In the case of Hennings v. Germany*,

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

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr L.-E. Pettiti,
Mr B. Walsh,
Mr J. De Meyer,
Mr N. Valticos,
Mr R. Pekkanen,
Mr A.N. Loizou,
Mr F. Bigi,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 29 May and 23 November 1992,

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

Notes by the Registrar

* The case is numbered 68/1991/320/392. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

PROCEDURE

1. The case was referred to the Court on 12 July 1991 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12129/86) against the Federal Republic of Germany lodged with the Commission under Article 25 (art. 25) on 16 April 1986 by Hans-Dieter Hennings, a German citizen.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) taken alone and together with Article 14 (art. 14+6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The President gave the lawyer leave to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 29 August 1991 the President drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr J. Pinheiro Farinha, Mr L.-E. Pettiti, Mr N. Valticos, Mr R. Pekkanen and Mr F. Bigi (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr B. Walsh, Mr A.N. Loizou and Mr J. De Meyer, substitute judges, replaced respectively Mrs Bindschedler-Robert and Mr Pinheiro Farinha, who had resigned, and Mr Cremona, whose term of office had expired, and whose successors had taken up their duties before the hearing (Rules 2 para. 3 and 22 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the German Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the organisation of the procedure (Rules 37 para. 1 and 38). In accordance with the order made in consequence, the Registrar received on 16 December 1991 the Government's memorial and on 18 December 1991 the applicant's, as well as, on 14 April 1992, the applicant's claim under Article 50 (art. 50). By letter of 15 May 1992 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. In accordance with the decision of the President - who had also given the representatives of the Government leave to plead in German (Rule 27 para. 2) - the hearing took place in public in the Human Rights Building, Strasbourg, on 26 May 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Meyer-Ladewig, Ministerialdirigent,
Federal Ministry of Justice, Agent,
Mrs E. Chwolik-Lanfermann, Richterin am
Oberlandesgericht, Federal
Ministry of Justice, Adviser;

(b) for the Commission

Mr A. Weitzel, Delegate;

(c) for the applicant

O.G. Freiherr von Ritter zu Groenesteyn, Lawyer.

The Court heard addresses by Mr Meyer-Ladewig for the Government, by Mr Weitzel for the Commission and by Freiherr von Ritter zu Groenesteyn for the applicant.

AS TO THE FACTS

I. The particular circumstances of the case

6. Mr Hans-Dieter Hennings is a German national born in 1945. At the material time he was a civil servant resident in Oberaudorf in Germany. He now lives in Tyrol, Austria.

7. On 15 April 1984 the applicant had an altercation with a ticket collector, Ms Huber, on a train journey from Kufstein in

Austria to Munich. Mr Hennings allegedly ran after her, grabbed her by the shoulder, snatched documents away from her and scattered them on the floor in order to retrieve his railway employee's pass that she had taken from him. Mr Hennings' six-year-old son was also party to the dispute and allegedly hit Ms Huber on the head several times with a wooden stick, causing her a number of days' absence from work.

8. On 25 April 1984 the Railway Police questioned the applicant about this incident. He said that he did not want to make a statement and that he wished to instruct a lawyer.

9. The Kiefersfelden customs police submitted their final report on the incident to the public prosecutor's office at the Traunstein Regional Court (Landgericht).

10. In a standard-form letter of 9 August 1984, the public prosecutor's office at the Traunstein Regional Court informed the applicant that they were accusing him ("Die Staatsanwaltschaft legt Ihnen zur Last") of the offence of coercion (Nötigung) under section 240 of the German Criminal Code (Strafgesetzbuch). It was stated that proceedings would not be brought against him (öffentliche Klage) if he paid a fine of DM 300 by 1 October 1984 to the State Treasury, Court Payments Office, Rosenheim.

A form to be returned by 20 September 1984 was enclosed for the purpose of consenting to this method of settlement which would result in the termination of the proceedings without further notice. No entry would be made in the criminal register. Failure to agree would result in criminal proceedings being brought (Anklage erhoben) against him without further notice. No explicit mention was made of the way in which the proceedings would be brought, namely the summary procedure whereby a penal order is issued as opposed to being summoned to appear in court.

11. As the applicant did not return the consent form or pay the fine he was issued with a penal order (Strafbefehl) by the Rosenheim District Court (Amtsgericht) on 7 November 1984 in accordance with a summary procedure (see paragraph 19 below). He was sentenced to a fine of DM 40 per day for twenty-five days for coercion and for the further offence of dangerous assault (gefährliche Körperverletzung) which was not mentioned in the letter of 9 August 1984.

When the postman found nobody at the applicant's home the order was served in accordance with the relevant legal provisions (see paragraph 20 below), by way of a notification in his letter-box on 12 November 1984 to collect a letter deposited at the Oberaudorf post office in his absence.

On the front of the notification form the recipient's attention was drawn, in bold type, to the fact that the document had been served on him with legal effect by virtue of its being deposited at the post office for collection - regardless of whether and when it actually came to his attention. On the back of the form it was stated that the letter should be collected as soon as possible and that failure to do so could have adverse legal consequences since time-limits began to run from the time of deposit at the post office.

