investigating Judge had reminded him in the first place that it was essential not to suppress any evidence and in particular not to attempt to interfere with the witnesses. Accordingly, he considered he had not broken his solemn undertaking of 21 April 1958. On this topic, he returned to the arguments put forward in his appeal of 29 August 1961 (see paragraph 16 above). Emphasising that he was unaware of the contents of Judge Thurner's statement (see paragraph 20 above), he also alleged that that judge had said to Mrs. Tuma, in September 1961, that in his view the Applicant had not broken his word. Stögmüller complained, moreover, that Mrs. Tuma had not been heard as a witness in her interviews of 17 and 21 August 1961 with Judge Leonhard (see paragraph 11 above). He added that she had asked the judge, on 21 August 1961, not to fix the Applicant's examination in two days' time because Stögmüller wanted to go to Steyr on that day, and that Judge Leonhard had made no objection.

In the same context, the Applicant specified that, from 21 April 1958 onwards, he had made ten or twelve journeys abroad to participate in international judo competitions - in which sport he had been several times Austrian champion until 1960; almost all the newspapers had reported at the time his successes and defeats. Again, certain civil actions brought against him by persons who claimed to be victims of his activities had obliged him, he said, to make journeys in his own country. He considered he was entitled to assume that the Investigating Judge would learn of these absences from the press and from official documents. On this point the Applicant referred to files 40 Cg 174/60 (Regional Civil Court of Vienna) and 6 C 413/59 (District Court of Hietzing) as well as to the information laid by Holzknecht, Reichel and Schumlitsch. The Public Prosecutor concerned in the case would, for his part, have known of the above-mentioned journeys from the hearings which had taken place on 15 June 1960 in the case reference 2b Vr 5328/59, (see paragraph 4 above) with which he was also dealing. Stögmüller submitted that all these facts established that he had never believed it necessary to have permission to travel from the judge to whom he had never ceased, in any event, to be available.

The Applicant further complained that the Judges' Chamber had found, in its decision of 19 October 1961, that there was a danger of absconding and yet the warrant of arrest was based solely on the breach of the undertaking and on the danger of repetition of offences. In his submission, this way of proceeding had prejudiced the right of defence because he had not had an opportunity, in his appeal of 29 August 1961, to put forward arguments to establish that there was no danger of his absconding. In his view, there was no such danger in this case. On this point, Stögmüller recalled that he had returned from each of his numerous journeys and, particularly, that he had appeared before the Regional Criminal Court of Vienna on 15 June 1960 in the case 2b Vr 5328/59 (see paragraph 4 above) although he had to expect, according to the indictment, a sentence of imprisonment from five to ten years. As to the new complaints made against him, he stressed that he had been informed of them six months before his second arrest. He added that the sentence to be foreseen in the present case was the same as in 1958. The fact that he was preparing the professional pilot's examination was, he also maintained, a further guarantee: once he obtained the necessary licence he could pilot only Austrian aeroplanes; the cost of his professional training - which amounted to about 150,000 or 200,000 schillings and which his father intended to cover by the sale of his aeroplane - constituted a real security. The Applicant also emphasised that his amateur pilot's licence would expire on 1 December 1961 and he could not renew it unless he recovered his liberty before that date.

On the question of the danger of repetition of offences, Stögmüller alleged, not without protesting his innocence that all the facts subsequent to his release were tied up with his activities as a financial agent, which activities he had ceased on 14 August 1961.

Finally, he pointed out that he had not yet been examined about a great many of the facts alleged against him and especially that he had not been heard on the merits of the case since his second arrest.

23. The Public Prosecutor's Office, to which the Investigating Judge had referred the appeal for opinion, replied on 31 October 1961:

- that the Prosecutor who had attended the hearing on 15 June 1960 was not familiar, at that time, with the file in the present case which was dealt with by one of his colleagues until the spring of 1960 and therefore the Applicant's statements on this point were shown to be incorrect;

- that Stögmüller had committed his first offences even before he began to work in his company;

- that detailed inquiries were to be made into the circumstances of the purchase of the aeroplane and the sale of the company Stögmüller and Co., as well as into the accused's debts and the expenses of the professional training which he had described.

The Applicant was in fact examined on these matters by the Investigating Judge on 28 December 1961.

24. On 10 November 1961, the Court of Appeal (Oberlandesgericht) of Vienna refused the appeal of 25 October. The court did not find it necessary to go into the question whether or not Stögmüller had broken his solemn undertaking given on 21 April 1958: contrary to the view held by the Judges' Chamber, it considered that a breach of this nature could not constitute specific grounds for remand in custody and, on this point, referred to a decision by the Supreme Court of 22 August 1958. Consequently, the Court of Appeal concentrated entirely on determining whether there was any danger of the Applicant absconding and any danger of repetition of offences. On the first of these matters, it decided that no danger existed for the reason that, during a period of more than three and a half years, the Applicant had complied with every summons issued by the Investigating Judge and had returned from all his many journeys although he held a pilot's licence, had an aeroplane at his disposal and was aware that the accusations against him had been aggravated. On the other hand, the court confirmed the decision of 19 October 1961 as regards the danger of repetition of offences. It noted in effect that according to the well-substantiated information (durchaus fundierte Anzeigen) laid by Josef and Maria Reichel, Karl Schumlitsch, Hans Burgmüller and Alois Holzknecht, Stögmüller had, between May 1959 and March 1961, either alone or in concert with Knöpflmacher and Brommer, committed further punishable acts in connection with the granting of loans, thereby causing a loss of more than 70,000 schillings to the persons concerned. The court therefore concluded that Stögmüller might, if released until the final result of the criminal proceedings in question ("bis zur rechtskräftigen Beendigung des vorliegenden Strafverfahrens"), commit further offences on the lines of those he had committed over a number of years. Although the Applicant had theoretically withdrawn from business, the court held that the danger was merely increased thereby: deprived of his previous means of livelihood, Stögmüller might be tempted to have recourse to fraudulent practices in order to maintain his customary standard of living.

25. On 24 November 1961, Stögmüller, in a letter to the President of the Regional Criminal Court of Vienna, described in detail his business career and, in particular, the preparations he had made to take up the occupation of professional pilot. He stressed, in particular, that he had sufficient means to enable him to complete his pilot's training because he had obtained 80,000 schillings as the proceeds of sale of his company and hoped to get 160,000 schillings for his father's aeroplane which he intended to sell. While offering to provide bail if he was set free, Stögmüller declared that he was ready to give a solemn promise not to engage any more in business activities. Finally, he complained that he had never had an opportunity to explain his case to Judge Leonhard, and he asked the President to allow him to do this before a member of the Committee (Präsidium) of the Court.

A perusal of the file does not show whether the President of the Court replied to this letter.

26. On 6 December 1961, the Applicant lodged a second application for provisional release. While he recognised that he had lost his livelihood by selling his business, he stressed that he hoped to obtain a professional pilot's licence and that his father had agreed to provide for his maintenance; he claimed this proved that there was no danger of repetition of offences. He added that he would be unable to take up flying as a career if his detention were prolonged. He also offered to provide security in an amount commensurate with his assets and with those of his family.

This application was accompanied by a letter addressed to Mr. Tuma on 27 November 1961, by the Applicant's father, Johann Stögmüller. The latter showed his readiness, if his son were released, to pay for his maintenance and for his professional training as a pilot.

On 21 December 1961, Stögmüller supplemented his application by explaining in detail the prospects he saw for a pilot in Austria; he referred in particular to a report in the "Express" newspaper on the need for Austria to recruit pilots for lack of Austrian pilots. The Applicant renewed his offer not to engage any more in business activities and declared himself ready to produce to the court within a reasonable time a contract of employment as a pilot.

27. On 29 December 1961, the Public Prosecutor's Office, consulted by the Investigating Judge, expressed its opposition to the release of the Applicant on the grounds that, in this case, there was a danger of repetition of offences. The Office referred on this point to the decision of the Court of Appeal (paragraph 24 above) and to the discovery made in December 1961 of other serious misdemeanours on the part of Stögmüller since his release. Further, the Office also observed that Stögmüller was in debt and had had to bring civil action, which was still pending, for the proceeds of the sale of his company.

28. The Investigating Judge refused the application on 3 January 1962. He pointed out, in substance, that the situation had not altered in the Applicant's favour since the decision of 10 November 1961; that, on the contrary, the danger of repetition of offences had become more acute as it had been learned that in 1959 Stögmüller had been instrumental in causing a certain Michael Schwanninger to lose several hundred thousand schillings; that Stögmüller was in debt and had no means of his own.

