EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 26083/94

Richard Waite and Terry Kennedy

against

Germany

REPORT OF THE COMMISSION

(adopted on 2 December 1997)

TABLE OF CONTENTS

## I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

### A. The application

2. The first applicant is a British national, born in 1946 and resident in Griesheim. The second applicant is also a British national, born in 1950 and resident in Darmstadt. They were represented before the Commission by Mr. A. Meyer-Landrut.

3. The application is directed against Germany. The respondent Government were represented by their Agent, Ms. H. Voelskow-Thies, Ministerialdirigentin, of the Federal Ministry of Justice.

4. The case concerns the question whether the applicants were denied access to a court for a determination of their dispute with the European Space Agency, relating to an issue under German labour law. The applicants invoke Article 6 para. 1 of the Convention.

### B. The proceedings

5. The application was introduced on 24 November 1997 and registered on 22 December 1994.

6. On 26 June 1995 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 3 November 1997, after an extension of the time-limit fixed for this purpose. The applicants replied on 15 December 1995.

8. On 24 February 1997 the Commission declared the application admissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 7 March 1997 and they were invited to submit such further information or observations on the merits as they wished. No such submissions were received.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

### C. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mr S. TRECHSEL, President
Mrs G.H. THUNE
Mrs J. LIDDY
MM E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS

F. MARTINEZ
C.L. ROZAKIS
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J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

12. The text of this Report was adopted on 2 December 1997 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. The Commission's decision on the admissibility of the application is annexed hereto.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

16. In 1977 the applicants, systems programmers by profession and employed by the company SPM, were placed at the disposal of the European Space Agency to render services at the European Space Operations Centre in Darmstadt.

17. The European Space Agency with headquarters in Paris, formed out of the European Space Research Organisation and the European Organisation for the Development and Construction of Space Vehicle Launchers, was established under the Convention for the Establishment of a European Space Agency of 30 May 1975 (United Nations Treaty Series 1983, Vol. 1297, I - No. 21524). The European Space Agency runs the European Space Operations Centre as an independent operation with seat in Darmstadt (Agreement concerning the European Space Operations Centre (ESOC) of 1967 - Bundesgesetzblatt II No. 3, 18.1.1969).

18. In 1979 the applicants' contracts were taken over by CDP, a limited company with its seat in Dublin. In 1982 the applicants founded Storepace, a limited company with its seat in Manchester, which

contracted with CDP on the services to be rendered by the applicants for the European Space Agency and the payment due. As from 1984 the European Space Agency participated in the above contractual relations through the Science System, one of its subsidiaries. Subsequently, the applicants liquidated Storepace and replaced this company by Network Consultants, a company with its seat on the Island Jersey. These changes in contractual relations had no bearing on the applicants' services at the European Space Operations Centre.

19. By letter of 12 October 1990, CDP informed the applicants that the cooperation with their company Network Consultants would terminate on 31 December 1990, when the term of their contracts expired.

20. The applicants thereupon instituted proceedings before the Darmstadt Labour Court (Arbeitsgericht) against the European Space Agency, claiming that, pursuant to the German Provision of Labour Act (Arbeitnehmerüberlassungsgesetz), they had acquired the status of employees of the defendant organisation. The termination of their contracts by the company CDP had no bearing on that labour relationship with the defendant organisation.

21. In the labour court proceedings, the defendant organisation relied on their immunity from jurisdiction under Article XV para. 2 of the Convention for the Establishment of a European Space Agency and its Annex I.

22. On 10 April 1991 the Darmstadt Labour Court, following a hearing, declared the applicants' actions inadmissible. The Labour Court considered that the defendant organisation had validly relied on its immunity from jurisdiction.

23. In its reasoning, the Labour Court considered in particular that the defendant organisation had been established in 1975 as a new and independent international organisation. The defendant organisation was therefore not bound by the rule of the legal regime governing the former European Space Research Organisation which had subjected it to German jurisdiction in cases of disputes with its employees which were outside the competence of its Appeals Board. The Labour Court found itself bound by the clear wording of the Convention and its Annex.

24. On 20 May 1992 the Frankfurt/Main Labour Court of Appeal (Landesarbeitsgericht) dismissed the applicants' appeal. It admitted an appeal on points of law (Revision) with the Federal Labour Court (Bundesarbeitsgericht).

25. The Labour Court of Appeal, referring to SS. 18-20 of the Court Organisation Act (Gerichtsverfassungsgesetz), considered that immunity from jurisdiction meant that foreign States and members of diplomatic missions, were generally not subject to German jurisdiction and that no judicial action could be taken against them. According to S. 20 para. 2 of the Court Organisation Act, such immunity could be provided for, inter alia, in international agreements. The defendant organisation in principle enjoyed such immunity from jurisdiction under Article XV para. 2 of the Convention on the Establishment of the European Space Agency and its Annex I. Moreover, even assuming that the European Space Research Organisation had previously waived immunity as regards labour disputes outside the competence of its Appeals Board, the defendant organisation was not bound thereby. In this respect, the Labour Court of Appeal, referring to the reasoning of the first instance decision, set out in detail that the defendant organisation had been established as a new international organisation and not as a mere legal successor to the European Space Research Organisation.