12. Since no objection had been lodged by the applicant within the one-week time-limit then prescribed by law and explicitly mentioned in the penal order, it acquired legal force as the final judgment in the matter on 20 November 1984.

13. An application for the reinstatement of the proceedings against the penal order was submitted by the applicant's lawyer

on 26 November 1984 and received by the Rosenheim District Court on 27 November 1984, more than two weeks after the date of notification in his letter-box. Under German law reinstatement may be granted when certain deadlines have been missed through no fault of the person concerned. Such an application should, however, have been submitted within one week of the cessation of the impediment according to section 45 of the Code of Criminal Procedure (see paragraph 19 below).

14. At the request of the public prosecutor's office the Oberaudorf post office submitted a note dated 3 December 1984 to the effect that the penal order had been collected by the applicant's wife on 19 November 1984 and not on 20 November 1984. This contradicted her affidavit of 23 November 1984 in which she said that she had returned home on 20 November having been away since 6 November. During her absence the applicant had stayed at home and worked as usual but had no key to their letter-box.

15. On 6 December 1984 the applicant's request for reinstatement was dismissed by the Rosenheim District Court and he was ordered to pay the costs. It was held that the accused was not prevented by any fault save his own from filing the objection in time because he had received the penal order on 19 November 1984 as shown by the information supplied by the post office and on that day he could still have filed the objection within the time-limit. Moreover, the request for reinstatement was filed at the registry out of time (see paragraph 13 above).

16. On 14 December 1984 the applicant's wife swore a second supplementary affidavit in which she confirmed that she had collected the penal order at the Oberaudorf post office on 19 November, but said that she had not given it to her husband until the following day because she had not wanted to irritate him after his day at work.

17. The Traunstein Regional Court dismissed the applicant's appeal (Beschwerde) on 24 January 1985 and ordered him to pay the costs. In its judgment the court noted the discrepancies not only between the applicant's wife's first affidavit and the evidence from the Oberaudorf post office but also between her own two affidavits of 23 November and 14 December. It concluded as follows:

> "There exists a suspicion that the applicant's wife swore a false affidavit so that her husband would be granted reinstatement in the [status quo ante] proceedings. The conclusion one must arrive at, therefore, is that the local court was right in dismissing the application for reinstatement."

18. On 17 October 1985, due to its lack of prospects of success, the Federal Constitutional Court (Bundesverfassungsgericht) rejected the applicant's appeal against the refusal of reinstatement. It held that, in principle, the Federal Constitutional Court could not examine whether or not the applicant had sufficiently substantiated his claim that he first knew of the penal order on 20 November 1984. If, as was held in the earlier decisions, the applicant learnt of the penal order on 19 November 1984, he could still have taken immediate steps to keep to the deadline. The judgment went on as follows:

> "Even if the complainant, however, had no longer been able to lodge an objection in time on 19 November 1984 he would not have been prevented from keeping to the deadline without there being some fault on his part. It is in principle the responsibility of the addressee himself to take sufficient care to ensure that documents to be served

can reach him. In this the complainant was clearly remiss. Although he himself was not away from his place of residence during his wife's absence, he did not bother about the contents of his letter-box and did not show appropriate concern to ensure that the letter-box could be opened even though the key was not available. Thus if the complainant was only able to learn of the penal order so shortly before expiry of the objection period, with the result that an objection could no longer be made in time, this does not necessarily prompt the assumption that the complainant missed the deadline for the objection through no fault of his own.

Nor would such an assumption be called for, even if it were true that the complainant's wife had only handed him the penal order on 20 November 1984. If the addressee leaves it to other persons to take receipt of his mail, then it can be expected of him that he ensures, through appropriate instructions or arrangements - and he must check that these are kept to - or through other suitable measures, that any post received is made known to him in good time and in its entirety. In this, too, the complainant was clearly remiss."

II. The relevant domestic law

19. Sections 407-410 of the Code of Criminal Procedure ("the Code"), as applicable at the relevant time, provide for the imposition of a penal order, without a trial, in cases concerning minor offences. Once the case has been allocated to the appropriate court, the public prosecutor may submit an application for a penal order which must be accepted by the judge if there are no grounds for refusing it, namely having a different legal assessment of the case or wishing to impose a different sentence.

The written penal order shall contain a reference to the fact that the penal order should be final, binding and enforceable if the accused fails to lodge a written objection at the appropriate court or have such an objection taken down in writing at the court office, at the relevant time, within one week of service. If the objection is received within the prescribed time-limit, trial proceedings are instituted. The time-limit for lodging an objection to the penal order has since been changed to two weeks by the Criminal Procedure Amendment Act (Strafverfahrensänderungsgesetz) of 27 January 1987 which came into force on 1 April 1987.

If, however, the accused is prevented from meeting the time-limit through no fault of his own (ohne Verschulden verhindert) an application to have the proceedings reinstated must be made within one week of the cessation of the impediment according to sections 44-45 of the Code.