The Investigating Judge did not express views on the offer to provide bail.

29. The Applicant appealed against this decision on 8 January 1962. Relying on the above-mentioned letter from his father (paragraph 25 above), he contended that the circumstances had indeed changed in his favour. He added that, according to case-law of the Supreme Court, only clear indications could be used to establish that a danger of repetition of offences

existed. It seemed to him, then, that there were such indications in the present case because he had given up his activities as a financial agent and the Schwanninger case dated from 1959.

30. On being consulted once again, the Public Prosecutor's Office gave an unfavourable opinion on 11 January 1962. The Office considered, in effect, that the existence of a danger of repetition of offences resulted definitely from the numerous punishable acts committed by Stögmüller since 21 April 1958. In this context, the Office further recalled that the accused had negotiated loans on a large scale even before beginning to work in his company. The Office finally suggested that further inquiries into the financial position of the Applicant and his father be commenced, and also into the circumstances surrounding the alleged sale of the aforesaid company.

31. The Judge's Chamber of the Regional Criminal Court of Vienna refused the appeal on 25 January 1962. Referring to the reasons given by the Court of Appeal on 10 November 1961, and by the Investigating Judge on 3 January 1962, it added that there was strong reason to suspect that Stögmüller had continued his operations in 1960. According to information received by the court on 19 January 1962, the Applicant had persuaded Stefanie Holzdorfer and Margarete Lorin that they would make an excellent bargain if they purchased an aeroplane: as a result of this transaction, Mrs. Holzdorfer had lost her entire fortune, consisting of a house valued at 400,000 schillings, while the father of Stögmüller had acquired ownership of the plane. The Judges' Chamber noted that as the two women claimed ownership of the aeroplane Johann Stögmüller could not sell it if he wished to do so to support his son and pay for his professional training as a pilot. The Chamber did not take any decision on the offer made by the Applicant to provide security.

It had been decided on 24 January 1962 to open a preliminary investigation in the aeroplane case which was the subject of separate prosecutions (26 d Vr 592/62).

32. On 25 January, and again on 12 and 15 February 1962, Stögmüller appealed against the decision of 25 January. Recalling that he had sold his company on 14 August 1961, he drew the conclusion that there was no danger of repetition of the offences. He also stated that he had about 250,000 schillings available of which 170,000 came from the sale of the aeroplane and 80,000 were in the form of a bill of exchange outstanding against the purchase of the company; he deduced from this that his upkeep and his professional training were assured. He complained in particular that the Investigating Judge and the Judge's Chamber had not taken into account the aforementioned letter from his father (paragraph 26 above). After describing in detail the way in which he was preparing for the pilot's examination (paragraph 9 above), he stressed that he had almost finished his professional training and that due to the dearth of professional pilots in

Austria, he would have no trouble in quickly finding employment in that profession. From this he reasoned that there was no danger of repetition of offences. In order to offer in this respect additional guarantees, he declared himself ready to undertake that, in the event of his release, he would carry on no business activities, he would report regularly to the court on his occupation and he would produce to the court his contract of employment.

33. The Vienna Court of Appeal refused the appeal on 14 March 1962. It considered that neither the Applicant's proposed change of occupation nor the time he wished to devote to training as a pilot was likely to avert the danger of repetition of offences. It further stressed that four days after the contested decision, a lawyer at Lienz, Mr. Oberhofer, had laid a charge against Stögmüller of having caused, by fraud, to his clients Alois and Martha Weiskopf of Virgen, a loss of 43,000 schillings in connection with the granting of a loan.

34. On 16 April 1962, the Applicant lodged a disciplinary complaint (Aufsichtsbeschwerde) against the conduct of the proceedings by the Investigating Judge and supplemented it on 27 April 1962. On 9 May 1962, he lodged a second complaint on the grounds that the competent authorities had not yet acted on the earlier one.

On 31 October 1962 - somewhat less than three months after the Application had been lodged with the Commission (1 August 1962) - Stögmüller lodged a further disciplinary complaint with the President of the Regional Criminal Court of Vienna. He complained that Judge Leonhard was dragging out the investigation, had not given him a hearing during seventeen months' detention, except on three charges, treated him worse than other persons detained with him, had not bothered about the other persons implicated in his case, had taken reprisals against him and had been suborned by the accomplices of the Applicant in other criminal cases.

His application to the President of the Court was not successful – no more than were his other disciplinary complaints - and, on 16 November 1962, Stögmüller applied to the Court of Appeal which, on 23 January 1963, dismissed his complaints after detailed examination.

35. Meanwhile, and more specifically on 7 November 1962, the Applicant had sought, in addition to the joinder of the proceedings 26 d Vr 1105/59 and 26 d Vr 592/62 (paragraphs 6 and 31 above), the withdrawal of the other judges under the jurisdiction of the Court of Appeal of Vienna and the transfer of the case to the Regional Court of Salzburg. In effect, he accused the afore-mentioned judges of bias. On this point, he alleged that an official counsellor at the Court of Appeal was implicated (verwickelt) in the case 26 d Vr 1105/59 and that one of those who was charged with him was the son of a magistrate. He also emphasised that the prosecutions had already been going on for almost five years and that he was in detention for seventeen months without having been heard by the Investigating Judge except on three points of minor importance.

The Supreme Court refused the application for transfer and then, on 6 February 1963, dismissed the request for the withdrawal of the judges of the Court of Appeal of Vienna. The motion for the withdrawal of the other judges under the jurisdiction of the Court of Appeal was dismissed by the Court of Appeal on 27 February 1963. On 15 January and 4 March 1963, these various decisions were transmitted to the Investigating Judge who, in accordance with the legislation in force, had suspended the preliminary investigation pending the result of the proceedings for the withdrawal of judges.

36. On 5 December 1962, Stögmüller had made an appeal based on the Constitution. Emphasising that the proceedings against him had already continued for five years and that he had spent eighteen months in custody while on remand without having been heard by the Investigating Judge except on three out of the fifty-six transactions in issue, he claimed to be a victim of violations of Articles 5 (1) (c) and (3) and 6 (1) (art. 5-1-c, art. 5-3, art. 6-1) of the Convention. He further complained that he had been prevented by the Regional Criminal Court of Vienna from voting at parliamentary elections.

On 27 May 1963, the Constitutional Court (Verfassungsgerichtshof) declared that it had no jurisdiction in the matter for the reason that the appeal was directed against judicial bodies acting in the normal course of their duties.

37. On 4 June 1963, the Investigating Judge ordered the joinder of the proceedings 26 d Vr 1105/59 and 26 d 592/62 (paragraph 35 above).

38. After consulting the Public Prosecutor’s Office through Dr. Tuma, the Applicant lodged, on 9 August 1963, a third application for provisional release. He claimed that, as a result of the many months - more than twenty-five in all - which he had spent in custody his business relations had been broken off and this gave greater credibility to his stated desire to give up his former occupation. He added that he would be in danger of losing his pilot’s licence if he was not speedily released and that in any event he had served in advance a large part of any sentence which might be imposed on him. According to him, the career which he hoped to take up would not give him any opportunity of committing offences of the type with which he was now charged. Stögmüller agreed, however, that employment as a pilot might raise suspicions that he would abscond. On this point he claimed that he had no intention of evading the proceedings instituted against him, as this would be pointless for a number of reasons. As proof of his good faith he nevertheless offered a security of 280,370 schillings, including the personal security of four relatives for a sum of 32,000 schillings each.

On being consulted by the Investigating Judge, the Public Prosecutor’s Office agreed, on 19 August 1963, to the conditional release of the Applicant. The Office stated its agreement with Stögmüller’s argument that there was no longer any danger of repetition of offences but there was a

danger of his absconding. In this context, the Office stressed that the investigation had shown that there were serious charges and that a heavy sentence might therefore be expected; it also recalled that Stögmüller intended to take up a career as a pilot. The Office took the view therefore, that only release accompanied by the above-mentioned guarantee was acceptable.

On 30 September 1965, Mr. Tuma stated before the Sub-Commission that this offer of security had been a purely formal one, made with the Public Prosecutor's agreement; its sole purpose was to enable the court to release the Applicant, whose family was in fact completely penniless.

However that may be, the Investigating Judge decided, on 21 August 1963, to release the Applicant on bail. He pointed out that, as the Applicant had broken off his business connections for almost two years, the danger of repetition of the offences had clearly ceased to exist, but that there was thenceforth a danger of absconding; he added that this last danger could be overcome by the making of a solemn undertaking and the deposit of security.