26. By letter of 16 September 1992 the Chairman of the Council of the European Space Agency informed the applicants that the Council, at its 105th meeting of 15 and 16 December 1992, had decided not to waive the immunity from jurisdiction in their case. This position was confirmed

in subsequent correspondence.

27. On 10 November 1993 the Federal Labour Court dismissed the applicants' appeal on points of law.

28. The Federal Labour Court considered that immunity from jurisdiction was an impediment to court proceedings, and that an action against a defendant who had immunity from jurisdiction, and had not waived this immunity, was inadmissible. According to S. 20 para. 2 of the Court Organisation Act, German jurisdiction did not extend to international organisations which were exempted in accordance with international agreements. In this respect, the Federal Labour Court noted that, pursuant to Article XV para. 2 of the Convention on the Establishment of the European Space Agency, the defendant organisation had the immunities provided for in Annex I of the said Convention, and that it had not waived immunity under Article IV para. 1 (a) of the Annex.

29. As regards the question of waiver, the Federal Labour Court found that the rule of the legal regime governing the former European Space Research Organisation, which had subjected it to German jurisdiction in cases of disputes with its employees which were outside the competence of its Appeals Board, did not apply in the applicants' situation as they had not been employed by the defendant organisation, but had worked for the defendant organisation on the basis of a contract of employment with a third person. The questions whether the rule in question amounted to a waiver of immunity and whether the defendant organisation was bound by this rule could therefore be left open.

30. Furthermore, the Federal Labour Court found no objections under constitutional law. There was no violation of the right of recourse to court under Article 19 para. 4 of the Basic Law (Grundgesetz), as the acts of the defendant organisation, an international organisation, could not be regarded as acts of a public authority within the meaning of that provision.

31. Finally the Federal Labour Court considered that a rather wide competence of international organisations to regulate staff matters was not unusual under international law. The regulations on the immunity of the defendant organisation did not conflict with fundamental principles of the German Constitution. Employees of the defendant organisations could bring either an appeal with the Appeals Board of the organisation, or the labour contract had to provide for arbitration in accordance with Article XXV of Annex I. In case of an unlawful provision of labour not covered by the aforementioned regulation, the employee concerned was not without any legal protection: the employee could file an action against his or her employer. The question whether the applicants could claim under public law that positive action be taken by the German Government to use their influence to achieve a waiver of immunity in the present case, or to bring the case to international arbitration under Article XVIII of the Convention on the Establishment of the European Space Agency, could not be determined in labour court proceedings.

32. On 11 May 1994 the Federal Constitutional Court (Bundesverfassungsgericht) refused to admit the applicants' constitutional complaint (Verfassungsbeschwerde).

33. The Federal Constitutional Court found in particular that the applicants' complaint did not raise a matter of general importance. The alleged absence of rights resulted from the particular contracts entered into by the applicants, who had not been directly employed by an international organisation but had worked there on the order of a third person.

34. Furthermore, the alleged violation of the applicants'

constitutional rights was not of special importance nor were the applicants significantly affected. In this respect the Constitutional Court noted the applicants' submissions according to which they had suffered major disadvantages on the ground that the European legislation on the provision of labour had been insufficient and that the termination of their contracts had affected their earning capacity. However, they had failed to show any disadvantages other than those associated with any loss of work. In particular there is no indication that they remained permanently unemployed and dependent upon social welfare benefits.

B. Relevant law

a. Provision of Labour Act

35. According to S. 1 para. 1 of the Provision of Labour Act (Arbeitnehmerüberlassungsgesetz), an employer, who, on a professional basis (gewerbsmäßig), intends to hire out his employees, i.e. temporary workers (Leiharbeitnehmer) to third persons, i.e. borrowing employers (Entleiher), is subject to permission. S. 9 (1) provides that contracts between the hirer out (Verleiher) and the borrowing employer as well as between the hirer out and the temporary worker are void in the absence of a permission within the meaning of S. 1. If the contract between a hirer out and a temporary worker is void, pursuant to S. 9 (1), a contract between the borrowing employer and the temporary worker is assumed by law to have been concluded (gilt als zustande gekommen) as from the envisaged start of employment (S. 10 para. 1). S. 10 para. 2 further provides for a compensation claim against the hirer out in respect of any damage suffered as a consequence of having relied on the validity of the contract, except where the temporary worker was aware of the reasons rendering the contract void.

b. Immunity from jurisdiction

36. SS. 18 to 20 of the German Court Organisation Act (Gerichtsverfassungsgesetz) regulate immunity from jurisdiction (Exterritorialität) in German court proceedings. SS. 18 and 19 concern the members of diplomatic and consular missions, and S. 20 para. 1 other representatives of States staying in Germany upon the invitation of the German Government. S. 20 para. 2 provides that other persons have immunity from jurisdiction according to the general rules of international law, e.g. foreign States in the exercise of public authority, or according to international agreements or other legal rules.

c. The Convention for the Establishment of a European Space Agency

37. The European Space Agency with headquarters in Paris, formed out of the European Space Research Organisation and the European Organisation for the Development and Construction of Space Vehicle Launchers, was established under the Convention for the Establishment of a European Space Agency ("ESA Convention") of 30 May 1975, which entered into force in 1980.