20. The service of documents, pursuant to section 37 of the Code, is governed by sections 181-182 of the Code of Civil Procedure (Zivilprozessordnung). If a document cannot be personally served, it may be deposited, inter alia, at the local post office. In that case a written notification of deposit must be delivered to the recipient's address in the manner customary in the case of ordinary letters or, if this should be inexpedient, affixed to the door of his home or handed to someone in the neighbourhood to transmit to the addressee.

PROCEEDINGS BEFORE THE COMMISSION

21. Mr Hennings lodged his application with the Commission on

16 April 1986. He complained under Article 6 (art. 6) of the Convention, taken in isolation and in conjunction with Article 14 (art. 14+6), about the short time-limit for filing an objection against the penal order and that it was not served on him personally.

22. The Commission declared the application (no. 12129/86) admissible on 4 September 1990. In its report of 30 May 1991 drawn up under Article 31 (art. 31), it expressed the opinion that there had been no violation of Article 6 para. 1 (art. 6-1) (nine votes to four) nor of Article 14 taken together with Article 6 para. 1 (art. 14+6-1) (twelve votes to one). The full text of its opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 251-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

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FINAL SUBMISSIONS TO THE COURT

23. The Government in their memorial of 16 December 1991 invited the Court to find "that the Federal Republic of Germany is not in breach of its obligations under the Convention".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

24. The applicant complained that he had been denied access to a court in breach of paragraphs 1, 3 (a), (b) and (c) of Article 6 (art. 6-1, art. 6-3-a, art. 6-3-b, art. 6-3-c).

In particular, he alleged that the prosecuting authorities failed to ensure that he was in actual receipt of the penal order through personal service and that due to the shortness of the time-limit for lodging an objection to it he was deprived of the possibility of getting legal assistance in time.

The Commission considered the case under Article 6 para. 1 (art. 6-1) and found that there had been no breach. The Government agreed.

25. The Court recalls that the guarantees contained in paragraph 3 of Article 6 (art. 6-3) are constituent elements, amongst others, of the general notion of a fair trial (see, amongst many authorities, the Artner v. Austria judgment of 28 August 1992, Series A no. 242-A, p. 10, para. 19). In the circumstances of the case, whilst also having regard to those guarantees, it is of the opinion that the complaint should be examined under paragraph 1 (art. 6-1), which provides as follows:

> " In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal established by law ..."

26. The Court, like the Commission and the Government, considers that the applicant could reasonably have been expected to obtain a key to his letter-box in order to have ready access to any mail addressed to him, particularly since he must have foreseen that proceedings would be brought against him as a result of his failure to reply to the letter of 9 August 1984 from the public prosecutor's office (see paragraph 10 above). The authorities cannot be held responsible for barring his access to a court

because he failed to take the necessary steps to ensure receipt of his mail and was thereby unable to comply with the requisite time-limits laid down under German law.

Whilst the time-limit of one week for lodging an objection following service of the penal order was short, especially where a new offence had been alleged (see paragraph 11 above), it must be borne in mind that the applicant still had the possibility of seeking reinstatement of the proceedings. Such a request must be granted if there has been no fault on the part of the person concerned. However, Mr Hennings failed to lodge even this request in time (see paragraphs 13-18 above).

27. In conclusion, it cannot be said that the applicant was denied his right of access to a court. Accordingly, there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 6 (art. 14+6)

28. Before the Commission the applicant also complained under Article 14 taken in conjunction with Article 6 (art. 14+6) that whereas the public prosecutor's office had three months to indict him he only had seven days in which to file an objection to the penal order.

He did not pursue this claim before the Court but he did allege in broad terms that he was the victim of discrimination because he did not have the same rights as those who had the benefit of trial proceedings. However, the Court, even if it had jurisdiction to do so, sees no reason to examine this claim since it is subsumed in his general complaint that he was denied access to court.

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that there has been no violation of Article 6 para. 1 (art. 6-1);

2. Holds unanimously that it is not necessary to examine the complaint under Article 14 taken together with Article 6 (art. 14+6).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 1992.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Walsh is annexed to this judgment.

Initialled: R.R.

Initialled: M.-A.E

DISSENTING OPINION OF JUDGE WALSH

1. By virtue of sections 407-410 of the Code of Criminal Procedure the applicant was "convicted", without a trial, of two criminal offences, namely coercion and dangerous assault. The

fact that the offences are classed as minor offences does not alter the applicable principles of Article 6 (art. 6) of the Convention. There was no public hearing or indeed any hearing, at which evidence was given or at which it would have been possible to cross examine witnesses prior to conviction. Therefore before there was any offer of an opportunity to object the applicant was adjudged to be guilty and that decision would so remain unless set aside on the objection of the applicant.

2. It appears to me that such a procedure throws the burden on the applicant to prove he is innocent which is a violation of the presumption of innocence guaranteed by Article 6 (art. 6). More fundamental however is that a conviction was recorded without being preceded by a trial.

3. I am therefore of the opinion that there has been a breach of Article 6 (art. 6) on two counts.