The following day, the Judges' Chamber of the Regional Criminal Court of Vienna fixed the amount of the security at 280,370 schillings. Stögmüller was released on 26 August 1963 after giving the solemn undertaking provided for in Article 191 of the Code of Criminal Procedure. His second period in detention therefore lasted, without interruption, for two years and one day. According to the minute prepared on the occasion of his release, the Applicant declared:

> "I acknowledge that I have been released on parole under Article 191 of the Code of Criminal Procedure. I have been informed of the consequences of a breach of my solemn undertaking; I will reside at Auhofstrasse 255, Vienna. If I am absent from that place of residence for more than seven days - which may happen as I intend to work as a pilot - I will give prior notice to the Court."

On 27 August 1963, the Court of Appeal acknowledged receipt of the required security.

When Mr. Leonhard, the Investigating Judge, appeared before the Sub-Commission as a witness on 20 July 1966, he stated in this connection:

> "Once Stögmüller had decided to change his occupation from moneylender to aviator, the danger of new offences ceased to exist. If he ceases to be a moneylender, he can no longer commit offences of the type with which he is charged. On the other hand, his wish to become a pilot raises again the danger that he may abscond, for as a pilot one often spends more time abroad than at home .... Because of the change of occupation, there was no further danger of repetition of offences and the provision of bail averted the danger of absconding ...".

39. In July 1966, Judge Leonhard announced that the preliminary investigation had been completed and he sent to the Public Prosecutor's Office the case record (Articles 111 and 112 of the Code of Criminal Procedure) which ran to well over twenty thousand pages.

40. When they appeared before the Commission, the parties agreed that the facts which had to be examined by the organs responsible for the investigation were highly complex. The difficulty lay essentially in the number of the operations in issue.

The preliminary investigation was originally concerned with eighty commercial transactions effected by the Applicant, of which seventy involved loans, almost all of which had been granted to farmers threatened with foreclosure. Finally, only forty-five transactions remained to be dealt with. The investigation concerned a series of offences of fraud (Articles 197, 199 (d), 200, 201 (d) and 203 of the Criminal Code), fraudulent conversion (Articles 183 and 184 of the Criminal Code), embezzlement (Article 205 (c)) of the Criminal Code) usury (Sections 2, sub-section 3, and 3, sub-section 4 of the Wuchergesetz), and a number of minor offences and misdemeanours (Vergehen and Ubertretungen). The offences with which Stögmüller was charged had involved their victims in a loss of considerably more than one million schillings.

These offences had been committed throughout Austria but particularly around Wels in Upper Austria. As Wels does not lie within the jurisdiction of the Vienna Court of Appeal, the Investigating Judge could not carry out all the necessary enquiries personally; for some hundred facts and items of evidence letters rogatory had to be issued. In order to simplify the procedure, Mr. Leonhard spent several weeks in Upper Austria in November and December 1961; with the agreement of the competent authorities, he there consulted the land registers and himself questioned five witnesses at Wels, eleven at Reid im Innkreis and seven at Braunau.

A total of one hundred and seventy-nine witnesses - sixty-seven of them during the period of Stögmüller's second detention while on remand (25 August 1961 to 26 August 1963) - and ten persons charged were heard during the preliminary investigation.

41. According to information supplied to the Commission by the Government on 14 June 1966, some two or three hundred days between 5 March 1958 and 18 March 1965 were devoted to hearing the Applicant. However, only seventy-eight interrogations were recorded in writing, namely, four between 5 March and 21 April 1958, four in 1961 (three of these after Stögmüller was arrested for the second time), six in 1962, six in 1963 (up to 26 August, the date of his release), fifty-one in 1964 and seven in 1965. The minutes filled about a thousand pages. According to the statement submitted to the Commission by the Government no record was kept of any interrogation of the Applicant between 28 December 1961 and 11 July 1962, nor between 23 July 1962 and 29 May 1963 nor between 26 August 1963 and 27 January 1964.

According to the minutes of the interrogations which the Government submitted to the Court of 24 September 1968, Stögmüller was, between 5 March 1958 and 26 August 1963, the date of his second release, heard on

only six of the numerous allegations which he had to face. The minutes drawn up during this period total one hundred and seven pages.

When the lady President of the Sub-Commission asked him, on 20 July 1966, why the Applicant had not been interrogated more often in the course of his second remand in custody, Judge Leonhard stated, in particular, as follows:

> "... I would say that Stögmüller is the most intelligent person I have come across in thirty years' (experience).
>
> "... At first I sat down with Stögmüller in the prison ... and began to go over the facts with him. After two or three days I realised that, because of his intelligence, this method was not getting me anywhere with him. It is, of course, usual for a judge ... to examine the person charged ... and then hear the witness ... That was not possible in Stögmüller's case. I interrogated him ... Stögmüller insisted that the minutes should contain only his own words. He objected to any kind of summary. I had to accept everything he told me, without being able to raise the slightest objection as to whether this or that statement could be correct, for I had not the necessary testimony ... I came to see that by proceeding in this way with Stögmüller I was not making any progress in the case. In the last analysis, that is why I stopped interrogating him, I wanted first to collect the evidence ...".

42. During his second period of detention, Stögmüller brought fifty-nine applications and appeals, of which twenty-seven or twenty-eight were disciplinary complaints against the Investigating Judge and were all dismissed as ill-founded. The judge informed the Sub-Commission that in his view this was a deliberate manoeuvre designed to thwart his efforts. In this connection, he mentioned a letter which the Applicant had sent to his counsel on 5 February 1963. Stögmüller suggested in the letter that Mr. Tuma should employ the good offices of a colleague, Mr. Lang, to negotiate an agreement with the Investigating Judge: while reserving the right to pursue his applications for release, he said that, if certain concessions were granted, he would undertake not to present any more applications and appeals despite the legitimacy of his complaints; meanwhile, he added, he would continue to employ the tactics which he had agreed with his counsel.

With the Sub-Commission's permission, the Government produced this document on 20 July 1966. In its Report of 9 February 1967, the plenary Commission noted that Judge Leonhard, who was responsible for supervising the Applicant's correspondence, had read the letter in question and had had a photocopy of it made before transmitting it to Mr. Tuma; in these circumstances, the Commission felt it could not take it into consideration.

It also appeared in fact that, in order to speed up proceedings and following an exchange of views between counsel for the defence and the Investigating Judge, Stögmüller withdrew, on 3 July 1962, an appeal which he had lodged on 25 June 1962 against a decision ordering the inclusion in the file of a letter he had written to his parents.

43. In 1966-67, the Applicant's pilot's licence and his restricted radio-telephonic certificate were withdrawn by the competent authorities following his above-mentioned conviction of 5 March 1964 (paragraph 4 above).

44. On 1 August 1967, that is a little less than six months after the adoption of the Commission's Report (9 February 1967), the Public Prosecutor's Office at Vienna completed the preparation of the indictment (Anklageschrift, Article 207 of the Code of Criminal Procedure).

One hundred and forty pages long, this document was directed against three persons, and Ernst Stögmüller was named first; a fourth person charged had died in the meantime.

Stögmüller, for his part was indicted for:

- aggravated usuary (Sections 2, sub-sections 1 and 3, and 3, sub-section 4, of the Usury Act) in nineteen instances;
- the misdemeanour of usury (Section 4, sub-section 1, of the Usury Act) in two instances;
- aggravated fraud or complicity in aggravated fraud (Articles 197, 199 (d), 200, 201 (d), 203 and 5 of the Criminal Code) in nineteen instances;
- the crime of fraudulent conversion (Articles 183 and 184 of the Criminal Code) in seven instances;
- an offence against Article 8 of the Criminal Code and Section 5, penultimate paragraph, of the Vagrancy Act.

The amount of loss alleged against Stögmüller exceeded a million schillings.

According to the indictment, thirty-two of the forty-eight acts therein referred to dated from before the first release of the Applicant (21 April 1958). The sixteen others had occurred in 1959, 1960 and 1961; however, they only related to six groups of persons out of a total of 27. It is clear, in effect, that the charges relating to certain facts were severed and then dropped (Article 57, 109 and 34, paragraph 2, of the Code of Criminal Procedure). This was so, in particular, as regards the charges in relation to the Weiskopf case (paragraph 33 above).

The Public Prosecutor's Office asked, in particular, for the opening of the trial before the Regional Criminal Court of Vienna sitting as a Lay-Judge court, the arraignment of the accused persons, sixty witnesses to be summoned and the depositions of thirty-seven other witnesses to be read, the reading of the opinions of two experts and of a series of other documents.