38. The purpose of the European Space Agency is to provide for and to promote, for exclusively peaceful purposes, co-operation among European States in space research and technology and their space applications, with a view to their being used for scientific purposes and for operational space applications systems (Article II). For the execution of the programmes entrusted to it, the Agency shall maintain the internal capability required for the preparation and supervision of its tasks and, to this end, shall establish and operate such establishments and facilities as are required for its activities (Article VI para. 1 (a)).

39. Article XV regulates the legal status, privileges and immunities

of the Agency. According to paragraph 1, the Agency shall have legal personality. Paragraph 2 provides that the Agency, its staff members and experts, and the representatives of its Member States, shall enjoy the legal capacity, privileges and immunities provided for in Annex I. Agreements concerning the headquarters of the Agency and the establishments set up in accordance with Article VI shall be concluded between the Agency and the Member States on whose territory the headquarters and the establishments are situated (paragraph 3).

40. Article XVII concerns the arbitration procedure in case of any dispute between two or more Member States, or between any of them and the Agency, concerning the interpretation or application of the ESA Convention or its Annexes, and likewise any dispute referred to in Article XXVI of Annex I, which is not settled by or through the Council.

41. Annex I relates to the privileges and immunities of the Agency.

42. According to Article I of Annex I, the Agency shall have legal personality, in particular the capacity to contract, to acquire and to dispose of movable and immovable property, and to be a party to legal proceedings.

43. Pursuant to Article IV para. 1 (a) of Annex I, the Agency shall have immunity from jurisdiction and execution, except to the extent that it shall, by decision of the Council, have expressly waived such immunity in a particular case; the Council has the duty to waive this immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency.

44. Article XXV of Annex I provides for arbitration with regard to written contracts other than those concluded in accordance with the Staff Regulations. Moreover, any Member State may submit to the International Arbitration Tribunal referred to in Article XVII of the ESA Convention any dispute, inter alia, arising out of damage caused by the Agency, or involving any other non-contractual responsibility of the Agency. According to Article XXVII of Annex I, the Agency shall make suitable provision for the satisfactory settlement of disputes arising between the Agency and the Director General, staff members or experts in respect of their conditions of service.

## III. OPINION OF THE COMMISSION

### A. Complaint declared admissible

45. The Commission has declared admissible the applicants' complaint that they did not have a fair hearing by a tribunal on the question of whether a contractual relationship existed between them and the European Space Agency.

### B. Point at issue

46. Accordingly, the issue to be determined is whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

### C. Article 6 (Art. 6) of the Convention

47. The applicants complain that they were denied access to a court for a determination of their dispute with the European Space Agency, relating to their claims under the German Provision of Labour Act. They invoke Article 6 para. 1 (Art. 6-1) of the Convention.

48. Article 6 para. 1 (Art. 6-1), as far as relevant, provides as follows:

> "In the determination of his civil rights and obligations ...,

everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law."

a. Applicability of Article 6 para. 1 (Art. 6-1)

aa. Existence of a dispute over a right

49. For Article 6 para. 1 (Art. 6-1) under its "civil" head to be applicable, there must be a "dispute" (contestation in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question (cf. Eur. Court HR, Neigel v. France judgment of 17 March 1997, para. 38, to be published in Reports of Judgments and Decisions 1997).

50. The Commission notes that the applicants brought proceedings with a German labour court against the European Space Agency, an international organisation with seat in Paris, operating the European Space Operations Centre in Darmstadt.

51. On a previous occasion, the Commission regarded a complaint about the lack of access to a court in respect of a dispute with the Iran-United States Claims Tribunal (The Hague) as being incompatible with the provisions of the Convention. In this context, it considered that, because of the immunity from suit before the Dutch courts under a privileges and immunities agreement, the administrative decisions of the Tribunal did not engage the responsibility of the Netherlands under the Convention. The Commission observed that it was in accordance with international law that States confer immunities and privileges to international bodies which are situated in their territory, and that such a restriction of national sovereignty in order to facilitate the working of an international body did not give rise to an issue under the Convention (No. 12516/85, Dec. 12.12.88, D.R. 58, p. 119).

52. In the present case, the applicants claimed before the German labour courts a declaratory judgment on the existence of an employment contract between them and the European Space Agency, pursuant to the German Provision of Labour Act, as a result of their being hired out for years to perform work for the European Space Agency in Germany. The dispute at issue did not concern any decision taken by an international body in the exercise of its powers which could not engage the responsibility of Germany, but related to a right which had its basis in German labour law.