45. The trial opened on 17 April 1968. The Regional Criminal Court of Vienna heard eighteen witnesses and read the depositions of seventy-eight others as well as the opinions of two experts.

On 9 May 1968, the court sentenced Stögmüller to four and a half years' severe imprisonment, with one night of "sleeping-hard" (hartes Lager) and one day's fasting each year, on nineteen counts of aggravated usury, one

count of usury, nineteen counts of aggravated fraud and seven counts of aggravated fraudulent conversion. In application of Article 265 of the Code of Criminal Procedure, the court took into account the sentence imposed on the Applicant in 1963-64 (paragraph 4 above). Furthermore, Stögmüller was ordered to pay to five of his victims sums totalling more than 315,000 schillings in damages and the rights of the civil plaintiffs were expressly reserved in all other respects.

The Applicant was acquitted on the remaining counts. Under Article 55 (a) of the Criminal Code, he was granted remission of sentence for the duration of the periods he had spent in provisional detention and in detention while on remand.

In fixing the amount of the remission, the court took the view that in this case there was, notwithstanding certain aggravating circumstances - the extent of the loss caused and the number of offences established - a conjunction of "very important and overriding" extenuating circumstances (Article 265 (a) of the Code of Criminal Procedure). In this respect, the court noted first that a lot of time had elapsed between the commission of the offences and the date of judgment; it acknowledged, in particular, that Stögmüller was only in part responsible for the fact that ten years had gone by since the opening of the preliminary investigation. The court also stressed that the Applicant, who had been only twenty-two years of age when he began his criminal activities, had committed no more offences since the end of 1960, but on the contrary had, on his release chosen an "ordinary" career (bürgerlich), had been of irreproachable conduct, had founded a family and had succeeded in reintegrating himself into society.

Stögmüller did not bring an appeal (Berufung), nor move to have the judgment set aside (Nichtigkeitsbeschwerde).

Some time after his release, Stögmüller took up residence in the United Kingdom where he became a pilots' instructor and had obtained the required certificate. However, he returned recently to his own country where he began to serve his sentence on 4 September 1968.

46. In his introductory Application dated 1 August 1962 (No. 1602/62), Stögmüller submitted:

- that his arrest and detention had been effected without "reasonable suspicion" of his having committed an offence and without its being "reasonably considered necessary" to prevent his committing an offence (Article 5 (1) (c) of the Convention) (art. 5-1-c);

- that he had not been brought to trial "within a reasonable time" or released pending trial (Article 5 (3)) (art. 5-3);

- that he had not been granted "a fair and public hearing within a reasonable time" (Article 6 (1)) (art. 6-1);

- that the manner in which the preliminary investigation had been carried out did not conform with the presumption of innocence (Art 6 (2)) (art. 6-2);

- that he had not been informed promptly and in detail of the nature and cause of the accusation against him (Article 6 (3) (a)) (art. 6-3-a);

- that he had not been permitted to examine or have examined witnesses against him (Article 6 (3) (d)) (art. 6-3-d);

The Applicant requested:

- that he be released, subject, if need be, to the sole condition that he should not exercise any other occupation than that of pilot;

- that he should have an opportunity of examining the witnesses against him.

On 14 September 1963, the Applicant also claimed that the Investigating Judge had become biased against him (Article 6 (1) (art. 6-1) of the Convention).

On 7 July 1964, the Commission declared inadmissible, as manifestly ill-founded, this last complaint and that grounded on Article 5 (1) (c) (art. 5-1-c); the Commission deferred its decision as to the admissibility of the remainder of the Application.

During an oral hearing held before the Commission on 1 October 1964, Mr. Tuma stated that he maintained only the claim in regard to the alleged violation of Article 5 (3) (art. 5-3). On that same day, the Commission decided that the Application was admissible in respect of that provision; it decided not to avail itself of its competence to examine further, ex officio, the allegations which had been withdrawn by the Applicant's counsel (Article 6 (1) and (3)) (art. 6-1, art. 6-3). On 14 December 1966, it deemed it was not required to resume the examination ex officio of the allegation relating to the duration of the criminal proceedings instituted against Stögmüller (Article 6 (1) (art. 6-1): "reasonable time"). The Commission did not, however, exclude the possibility that the period of more than two years which had elapsed since its decision of 1 October 1964 might be a factor such as would justify the lodging of a further Application.

47. Following the decision that part of the Application was admissible, the Sub-Commission established the facts of the case and sought in vain to reach a friendly settlement (Articles 28 and 29 of the Convention) (art. 28, art. 29).

48. Before the Commission and Sub-Commission, the Applicant stated exactly how he viewed the problem raised in this case in respect of Article 5 (3) (art. 5-3). In his view, it was not enough to note that he had obtained his freedom on 26 August 1963; the question was whether he had been given his freedom in good time or after an excessively long delay. His two periods of detention while on remand - covering a total period of two years and seven weeks - could not, in his submission, be considered "reasonable" within the meaning of the Convention. Stögmüller stated that under Austrian law the penalty for the offences with which he was charged was not less than six months' imprisonment and nor more than ten years' penal servitude and in the event of his being found guilty he expected a sentence

of two or three years. He deduced from this that his detention constituted an anticipated sentence. According to him, the course of the preliminary investigation had been subject to abnormal delays which he attributes to two reasons: Judge Leonhard was dealing with another very complex case (Rafael, Neumeister and accomplices); furthermore, the Judge had begun by summoning a large number of witnesses instead of first hearing the Applicant in accordance with normal practice. Stögmüller also claimed that during his second period of detention he had been questioned only thirteen times and on only five of the eighty or more operations in issue. He claimed that his detention had in fact been used as a means of pressure: that it was hoped by prolonging the detention to prevail on him to confess. The Investigating Judge was said to have had an illuminating conversation on this subject with Mr. Tuma in 1961. The Applicant conceded that his application for the withdrawal of judges had had the effect of suspending the preliminary investigation (see paragraph 35 above). He maintained, however, that he had been in custody for about a year before he had brought these applications and explained he had done so because he was exasperated by the slow progress of the proceedings; he said that the competent courts could, in any case, have taken a decision on these applications within one month.

Referring also to Article 5 (1) (c) (art. 5-1-c) of the Convention, the Applicant claimed that his detention had ceased to be "lawful" ("régulière") on 10 November 1961, the date on which the Court of Appeal of Vienna had agreed that there was no danger of his absconding (see paragraph 24 above). As to the danger of repetition of offences, Stögmüller disputed its existence: he said that on 14 August 1961, that is, eleven days before his second arrest, he had sold his business and given up all commercial activity such as might possibly justify fears of this danger. He pointed out finally that the reasons which had led the authorities to release him in 1963 corresponded exactly to the arguments put forward by him two years earlier in his own applications and appeals. He therefore concluded that he ought to have been released in 1961.

49. After the failure of the Sub-Commission’s attempt to reach a friendly settlement, the Commission drew up the Report provided for in Article 31 (art. 31) of the Convention. This document was adopted on 9 February 1967 and transmitted to the Committee of Ministers of the Council of Europe on 11 May 1967. The Commission states its opinion therein, by eight votes against three, that Article 5 (3) (art. 5-3) of the Convention has been violated in the present case. The Report contains two concurring opinions and three dissenting opinions.

Arguments of the Commission and the Government

1. In its Report of 9 February 1967, the Commission followed the method known as that of the seven "criteria" or "factors" which it adopted in the Wemhoff and Neumeister cases (see e.g. Publications of the Court,

Series A, Neumeister case, judgment of 27th June 1968, pages 23-24). After applying each of these criteria to the present case, the Commission considered them as a whole. The factors whose consideration, according to the Commission, led it to find "unreasonable" the nature of the length of the detention on remand in issue, i.e. criteria Nos. 1, 2 and 6, appeared to it to weigh more heavily than those telling in the opposite direction. By a majority of eight to three, the Commission expressed the opinion that there had therefore been a violation of Article 5 (3) (art. 5-3) of the Convention.

2. At the hearings of 10 and 11 February 1969, the Commission's Delegates based their arguments essentially on the judgments which the Court had given in the meantime in the Wemhoff and Neumeister cases, but also referred frequently to the Commission's Report and in particular to the majority opinion.

Referring to paragraph 10 of the section "As to the Law" in the first of these judgments, the Commissions' Delegates observed that in the opinion or the Court and that of the Commission, the concept of "reasonable time" must be interpreted in the light of the concrete facts of each case. According to the Commission, it is in the nature of things that the same factors are not necessarily involved every time Article 5 (3) (art. 5-3) is invoked. However, the experience gained in the Wemhoff, Neumeister, Stögmüller and Matznetter cases showed that as a rule certain factors were considered by the Commission and the Court in such cases.