53. The Commission further considers that the immunity from jurisdiction, accorded to members of diplomatic or consular missions of foreign States in the exercise of public functions or international organisations such as the European Space Agency, does not exclude the existence of substantive rights under domestic law and cannot be regarded as delimiting the very substance of any such rights.

54. In this context, the Commission observes that, in any event, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 para. 1 (Art. 6-1) - namely that civil claims must be capable of being submitted to a judge for adjudication - if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (cf. Eur. Court HR, Fayed v. United Kingdom judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, para. 65; see also Eur. Court HR, Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 16, para. 36; No. 9310/89, Dec. 16.7.86, D.R. 47, p. 5; No. 12816/87, Dec. 18.1.89, D.R. 59,

p. 186).

55. In the Commission's view, the rules on immunity from jurisdiction of, inter alia, international organisations prevent claims concerning substantive rights, which exist as such under German law, from being raised and enforced against the privileged persons in German court proceedings, unless they waive their immunity. In these circumstances, it is merely a procedural bar preventing the possibilities of bringing potential claims to court.

56. The labour court action brought by the applicants, therefore, related to a dispute over a substantive right under German law.

bb. The civil nature of the right concerned

57. The Commission recalls that Article 6 para. 1 (Art. 6-1) applies where the subject-matter of an action is "pecuniary" in nature and is founded on an alleged infringement of rights which are likewise pecuniary (cf. Eur. Court HR, Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40) or where its outcome is "decisive for private rights and obligations" (cf. Eur. Court HR, H. v. France judgment of 24 October 1989, Series A no. 162-A, p. 20, para. 47).

58. Disputes relating to private law relations between employer and employee generally are of a "civil" nature for the purposes of Article 6 para. 1 (Art. 6-1) (cf. Eur. Court HR, Obermeier v. Austria judgment of 28 June 1990, Series A no. 179, p. 21, para. 67).

59. It is true that the Convention does not secure a right of recruitment to the civil service, and disputes relating to the recruitment, employment and retirement of civil servants are as a general rule outside the scope of Article 6 para. 1 (Art. 6-1) (Eur. Court HR, Glasenapp and Kosiek v. Germany judgments of 28 August 1986, Series A no. 104, p. 26 para. 49, and no. 105, p. 20, para. 35; Francesco Lombardo v. Italy judgment of 26 November 1992, Series A no. 249-B, p. 26, para. 17; Fusco v. Italy judgment of 2 September 1997, para. 20, 21, to be published in Reports of Judgments and Decisions 1997).

60. However, notwithstanding similar public law features of the international civil service, the present case does not concern a question of recruitment and employment by the European Space Agency on the basis of its Staff Regulations. Rather, the applicants asserted a right to employment on the basis of the German Provision of Labour Act. In this situation, the European Space Agency may be compared with any other private person to whom services were rendered by an employee on the order of another private employer, within the meaning of the German Provision of Labour Act.

61. In these circumstances, the Commission finds that the action brought by the applicants before the German labour courts concerned their civil rights within the meaning of Article 6 para. 1 (Art. 6-1). The applicability of Article 6 (Art. 6) to the present case is indeed not disputed by the respondent Government.

b. Compliance with Article 6 para. 1 (Art. 6-1)

62. Article 6 para. 1 (Art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a tribunal (Eur. Court HR, Golder v. United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, para. 36; Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-25, para. 57; Fayed judgment, op. cit.; Bellet v. France judgment of 4 December 1995, Series A no. 333-B, p. 41, para. 31).

63. The applicants consider that it is not acceptable under Article 6 (Art. 6) that, in a dispute against an international organisation, the

access to a tribunal is entirely excluded by the rules on immunity from jurisdiction.

64. The Government argue that the principle of immunity of international organisations constitutes an inherent limitation to Article 6 para. 1 (Art. 6-1).

65. In the case-law of the Court (cf., as a recent authority, Eur. Court HR, Bellet judgment, loc. cit.), the scope of the principle of the right of access to a court has been clarified in the following terms:

> "(a) The right of access to the courts secured by Article 6 para. 1 (Art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals'.
>
> (b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.
>
> (c) Furthermore, a limitation will not be compatible with Article 6 para. 1 (Art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

66. In the present case, the applicants had access to the German labour courts and the Federal Constitutional Court, however, only to be told that their actions were inadmissible on the ground of the defendant organisation's immunity from jurisdiction. They did not, therefore, achieve a determination of the merits of their claims.

67. The Commission recalls that the fact of having access to domestic remedies, only to be told that one's actions are barred by operation of law does not always satisfy the requirements of Article 6 para. 1 (Art. 6-1). The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the rule of law in a democratic society (cf. Eur. Court HR, Bellet judgment, op. cit., p. 42, para. 36).

68. The Government maintain that the permissible limitations to the right of access to a court include the traditional and generally recognised principle of state immunity and also the immunity of international organisations. In this respect, they explain that the immunity granted to international organisations corresponds, like the state immunity, to the principle of the sovereign equality of all states. An international organisation can only function satisfactorily if its independence is ensured. The activities of international organisations are so closely linked with their sovereign purposes that even private acts cannot be entirely excluded from immunity.