In this connection, the Commission's Delegates referred particularly to paragraph 5 of the section "As to the Law" of the Neumeister judgment and summarised the arguments put forward by the Applicant in support of his three applications for release on bail and the reasons why the competent Austrian courts refused the first two and granted the third.

They reminded the Court that the Commission had examined these facts to see whether the proceedings dealing with the Applicant's requests for release on bail had been unduly prolonged by the fault of the authorities concerned and that they had not found any such fault.

Other factors should also be taken into consideration; in this respect the Delegates referred to the Applicant's conduct during the preliminary investigation and particularly his fifty-nine appeals, applications and other motions, thirty-four of which could not be taken into consideration in the Report of 9 February 1967 as the Government had not drawn attention to them until its Memorial of 4 December 1967. The Delegates pointed out that in the opinion of the Commission Stögmüller "went beyond a fair exercise of his right of petition" in challenging all the judges of the Vienna Court of Appeal and that "this element points to the conclusion that the prolongation of his detention, which resulted from this challenge was not unreasonable" (paragraph 69 (4) of the Report). The Delegates nevertheless produced a letter dated 23 December 1967 and addressed to the Commission in which the Applicant explained why he made that challenge.

Again, the complexity and difficulties of the preliminary investigation told in favour of the reasonableness of the length of detention in issue. Moreover, the Court had taken account of a similar factor in its judgment of 27 June 1968, in the Wemhoff case (paragraph 17 of the section "As to the Law").

Other factors told in the opposite direction, i.e. the length of the Applicant's detention - both in itself and, in particular, in relation to the sentence applicable in case of conviction - and the manner in which the preliminary investigation had been conducted. In paragraph 16 of the reasons of the Wemhoff judgment, the Court had implied that the actual duration of a period of detention could in certain circumstances be a determining factor in deciding whether it was reasonable. As to the manner in which the preliminary investigation was conducted, the Court had taken account of this in the Neumeister judgment (paragraph 21 of the reasons); it was true that the Court was dealing with Article 6 (1) (art. 6-1) of the Convention but this aspect of the question was even more relevant from the point of view of Article 5 (3) (art. 5-3). In the present case. Judge Leonhard had to investigate several very difficult and complicated cases at the same time, including that of Rafael, Neumeister and others; the steps taken to relieve him of dealing with new cases, which were mentioned by the Government for the first time during the oral hearings, did not in any way refer to the cases already pending.

3. The Delegates then replied to the Government's criticisms of the Commission's method of establishing the facts and setting them out in its Report.

4. According to the Commission, the period of detention, the compatibility of which with Article 5 (3) (art. 5-3) had to be examined, ran from 25 August 1961 to 26 August 1963. The Applicant's detention from 3 March to 21 April 1958 could not be taken into consideration because it occurred before the entry into force of the Convention with respect to Austria (3 September 1958).

In reply to an objection by the Government that the present case dealt exclusively with the period of detention prior to the lodging of the Application (25 August 1961-1 August 1962, see paragraph 11 below), the Delegates replied by referring to paragraph 7 of the Neumeister judgment in which the Court had rejected a similar objection. They stated that the Commission had relied on this opinion of the Court in its recent decision on the admissibility of Application No. 2614/65, Ringeisen against the Republic of Austria (Collection of Decisions of the Commission, Volume 27, page 51).

At the Court's request, the Delegates then replied to the Government's argument based on Article 26 (art. 26) of the Convention. They pointed out that the Applicant's detention terminated on 26 August 1963, i.e. before the Commission's decision on admissibility (1 October 1964). They added that

it should be observed that this decision was taken after a hearing on the same day at which both parties were represented and in which the parties had made submissions on the admissibility of the complaint in question which related to the whole period of detention. The Government had not however, raised any objection to the Application grounded on Articles 26 and 27 (3) (art. 26, art. 27-3) of the Convention and the Commission had not considered that it should be rejected under these provisions for failure to exhaust domestic remedies. Before the above-mentioned decision of 1 October 1964, the Applicant had on two occasions applied to each of the authorities from whom a person detained while on remand in Austria may seek his release under Articles 113 et seqq. of the Code of Criminal Procedure; he had thus exhausted the domestic remedies. However, Austrian law does not limit the number and frequency of this type of application. The Delegates remarked that if the Government's argument were to be accepted, it would lead to the conclusion that a person held in detention while on remand would have to make incessant applications in order to exhaust the domestic remedies with respect to the whole period of his detention: such a large number of applications would not only be likely to be considered as an obstruction of the normal course of criminal procedure but even as an abuse of the right of appeal.

Again, a person alleging the violation of Article 5 (3) (art. 5-3) with respect to the length of his detention while on remand complains of a continuing situation which should be considered as a whole and not divided up in the manner suggested by the Government. In the opinion of the Delegates, if the Government's argument were accepted, the effect of Article 5, paragraph (3) (art. 5-3), of the Convention would be gravely impaired: it would dissuade detained persons from petitioning the Commission until they had endured a long period of detention while on remand. The Delegates also emphasised that it might in the result be less favourable for the respondent State in cases where a detained person was set at liberty by virtue of a request for release subsequent to the lodging of his Application.

The Delegates submitted that once the Application was declared admissible and Article 26 (art. 26) of the Convention had been respected at the stage of examination of admissibility, the Commission and the Court were competent to judge whether the length of the detention while on remand in issue was reasonable without this competence being in any way limited as to time.

5. Finally the Delegates replied to the Government's arguments based on the fact that the Applicant had been convicted on 28 May 1963 by the Regional Criminal Court of Vienna in the first criminal proceedings instituted against him (file 2 b Vr 5328/59, see paragraph 10 below).

In their view, the proceedings before the Commission related exclusively to the second prosecution (file 26 d Vr 1105/59); this appeared clearly from

the Report of 9 February 1967. It was clear, moreover, that the decisions taken between 1961 and 1963 by the Austrian Courts with respect to the Applicant's detention while on remand related to this latter prosecution.

The Delegates also observed that the judgment of the Vienna Regional Criminal Court in the first criminal case was given in June 1960, i.e. more than a year before the arrest and detention of the Applicant in connection with the second prosecution. It would follow that the first prosecution was not relevant to the solution of the problem before the Court in the present case.

6. At the hearing of 10 February 1969, the Commission requested the Court:

> "to decide whether the Convention has been violated or not by the detention of Ernst Stögmüller from 25th August 1961 to 26th August 1963."

7. In its Application of 12 June 1967, the Government expressed the opinion that the Commission's Report was based on erroneous legal reasoning, an incorrect finding of the facts and an inaccurate assessment of the evidence.

These submissions were developed in detail in its memorial of 6 December 1967. The Government put forward arguments similar to those it had submitted in the Neumeister case (see pages 29 to 34, paragraphs 18 to 27 of the judgment of 27 June 1968). In particular, the Government raised objections of principle to the use of the criteria, to their application to the analysis of the facts and against criterion No. 1; it also disputed the way in which the Commission had used criteria Nos. 2, 4 and 6 in the present case.

8. At the oral hearings of 10 and 11 February 1969, the Government's representatives based their pleadings in part on the judgments which the Court had given in the meantime in the Wemhoff and Neumeister cases. In their opinion, the reasons which led to the rejection of the Applicant's first two requests for release on bail were conclusive and convincing; although the lack of danger of his absconding was acknowledged by the Court of Appeal on 10 November 1961, the danger of a repetition of the offences continued throughout the period of detention in issue; the decisions to this effect taken by the Austrian courts were confirmed by the judgment of 9 May 1968 convicting the Applicant which proved that offences had been committed after the first release. Even during his detention while on remand the Applicant had continued to recover debts due from his business activity, from which it might be concluded that he did not intend to abandon that activity. The danger of a repetition of the offences had, however, gradually lost its strength, particularly as a result of the progress of the preliminary investigation and the Applicant's change of occupation. On the other hand, the sale of the company had little significance in this respect: the Applicant, who had never obtained the licence necessary to act as an agent for credit transactions, could have resumed his business activity at any time. But

while the danger of a repetition of the offences gradually became less, the danger of his absconding had revived in view of the severity of the sentence to be expected and the fact that the Applicant intended to take up the career of pilot in the United Kingdom, a State which had not made an extradition treaty with Austria. However, the authorities had averted this danger by accepting the security offered by the Applicant.