69. The Commission notes that SS. 18 to 20 of the German Court Organisation Act confer immunity from jurisdiction on diplomatic missions and consular representations, and on other persons according to the general rules of international law, e.g. foreign States in the exercise of public authority, or according to international agreements or other legal rules. Pursuant to Article IV para. 1 (a) of Annex I to the "ESA Convention" of 1975, the European Space Agency shall have immunity from jurisdiction and execution, except to the extent that it shall, by decision of the Council, have expressly waived such immunity

in a particular case; the Council has the duty to waive this immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency.

70. As to the rationale of international immunities, the Commission observes that the provision of privileges and immunities to international organisations is an essential means of protection of these organisations from unilateral interference by individual governments. The constitutional instruments of inter-governmental organisations elaborately define their decision-making processes, and in particular the type and degree of influence each government is to have in respect of the organisation. It is therefore considered unacceptable for individual governments to be able, whether through their executive, legislative or judicial organs, to require an inter-governmental organisation to take certain actions by commands addressed to the organisation itself or to any of its officials.

71. The Commission finds that the underlying aim of the system of providing international immunities to international organisations is to contribute to their proper functioning. The contested limitation on the ability to take legal proceedings against the European Space Agency therefore resulted from rules which pursued legitimate aims.

72. It remains to be determined whether in the circumstances of the present case there was a reasonable relationship between the means employed and the legitimate objectives pursued by the limitation in question.

73. The Commission considers that States may transfer to international organisations competences (cf. No. 13258/87, Dec. 9.2.1990, D.R. 64, p. 138), and may also grant these organisations immunity from jurisdiction, in particular in relation to the exercise of those competences which are to be considered as public and not as commercial (in the same sense as it is accepted for foreign states by the distinction between acta iure imperii and acta iure gestionis, cf. No. 24236/94, Dec. 4.12.95, D.R. 84-A, p. 84 with further references) "provided that within that organisation fundamental rights will receive an equivalent protection" (No. 13258/87, loc. cit.). This is a special feature of the general principle that "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty" (No. 235/56, Dec. 10.6.58, Yearbook 2, p. 256 (300), No. 13258/87, op. cit., p. 138).

74. Viewed in the light of the foregoing considerations, the legal impediment to bringing litigation before the German courts, namely the immunity of the European Space Agency from German jurisdiction, is only permissible under the Convention if there is an equivalent legal protection. In this context, the Commission recalls that the object and the purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (cf. Eur. Court HR, Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 12, para. 24).

75. The applicants maintain that they did not have any other legal possibility to establish their rights under German labour law. In particular, in lodging compensation claims against the company CDP, the company hiring them out to the European Space Agency, they could not secure continuation of their work for the European Space Agency. This is disputed by the Government.

76. The Commission considers that the problems posed by the application of the rules on immunity from jurisdiction in the present case have to be seen against the general arrangements made for

appropriately resolving private law disputes to which the European Space Agency is a party. As stated above (see para. 70), the object of this immunity is merely to save an international organisation from having to litigate unwillingly in national courts.

77. The Commission notes that, pursuant to the legal system established under Annex I to the "ESA-Convention", the European Space Agency has resorted to various devices to settle disputes with private parties. Thus members of staff or experts may have recourse to an Appeals Board in respect of their conditions of service. Arbitration is provided for in respect of disputes concerning written contracts other than those concluded in accordance with the Staff Regulations. Moreover, any Member State may submit to the International Arbitration Tribunal any dispute, inter alia, arising out of damage caused by the Agency, or involving any other non-contractual responsibility of the Agency. The possibility of requesting the German Government to bring the applicants' case before the International Arbitration Tribunal was already mentioned by the Federal Labour Court, in its decision of 10 November 1993. Moreover, Article IV of the said Annex I obliges the Council of the European Space Agency to waive its immunity in all cases where reliance upon it would impede the course of justice and it can be waived without prejudicing the interests of the Agency.

78. The Commission concludes from the foregoing that, in private law disputes involving the European Space Agency, judicial or equivalent review may be obtained, albeit in procedures adjusted to the special features of an international organisation and therefore different from the remedies available under domestic law.

79. It is true that the procedures under the legal regime of the European Space Agency did not provide the applicants with a remedy to argue before a court that an employment contract between them and the European Space Agency was assumed by law to have been concluded, pursuant to the German Provision of Labour Act. They did not, therefore, receive a legal protection within the European Space Agency which could be regarded as equivalent to the jurisdiction of the German labour courts. Likewise, the possibility addressed by the Government, namely to institute administrative proceedings against the German Government in order to enforce proceedings before the International Arbitration Tribunal would not have provided the direct relief sought by the applicants.

80. However, the applicants' situation was the direct consequence of the particular nature of their claim for recognition of a labour contract with the European Space Agency under the German Provision of Labour Act, i.e. special legislation enacted for the German labour market. Litigation of this kind would bypass and could undermine the employment policies of international organisations under their own staff regulations. Bearing in mind that the aim of international immunities, which are generally accorded to international organisations, particularly by the States Parties to the Convention, is to protect international organisations from unilateral interference by individual governments, whether through their executive, legislative or judicial organs (see above para. 70), the Commission cannot apply the test of proportionality in such a way as to force an international organisation to be a party to domestic litigation on a question of employment governed by domestic law.

81. A further factor is to be taken into account. The applicants had, as pointed out by the Government, a possibility of bringing legal proceedings in Germany, in pursuance of the relevant provisions of the German Provision of Labour Act, against the GDP company, the Irish partner in the chain of contractual relations for hiring out the applicants to the European Space Agency. Whilst not covering their specific claims of employment, such proceedings could have been a means enabling them to recover compensation for financial loss suffered as a consequence of their legal situation, pursuant to the Provision of

Labour Act.

82. In the light of these considerations, the Commission finds that the national authorities, in providing immunity from jurisdiction to the European Space Agency, did not exceed their margin of appreciation to limit the applicants' access to the courts under Article 6 para. 1 (Art. 6-1), either as regards the state of the applicable law or as regards the effects of the application of that law in the present case. Notwithstanding the applicants' special situation, a reasonable relationship of proportionality can be said to have existed between the rules on international immunity and the legitimate aims pursued.

83. In these circumstances, the Commission considers that the limitation on the applicants' opportunity to take legal proceedings against the European Space Agency did not amount to an unjustified denial of their "right to a court" under Article 6 para. 1 (Art. 6-1).

CONCLUSION

84. The Commission concludes, by 17 votes to 15, that in the present case there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention.

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| M. de SALVIA | S. TRECHSEL |
| Secretary | President |
| to the Commission | of the Commission |

(Or. English)

CONCURRING OPINION OF MR K. HERNDL

While I fully agree with the Commission's conclusion that there was no violation of Article 6 para. 1 of the Convention and accept the reasoning leading to that conclusion (paragraphs 83 to 90 of the Report), I should like to elaborate a little further on some of the legal issues involved in the present case.

1. The legal situation under international law

As a general rule international governmental organisations, in particular those of a universal character, enjoy immunities on the territory of their member States. Those immunities are laid down either in the constitutional document of the respective organisation or in special conventions which are binding on member States. The immunity granted to international organisation is generally recognized and should even be ensured under international custom (cf. Seidl-Hohenveldern, Völkerrecht, 8th edition, 1994, margin No. 1498). In the latter respect, Dominicé also affirms that at least as far as the organisations of the UN system are concerned, there exists a customary rule of international law concerning immunity from any national jurisdiction (cf. Dominicé, l'Immunité de juridiction et d'exécution des organisations internationales, Recueil des Cours, tome 187, p. 220).

As the Commission rightly states, it is considered unacceptable for individual governments to be able, whether through their executive, legislative or judicial organs, to require an inter-governmental organisation to take certain actions by command addressed to the organisation or to any of its officials (cf. R. Bindschedler, International Organizations, General Aspects; and P. Szasz, International Organizations, Privileges and Immunities, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. II, 1992, pp. 1289, and pp. 1325 et seq.).

Only a corresponding rule of international law can ensure the independence of an international organisation, protecting the organisation as it were from unilateral interference by individual

governments.

In the case of ESA the constituent treaty, i.e. the Convention for the Establishment of a European Space Agency of 30 May 1975, provides for the organisation's immunity from (national) jurisdiction and execution (Article XV read in conjunction with Annex I of the Convention). These provisions are binding on all member States of the Organisation, hence also on Germany.

2. The implication of this legal situation for German law

German law appears to be basically in line with this international legal situation. The Courts Organisation Act, in regulating the immunity from jurisdiction of internationally protected persons, provides in its Section 20 that other persons (other than the members of diplomatic or consular missions or representatives of other States officially invited to Germany) have immunity from jurisdiction according to the general rules of international law or according to international agreements or other legal rules. This is exactly the case with ESA.

Consequently, as ESA as a legal person does not come under German jurisdiction, neither do the legal disputes of private persons with ESA. It is legitimate to pose the question whether the European Convention on Human Rights is at all applicable in respect of such types of disputes for which the national courts do not have jurisdiction under international law. Thus, as regards private law disputes with ESA, the parties to such disputes might not fall under German jurisdiction in the sense of Article 1 of the Convention, because German jurisdiction over those kinds of disputes simply does not exist under international law.

The situation can be regarded as similar to a situation where, owing to the total lack of any link with the territorial jurisdiction, courts have to decline to adjudicate a dispute as they have legally no jurisdiction. It is in fact the State which lacks jurisdiction.

With this in mind, international organisations - and the report refers to this fact in paragraph 44 - do make arrangements for the legal settlement of their private law disputes outside the framework of national courts. This has been done by ESA, and accordingly the Commission found that, as a matter of principle, equivalent legal protection does exist as regards private law claims against ESA.