9. The Government considered that the method laid down by the Court in the two judgments of 27 June 1968 (see, for example, paragraph 5 of the section "As to the Law" of the judgment in the Neumeister case) results inevitably in having to submit to the Court the merits of the final domestic decision on an Applicant's detention while on remand. But such a result is contrary to the Convention and to the case-law of the Commission and the Court.

This method would involve the risk of blurring the clear distinction which, according to the Government, should be maintained between paragraph (1) (c) and paragraph (3) of Article 5 (art. 5-1-c, art. 5-3). It was only the length of detention that was in issue and not the detention as such. The question whether the conditions justifying detention while on remand were fulfilled did not in the present case merit the importance that had been given to it by the Court in the Neumeister judgment. Referring to paragraph 10 of the reasons of the Wemhoff judgment, the Government's representatives expressed their agreement with the manner in which the Court had interpreted the concept of reasonableness. In their opinion, account must be taken of all circumstances which have had a bearing on the length of detention: the practical difficulties of the preliminary investigation particularly with regard to the principle of the determination of the true facts, the behaviour of the Applicant, etc. In short, the question was whether an authority of the Austrian State had delayed the proceedings: if this was not so, the Government considered that there was no reason to accuse it of having failed to comply with the requirements of paragraph (3) of Article 5 (art. 5-3).

In this connection, the Government insisted strongly on the exceptional difficulties encountered in the preliminary investigation and particularly the wide extent of the alleged dishonest dealings, the complexity of the facts, the skill of the Applicant and the number of witnesses. It also pointed out that the competent authorities, in their anxiety to speed up the course of the proceedings as far as possible, had ordered the severance of certain prosecutions and relieved Judge Leonhard of dealing with new cases during a number of periods which extended from 1 June 1959 to 30 September 1963 and amounted in all to about twenty-five months. This last-mentioned information had not been given to the Commission but the Government's representatives thought it right and necessary to give it to the Court; there was no rule forbidding the introduction of new material (Neuerungsverbot) before the Court. It is true that Judge Leonhard had had to deal at the same

time with the Stögmüller case and the case concerning Rafael, Neumeister and others; however, he had stated before the Sub-Commission that it was only the length of the preliminary investigation and not that of the Applicant's detention while on remand which had been prolonged as a result. Again, the Commission had not in its Report found any fault on the part of the Austrian judicial authorities; it thus gave the impression that the present case - as indeed the Neumeister case - was concerned less with the particular proceedings than with the Austrian system of criminal investigation.

Unlike the authorities concerned, the Applicant had systematically sought to delay and complicate the preliminary investigation. His dilatory tactics consisted in particular of a mass of applications and appeals - including the challenges to judges and requests for transfer of the proceedings - and of accusations of perjury against the prosecution witnesses. This appeared clearly from the letter addressed by Stögmüller to his lawyer on 5 February 1963.

As matters stood, the fact that the proceedings did not terminate earlier had not prejudiced the Applicant: he had been granted remission of sentence for the time he had spent in detention while on remand; furthermore, the Court had exercised in his favour its "special right of mitigation" (Article 265 (a) of the Code of Criminal Procedure) which it did for the reason that a fairly considerable time had passed since the offences were committed.

10. In order to solve the problem raised by the present case the Government considers that it is necessary to take account of the first prosecution of the Applicant. Those proceedings, which ended with the judgment of the Vienna Regional Criminal Court of 28 May 1963 (file 2 b Vr 5328/59) and the second prosecution (file 26 d Vr 1105/59) together formed an indivisible whole. The two proceedings related, in effect, to similar offences which were interconnected and were tried by the same court; moreover, all the legal requirements (Article 56 of the Code of Criminal Procedure) for a joinder of the two proceedings were satisfied both at the time judgment was given and during the detention while on remand. According to the Government, the judgment of 28 May 1963 must be considered as satisfying the Applicant's entitlement to be tried (Aburteilung) within the meaning of Article 5 (3) (art. 5-3) of the Convention. It could be regarded as a sort of partial or first judgment. As to the judgment of 9 May 1968, it was merely supplementary to that of 28 May 1963, to which it expressly referred (cf. Article 265 of the Code of Criminal Procedure). The Government added that it would cause serious difficulties if the Court were to ignore the first judgment; it observed that when a person is charged with a great number of offences the prosecution often begins, particularly in countries outside the European legal system, by separating some of the offences and putting them before the competent court; this practice which is perfectly in accord with the Convention would therefore

have to be abandoned if the Court did not consider the judgment of 28 May 1963 as being a real judicial decision within the meaning of Article 5 (3) (art. 5-3).

In reply to the arguments of the Commission's Delegates, the Government's representatives emphasised that although the first criminal proceedings had not led to an Application by Stögmüller against the Republic of Austria, they had nevertheless played a certain part in the proceedings before the Commission: they are mentioned in one of the annexes to the Commission's Report and a question concerning those proceedings was put to the parties by the President of the Sub-Commission. It is true that judgment had been given in those proceedings on 15 June 1960 but this judgment had been set aside by the Supreme Court on 31 January 1961: therefore, the only judgment to be considered was the judgment of 28 May 1963.

The Government therefore submitted that the length of detention in issue, which in its opinion should be reduced by about six months to make allowance for the delays caused by Stögmüller's challenges to the judges, should be shortened by a further three months.

11. In its Memorial of 6 December 1967, the Government on the other hand, criticised the Commission for having taken into consideration the period which followed the lodging of the Application (1 August 1962-26 August 1963): in the Government's opinion, the Commission could only deal with facts which had been put before it in an Application submitted under Article 24 (art. 24) or 25 (art. 25) and in all logic such an Application could only relate to matters prior to the date on which it was lodged.

In a judgment of 27 June 1968 the Court rejected a similar argument put forward by the same Government in the Neumeister case (see pages 30 and 38 of the judgment). The Government nevertheless maintained its position on 10 and 11 February 1969. In its view, the case before the Court dealt exclusively with the period between 25th August 1961 and 1st August 1962.

Apart from Articles 24 and 25 (art. 24, art. 25), the Government relied particularly on Article 26 (art. 26) of the Convention. In this context it maintained that the Commission's decision on admissibility was not infallible and that the Court was competent under Articles 19 and 45 (art. 19, art. 45) of the Convention to examine the question whether proceedings had properly been brought against the respondent State and whether the Application was admissible.

According to the Government, it would be contrary to Article 26 (art. 26) if one were to adopt the opinion that an Application alleging a violation of Article 5 (3) (art. 5-3) related to a situation and not to an isolated act (paragraph 7 of the reasons of the Neumeister judgment): it would be enough for the person concerned to have exhausted the domestic remedies immediately after the beginning of his detention while on remand in order to be entitled to question the legality of the whole period of detention by

applying to the Commission; the respondent State would thus be prevented from taking steps to remedy within the framework of its domestic legal system a supposed violation which might very well not have occurred until after the lodging of the Application. In the Government's opinion, such a result would be contrary to a rule of customary international law and Article 26 (art. 26) was purely and simply a reproduction of this rule.

Moreover, in the Government's view, the starting point of the Court's reasoning was not at all beyond discussion. For the Application was not directed against the detention as such but against the length of a period of detention which in itself was compatible with the requirements of the Convention. Consequently, the time factor was of capital importance for the determination of the subject of the dispute, which was not so much a continuing situation but a definite fact, that is, the length of a detention which itself complied with the requirements of Article 5 (1) (c) (art. 5-1-c).

Referring in particular to the decision of 18 July 1968 on the admissibility of Application No. 2614/65 (Ringeisen against the Republic of Austria), the Government expressed the concern it felt as to the manner in which the Commission interpreted Article 26 (art. 26): this very free and informal interpretation did not accord with the intention of the Contracting States.

Referring to its own conception, the Government did not consider that this would oblige a person desirous of protecting his rights to introduce a series of successive applications. In its opinion, an aggrieved person should apply to the Commission when he considered that he had been too long in detention: such an Application would be successful if that was in fact the case; otherwise it would be rejected on the grounds that the Applicant was complaining of a violation which had not yet occurred.

The Government concedes that it did perhaps fail to raise before the Commission the objection based on Article 26 (art. 26). It nevertheless considers that it is entitled to raise the matter before the Court: in its opinion, neither the rule forbidding the introduction of new matter (Neuerungsverbot) nor the obligation to raise certain matters at the beginning of proceedings (Eventualmaxime) appears to apply in the circumstances.