3. The earlier jurisprudence of the Commission

It may serve as illustration to refer at this stage to the Commission's decision in the analogous case of Spaans v. the Netherlands (No. 12516/86, Dec. 12.12.88, D.R. 58 p. 119), where the Commission considered exactly the above mentioned aspects.

In the case of Spaans v. the Netherlands which concerned the immunity of the Iran-United States Claims Tribunal, an entity established through international treaty, the respondent government stressed that "the rule that the ... Tribunal in its capacity as a body established under public international law enjoys certain immunities and privileges ... is, in general terms, derived directly from the generally accepted principles of international law (NB: not underlined in the original)", the Netherlands Supreme Court upholding that view by confirming that "an international organisation is, in principle, not subject to the jurisdiction of the courts in the ... State concerning disputes that have a direct connection with the fulfilment of the organisation's tasks". Moreover the Commission rejected the application as incompatible ratione personae, noting that "it is in accordance with international law that States confer immunities and privileges to international bodies ... The Commission does not consider that such a restriction of national sovereignty in order to facilitate the working

of an international body gives rise to an issue under the Convention".

4. The results of the situation for the applicants

It must be recalled that there never existed a contractual relationship, entered into by the applicants themselves, between ESA and the applicants. They were employed by private companies (SPM, CDP, T, T.I.) and at some stage two of the applicants even had set up their own company to contract with these firms as to the services they would render. At the end of their contracts - when their actual employers informed them that the contract would not be continued following its expiration (see para. 19 of the report) - they decided to put forward claims against ESA. This was made possible only by the existence of a particular and specific provision in German law concerning the hiring out of employees (Provision of Labour Act). That act stipulates that contracts between a hirer out and a borrowing employer, as well as between the hirer and the temporary worker, require permission from a German governmental authority (the Federal Employment Office), otherwise they are void. As far as the granting of governmental permission for such contracts is concerned, it must remain an open question to what extent ESA - an international organisation and proper subject of international law - could actually be subjected to such a regime in respect of the service contracts which it concluded and which were necessary for the fulfilment of it tasks. This issue was not, and could not be, decided by the German courts for the simple reason that ESA is not subject to German jurisdiction as explained. While the applicants themselves do not deny that their alleged labour relationship with ESA was "fictitious" (namely a "fiction" under German law), they seem to have viewed ESA as the easiest target and sued ESA although they admittedly had never entered into any legal relationship with the organisation.

The applicants are, however, by no means barred from asserting their claims in the courts against CDP (based in Ireland), T. (based in France) or T.I. (based in Italy), their respective actual employers. They failed to do so, mainly for the reason - as stated by themselves - that any court action against their employer would not have afforded them the possibility to ensure continuation of their work for ESA. What they obviously wanted was to force ESA to continue a working relationship which their own employers had terminated.

The present case illustrates very well the need of international organisations to be protected through their immunity under international law against abuse and possible unilateral interference. The Commission recognizes this when it refers to the applicants' situation as being "the direct consequence of the particular nature of their claim for recognition of a labour contract with ESA under the German Provision of Labour Act, i.e. special legislation enacted for the German labour market. Litigation of this kind would bypass and could undermine the employment policies of international organisations under their own staff regulations" (para. 87 of the report).

5. Conclusion

a. ESA's immunity is founded in international law binding on Germany.

b. German courts do not, therefore, have any jurisdiction over private law disputes affecting ESA (unless a waiver would occur). For such disputes ESA is obliged under its constituent treaty to make suitable provision for settlement.

c. The applicants could have any time brought claims against their actual (not their "fictitious") employers.

d. It cannot be maintained that in "providing" immunity from jurisdiction to ESA, the national authorities exceeded their

margin of appreciation to limit the applicants' access to the courts under Article 6 of the Convention. As a member State of ESA, Germany did not "provide" immunity to ESA but is bound by ESA's constituent treaty. Germany could otherwise not have become a member of that organisation.

(Or. English)

DISSENTING OPINION OF MR G. RESS
JOINED BY MM E. BUSUTTIL, A.S. GÖZÜBÜYÜK, A. WEITZEL, J.-C. SOYER, C.L. ROZAKIS, L. LOUCAIDES, M.A. NOWICKI, I. CABRAL BARRETO, B. CONFORTI, I. BÉKÉS, J. MUCHA, A. PERENIC, E.A. ALKEMA and R. NICOLINI

1. This case raises the important issue of relations of the System of Protection of Human Rights under the ECHR to international organisations. It raises in particular the question how far State parties to the ECHR can by subsequent treaties grant immunities from law suits to international organisations.