12. In the Government's opinion, if the Court was nonetheless to hold that there had been a violation of paragraph (3) of Article 5 (art. 5-3), it ought to indicate the time when this violation commenced. Since it was not contested that Stögmüller's original arrest was valid (paragraph 1 (c) of Article 5) (art. 5-1-c) this inference would, in the opinion of the Government, imply that the detention in issue was originally compatible with paragraph (3) (art. 5-3). It was therefore a great significance to the Government to know - if this should be the case - for what length of time the detention in question had continued to be reasonable.

13. In its Memorial of 6 December 1967, the Government made the following submissions to the Court which it confirmed at the hearing of 10 February 1969:

> "May it please the Court to declare that the length of detention pending trial, which is the subject of the Application lodged by Ernst Stögmüller against the Republic of Austria and of the Report drawn up by the European Commission of Human Rights on 9 February 1967 in accordance with Article 31 (art. 31) of the European Convention on Human Rights, does not conflict with the obligations arising from the said Convention".

AS TO THE LAW

1. The Application of Stögmüller raised, in the part which the Commission declared admissible, one single point which the Court has to determine: the point is whether the detention of the Applicant while on remand exceeded the reasonable time laid down in Article 5 (3) (art. 5-3) of the Convention.

2. Under Article 5 (3) (art. 5-3), "Everyone arrested or detained in accordance with the provisions of paragraph (1) (c)" of that Article (art. 5-1-c) "shall be entitled", inter alia, "to trial within a reasonable time or to release pending trial" and such "release may be conditioned by guarantees to appear for trial".

3. In its judgment of 27 June 1968 in the Neumeister case (page 37, paragraph 5), the Court held that "it is essentially on the basis of the reasons given in the decisions on the applications for release pending trial, and of the true facts (‘faits non controuvés’) mentioned by the Applicant in his appeals, that the Court is called upon to decide whether or nor there has been a violation of the Convention". The Court also expressed the same view in the Judgment it delivered on the same date in the Wemhoff case (page 24, paragraph 12).

The Austrian Government objects that such method is contrary to the Convention inasmuch as it necessarily results in making subject to the supervision of the Court the last national decision on the maintenance of the detention.

The Court does not find the objection to be well-founded. It is true, as the Court stated in the Neumeister judgment (page 37, paragraph 5), that "it is for the national judicial authorities to seek all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty". But the examination of the observance of Article 5 (3) (art. 5-3) of the Convention would be deprived of all meaning if the Court were prevented from assessing freely, on the basis of the factors determined by the domestic courts and of the true facts ("faits non controuvés") mentioned by the

Applicant in his applications and appeals, whether the prolongation of the detention was reasonable within the meaning of Article 5 (3) (art. 5-3).

4. Nor does the Court accept the distinction proposed by the Austrian Government between the length of the detention and the grounds for the detention, which latter, in the Government's view must be assessed in relation to Article 5 (1) (c) (art. 5-1-c) alone and are irrelevant to the concept of the "reasonableness" of the length of the detention within the meaning of paragraph (3) of the same Article (art. 5-3).

It is true that paragraph (1) (c) (art. 5-1-c) authorises arrest or detention for the purpose of bringing "before the competent legal authority" on the mere grounds of the existence of "reasonable suspicion" that the person arrested "has committed an offence" and it is clear that the persistence of such suspicions is a condition sine qua non for the validity of the continued detention of the person concerned, without its being necessary to go into the point whether detention maintained in spite of the disappearance of the suspicions on which the arrest was grounded violates Article 5 (1) (art. 5-1) or Article 5 (3) (art. 5-3) or these two provisions read together.

Article 5 (3) (art. 5-3) clearly implies, however, that the persistence of suspicion does not suffice to justify, after a certain lapse of time, the prolongation of the detention. That paragraph stipulates that the detention must not exceed a reasonable time. It is admitted on all sides that it is not feasible to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence. The Court is, therefore, led necessarily, when examining the question whether Article 5 (3) (art. 5-3) has been observed, to consider and assess the reasonableness of the grounds which persuaded the judicial authorities to decide, in the case which is brought before the Court, on this serious departure from the rules of respect for individual liberty and of the presumption of innocence which is involved in every detention without a conviction. For this purpose, the Court takes into account the facts established by the decisions of the said authorities and the non-refuted facts advanced by the person concerned.

5. On the other hand, there is no confusion between the stipulation in Article 5 (3) (art. 5-3) and that contained in Article 6 (1) (art. 6-1). The latter provision applies to all parties to court proceedings and its aim is to protect them against excessive procedural delays; in criminal matters, especially, it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.

Article 5 (3) (art. 5-3), for its part, refers only to persons charged and detained. It implies that there must be special diligence in the conduct of the prosecution of the cases concerning such persons. Already in this respect the reasonable time mentioned in this provision may be distinguished from that provided for in Article 6 (art. 6).

On the other hand, even if the duration of the preliminary investigation is not open to criticism, that of the detention must not exceed a reasonable time.

Thus, Article 5 (3) (art. 5-3) appears as an independent provision which produces its own effects whatever may have been the facts on which the arrest was grounded or the circumstances which made the preliminary investigation as long as it was. The Court is therefore unable to consider as decisive some of the facts referred to in argument in the pleadings, such as the point whether there are too few Investigating Judges in Austria or whether the system of assigning cases makes it possible to avoid that some of them are too busy to be able to dispose at a satisfactory rate of the cases allocated to them.

6. In addition to the objections dealt with above, the Austrian Government has disputed that the period of detention on which the Court can give judgment should extend as far as the release of Stögmüller, as the Commission admitted in its Report. According to the Government, the Court can only give judgment on the validity of the detention prior to the lodging of the Application (1 August 1962).

7. The Court has already had occasion to pronounce itself on the question whether or not it could take account of facts which were subsequent to an application but were directly related to facts covered by the application and it answered this question in the affirmative. In its judgment of 1 July 1961 in the Lawless case (page 51, paragraph 12) the Court took into account the Applicant's internment from 13 July to 11 December 1957 even though the lodging of the application dated from 8 November 1957. Similarly, in the Neumeister case the Court examined the entire period of the detention of Neumeister from 12 July 1962 to 16 September 1964, the date on which he recovered his freedom, that is, more than one year after he had petitioned the Commission (12 July 1963).

The Court refers to the reasons stated in this last-mentioned judgment (page 38, paragraph 7). The Court finds, moreover, that it is in accordance with national and international practice that a court should hold itself competent to examine facts which occurred during the proceedings and constitute a mere extension or the facts complained of at the outset. This is clearly the case in matters of detention while on remand, as courts seized of an application for release take their decisions in the light of the situation which exists at that time. For their part, international judicial bodies have frequently held that compensation for damage resulting from an illegal act of a State must also cover damage suffered by the applicant party after the institution of international proceedings.

8. The Court has paid careful attention to the arguments to the contrary which the Austrian Government has developed on the basis of Article 26 (art. 26) of the Convention, relating to the rule of prior exhaustion of domestic remedies.

First of all, the Court makes a point of noting that not only did the Government not rely on this provision before the Commission, but itself clearly took into consideration, both during the proceedings on admissibility and in the course of the examination of the merits of the case, the period of detention which elapsed between the lodging of the application and the release of Stögmüller (see Appendices II and III to the Commission's report and the note of the hearings held on 1 October 1964, 30 September 1965 and 20 July 1966, passim).

One might therefore question whether the Austrian Government is still entitled to contest that the supervision to be made by the organs set up to ensure the observance of the Convention can extend to this period of Stögmüller's detention or whether the Government should not be held to be estopped.

The Court considers, however, that it ought not take this negative stand which, moreover, has not been proposed to it by the Delegates of the Commission. The contention of the Austrian Government is, furthermore, obviously important and there is a definite interest in examining it.

9. Relying on the opening words of Article 26 (art. 26) ("The Commission may only deal with the matter ...", "La Commission ne peut être saisie ..."), the Government has maintained that the condition of exhaustion of domestic remedies applies not only to the admissibility of applications, which is the subject-matter of Article 27 (art. 27), but also prevents the organs mentioned at Article 19 (art. 19) from taking account of complaints concerning subsequent facts in respect of which the exhaustion of domestic remedies has not been verified.

10. As to the admissibility of the Application, it was accepted by the Commission in its decision of 1 October 1964. The Court notes that the correctness of that decision has not been contested.

11. As to the point whether the proceedings instituted ("saisine") may embrace complaints concerning facts which occurred after the lodging of the Application, international law, to which Article 26 (art. 26) refers explicitly, is far from conferring on the rule of exhaustion the inflexible character which the Government seems to attribute to it. International law only imposes the use of the remedies which are not only available to the persons concerned but are also sufficient, that is to say capable of redressing their complaints.