To my great regret I am unable to follow the reasoning of the majority that in this case the margin of appreciation to limit the applicants' access to the court has not been exceeded. Quite the contrary. The applicants did not find a labour court at their disposal in Germany to determine the merits of their specific legal claims arising out of the German Provision of Labour Act (Arbeitnehmer-überlassungsgesetz). Admitting that States may create international organisations with specific competence and jurisdiction the States cannot evade by these treaties their responsibility under the ECHR which has created an objective European legal order. They must at least provide "that within the organisation fundamental rights will receive an equivalent protection "(No. 13258/87, X v. Germany, Dec. 9.2.90, D.R. 64, p. 138). Immunities of international organisations, created by subsequent treaties, cannot be considered as a kind of general unwritten exception to the scope of application of the ECHR. There is no inherent general exception under the ECHR to institutions of international public law, which may as far as they are not of a ius cogens nature be disposed of by the parties of the treaty. Furthermore we have not here to decide on the rule of state immunity or diplomatic or consular immunity or other forms of personal immunities but only on immunities of international organisations created after the coming into force of the ECHR. If States which are members of the ECHR become members of such an international organisation they must ensure that actions and other forms of legal relations of these organisations do not violate the ECHR at least as individuals under the jurisdiction of these States are concerned.

2. Unlike the opinion of the majority I find that the ESA did not provide a protection which would meet the requirement of Article 6 para. 1. Pursuant to the legal system established under Annex I to the "ESA-Convention", the European Space Agency apart from the possibility of waiving its immunity has resorted to various devices to settle disputes with private parties. Thus members of staff or experts may have recourse to an Appeals Board in respect of their conditions of service. Arbitration is provided for in respect of disputes concerning written contracts other than those concluded in accordance with the Staff Regulations. Moreover, any Member State may submit to the International Arbitration Tribunal any dispute, inter alia, arising out of damage caused by the Agency, or involving any other non-contractual responsibility of the Agency. Thus, in various private law disputes involving the European Space Agency, judicial review may be obtained. However, the applicants, asserting a right to employment under German labour law, were not covered by these remedies. The applicants' interests did not, therefore, receive a legal protection within the European Space Agency which could be regarded as equivalent to the jurisdiction of the German labour courts or at least to the minimum of a judicial review of their case.

As regards any other remedies, I note that the Federal Labour Court referred the applicants to the possibility of requesting the German Government to bring the applicants' case before the International Arbitration Tribunal. Moreover, the Government addressed the possibility of instituting administrative proceedings against the German Government in order to enforce such proceedings. However, proceedings before the International Arbitration Tribunal, to which the applicants would not be a party and which would not directly relate to their claim under the German Provision of Labour Act, cannot be regarded as an effective legal remedy, for the purposes of Article 6 para. 1.

The applicants also had, as pointed out by the Government, a possibility of bringing other legal proceedings, in pursuance of the relevant provisions of the German Provision of Labour Act, against the GDP company, the Irish partner in the chain of contractual relations for hiring the applicants out to the European Space Agency. Arguing that their contract with the private company was null and void under the Provision of Labour Act, they could have claimed compensation in respect of any damages suffered as a consequence of having relied on the validity of their contract. However, such action against a company seated abroad does not appear a practical solution to the applicants' problems. Above all, they could not, in such proceedings, have secured the right asserted by them, namely an employment contract with the European Space Agency as borrowing employer. Accordingly, these proceedings cannot be regarded as a substitute or the requirement of access to court.

It cannot be the essence of the guarantee of access to court, in particular in labour law matters, to refer the individual to the possibility of legal procedure abroad or to the possibility of a claim to damages when he is seeking a judgment on the employment contract or contractual relation. If this would have to be adopted as the essence of the right to access to court that would amount to "a right to access to a court in another contracting State and on another legal claim". In my view this misconstrues Article 6 para. 1.

I am aware that the applicants' situation was the direct consequence of the particular nature of their claim for recognition of a labour contract with the European Space Agency under the German Provision of Labour Act, i.e. special legislation enacted for the German labour market. However, I find that the question as to whether and to what extent domestic legislation of this kind can be held against an international organisation, which regularly enacts its own staff regulations, cannot be resolved in removing such matters from judicial review. In this connection, it must be borne in mind, as stated in paragraph 70 of the Commission's Report, that the object of the immunity from jurisdiction accorded to international organisations is merely to save them from having to litigate unwillingly in national courts.

In the light of these considerations, it cannot be said that a reasonable relationship of proportionality was achieved between the effects of the rules on immunity accorded to the European Space Agency on the applicants' interest to have their claim under the German Provision of Labour Act determined by a court and the legitimate aim pursued. Consequently, in providing immunity from jurisdiction to the European Space Agency, the national authorities exceeded their margin of appreciation to limit the applicants' access to the courts under Article 6 para. 1.

It would have been possible that the German labour courts also interpret the relevant provisions of the ESA-Convention as to the effect to bring these in line with the requirements of Article 6. In particular due regard could and should have been given to the trend in international public law to restrict state immunity in labour disputes.

There is nothing that warrants a wider application in relation to immunities of international organisations.

In these circumstances, I consider that the limitation on the applicants' opportunity to take legal proceedings against the European Space Agency amounted to an unjustified denial of their "right to a court" under Article 6 para. 1.