12. Thus, in matters of detention while on remand, it is in the light of the circumstances of the case that the question is, in appropriate cases, to be assessed whether and to what extent it was necessary, pursuant to Article 26 (art. 26), for the detained applicant, who had exhausted the remedies before the Commission declared his application admissible, to make later on further appeals to the national courts in order to make it possible to examine, at international level, the reasonableness of his continued detention.

But such question only arises if the examination of the reasons given by the national courts in their decisions on the appeals made before the lodging of the Application has not led to the conclusion that, at that date, the detention had exceeded a reasonable time. Indeed, if the opposite be the case it is clear that the detention while on remand which is held to have exceeded a reasonable time on the day when the application was lodged must be found, except in extraordinary circumstances, to have necessarily kept such character throughout the time for which it was continued.

As this is the conclusion which the Court has reached in the present case, there is no need for the Court to examine separately the Applicant's complaints concerning the period of detention which followed the lodging of the application.

13. Two reasons have been put forward by the competent Austrian authorities in justification of the Applicant's continued detention: the danger of repetition of the offences and the danger of absconding.

14. The first of these reasons, which may suffice in Austrian law to justify the continuation of the remand in custody of a person charged or accused, was the basis of the warrant of arrest of 24 August 1961 and of the decisions of 19 October 1961, 10 November 1961, 3 January 1962, 25 January 1962 and 14 March 1962.

Among the considerations relied upon at that time, one fact stood out above all others, the fact that Stögmüller was alleged to have continued, even after his first release, his fraudulent activities, as was borne out by the information laid by Josef and Maria Reichel, Karl Schumlitsch, Hans Burgmüller and Alois Holzknecht (decision of the Court of Appeal of Vienna on 10 November 1961) and by Alois and Martha Weiskopf (decision of the Court of Appeal of Vienna on 14 March 1962). To this, the Applicant was able to reply that only two of these complaints, those of Reichel and Schumlitsch relating to facts which occurred in February and March 1961, were prosecuted by the Public Prosecutor's Office and formed part of the judgment of the Vienna Court.

The same decisions also pointed out that, on the sale of his company Stögmüller no longer had the means to maintain his customary standard of living, that he had to institute civil proceedings to recover the proceeds of the sale of his company and that therefore there was a temptation for him to commit new crimes in order to pay for his upkeep. The Applicant, however, never ceased to point out - and when questioned as a witness before the Sub-Commission, Investigating Judge Leonhard expressly acknowledged - that the danger of repetition of the offences had disappeared once Stögmüller had given up his occupation of money-lender in order to become an aviator. The Court shares this view. Besides, the Court notes that in its judgment of 9 May 1968 convicting the Applicant, the Vienna court observed that he had not committed any more offences since the month of March 1961.

The Court, therefore, considers that the existence of a danger of repetition of the offences could not be upheld in the circumstances of the case.

15. Secondly, it has been sought to justify the continuation of the detention of Stögmüller by relying on the danger of his absconding. In this connection, it has been maintained that Stögmüller had to expect a heavy sentence, especially after the extension (24 August 1961) of the preliminary investigation to other offences, and that his pilot's licence and his father's aeroplane enabled him to go abroad at any time.

As against this, Stögmüller did, however, stress correctly that during the first period of his provisional release (from 21 April 1958 to 25 August 1961) he had gone abroad by plane on several occasions and had always returned to Austria - even if he was slightly late on 21 August 1961 which in any case he explained satisfactorily to the Investigating Judge.

One must note, in this respect, that the danger of an accused absconding does not result just because it is possible or easy for him to cross the frontier (in any event, it would have been sufficient for the purpose to ask Stögmüller to surrender his passport): there must be a whole set of circumstances, particularly, the heavy sentence to be expected or the accused's particular distate of detention, or the lack of well-established ties in the country, which give reason to suppose that the consequences and hazards of flight will seem to him to be a lesser evil than continued imprisonment. But the behaviour of Stögmüller shows clearly that such was not his situation. It is in any case decisive in this connection to note that the Vienna Court of Appeal found, in its decision of 10 November 1961, that there was no danger of his absconding. It is true that Stögmüller's provisional release was granted afterwards only subject to security but provision of security had already been offered by him as early as 6 December 1961.

In these circumstances, the Court considers that, at any rate from that date, there was no danger of absconding sufficient to justify the keeping of Stögmüller in detention.

The second application for provisional release, which was made on 6 December 1961, should therefore have been granted.

16. In order to justify the length of the detention in issue, the Government has, however, put forward two further arguments which, it may be observed, did not appear in the decisions of the competent national courts. The Government has stressed that it was necessary to conduct against Stögmüller, side by side, two criminal proceedings legally distinct but in fact constituting one indivisible entity (cases No. 26 d Vr 1105/59 and No. 2 b Vr 5328/59); furthermore, the Government underlined the delays caused by certain of the Applicant's applications and appeals and, in particular, his challenges to judges.

The preceding considerations are sufficient to reject the first argument: having found, in respect of case No. 26 d Vr 1105/59, that there was neither a danger of absconding nor a danger of repetition of offences, the Court sees no reason to come to a different conclusion in respect of case No. 2 b Vr 5328/59, which was in any event much less serious.

Nor does the Court accept the second argument. In fact, the Applicant brought the applications and appeals in question only in November 1962 and at that time the length of his detention had already ceased to be reasonable (see paragraph 15 above).

FOR THESE REASONS, THE COURT:

Holds, unanimously, that there has been in this case a breach of Article 5 (3) (art. 5-3) of the Convention;

Reserves for the Applicant the right, should the occasion arise, to apply for just satisfaction.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this tenth day of November, one thousand nine hundred and sixty-nine.

H. ROLIN
President

M.-A. EISSEN
Registrar

Judge Verdross and Judge Bilge have annexed to the present judgment their separate joint concurring opinion, in accordance with Article 51 (2) (art. 51-2) of the Convention and Rule 50 (2) of the Rules of Court.

H. R.
M.-A. E.

SEPARATE JOINT CONCURRING OPINION OF JUDGES VERDROSS AND BILGE

(Translation)

We agree with the opinion expressed in the judgment with the sole exception of the reasons stated in respect of the exhaustion of domestic remedies.

In our opinion, the Court should not examine the arguments put forward by the Austrian Government on the exhaustion of domestic remedies for the following reasons:

It is true that "the jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)" (Article 45) (art. 45). This Article must not, however, be interpreted in isolation. The jurisdiction of the Court is not defined by Article 48 (art. 48) alone, to which explicit reference is made in Article 45 (art. 45): it is also defined by other articles. It is provided in Article 47 (art. 47) that "the Court may only deal with a matter after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32 (art. 32)". Then, according to Article 28 (art. 28) the effort to achieve a friendly settlement only takes place where the Commission declares the application admissible and ascertains the facts. The Commission does not accept the application if it "considers (it) inadmissible under Article 26 (art. 26)" (Article 27 (3)) (art. 27-3). Without having to go into the exact meaning of the term "case" ("affaire") used in Article 45 (art. 45), one must conclude from the text of the Articles cited that a High Contracting Party may not submit to the Court any question it pleases without observing the conditions laid down by the relevant Articles of the Convention.

The rule of exhaustion of domestic remedies is a preliminary question relating principally to the admissibility of the application (Article 27 (3)) (art. 27-3). It is for the Commission to decide whether this condition has been fulfilled. Indeed, Article 26 (art. 26) stipulates that "the Commission may only deal with the matter after all domestic remedies have been exhausted ...". According to the very text of this Article, the question of exhaustion of domestic remedies must be previously raised before the Commission. In the present case that has not been done. Consequently, the Commission has not had an opportunity to take a decision on the point.

This conclusion can also find confirmation in the general plan of the Convention and the special features of our jurisdiction. By Article 19 (art. 19), the Convention set up the Commission and the Court to ensure the observance of human rights. To this aim, the Commission and the Court have defined powers. Competence to accept an application and to check its

admissibility belongs to the Commission. Furthermore, the institution of the Commission and its functions constitute special features of our jurisdiction. One may not therefore interpret Article 45 (art. 45) without taking account of this general plan of the Convention and of the special features we have just mentioned.

For the reasons set out above, we consider that the Court may not entertain a question of exhaustion of domestic remedies which has not been previously submitted to the Commission. In the present case, the Court should find it sufficient to point out to the Austrian Government that the Court is unable to examine the question at this stage.