AS TO THE ADMISSIBILITY OF

Application No. 30047/96
by Erich MIELKE
against Germany

The European Commission of Human Rights sitting in private on 25 November 1996, 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
H. DANELIUS
F. MARTINEZ
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

Mr. M. de SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 24 January 1996 by Erich MIELKE against Germany and registered on 2 February 1996 under file No. 30047/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1907, is a German national and resident in Berlin. He was previously the Minister for State Security (Minister für Staatssicherheit) of the former German Democratic Republic. In the proceedings before the Commission, he is represented by Mr. H. Dreyling and Mr. S. König, lawyers practising in Berlin.

The facts of the case, as submitted by the applicant, may be summarised as follows.

a. The criminal proceedings against the applicant prior to his trial

In March 1934 the Berlin Public Prosecutor's Office (Staatsanwaltschaft) preferred an indictment (Anklageerhebung) against the applicant and several further persons, charging them with two counts of murder and one count of attempted murder, namely of having, as accomplices, shot two police officers and seriously wounded a third police officer in the evening of 9 August 1931 near the "Bülowplatz" in Berlin. On 23 April 1934 the Berlin Regional Court (Landgericht) provisionally discontinued the proceedings against, inter alia, the applicant on the ground that he had absconded to the former Soviet Union. On 19 June 1934 the Berlin Regional Court sentenced three of the remaining accused to death and others to high sentences of imprisonment (Zuchthaus), while others were acquitted or the proceedings against them were discontinued.

On 7 February 1947 the Berlin District Court (Amtsgericht), upon the request of the Berlin Director of Public Prosecutions (Generalstaatsanwalt), quashed the warrant of arrest issued against the applicant on 23 April 1933, and issued a new warrant of arrest, indicating the applicant's address in the Soviet Occupied Zone of Berlin.

By letter of 8 February 1947, the Director of Public Prosecutions, having regard to the applicant's position as Vice-President of the German Central Administration for the Interior (Zentralverwaltung für das Innere) in the Soviet Occupied Zone, informed the Berlin Headquarters (Zentralkommandantur) of the Soviet Armed Forces about the arrest warrant of 7 February 1947 and his intention to proceed with the case. By letter of 12 February 1947 the Director of Public Prosecutions inquired with the Soviet Occupation Authorities (Besatzungsbehörde) whether German criminal jurisdiction could be exercised over the applicant. The letter was sent on 14 February 1947 together with files, further files were sent on 28 February 1947. Additional inquiries in 1947 and 1949 remained unanswered, and the files were not returned. The files in question were found in 1990 on the occasion of a search of the applicant's premises, and handed over to the Berlin Prosecutor's Office in November 1990.

b. The trial proceedings before the Berlin Regional Court

On 28 November 1991 the Berlin Regional Court admitted the 1934 bill of indictment against the applicant (Zulassung der Anklage) and ordered the trial to be reopened (Eröffnung des Hauptverfahrens). Furthermore, the Regional Court issued an arrest warrant against the applicant. On the basis of that arrest warrant, the applicant was detained on remand as from 2 December 1991.

The trial against the applicant was held before the 23rd Extended Criminal Chamber (Große Strafkammer) of the Berlin Regional Court, sitting as Assize Court (Schwurgericht) on eighty-seven days between 10 February 1992 and 26 October 1993. In these proceedings, the applicant was assisted by six defence counsel, inter alia, MM. König and Dreyling.

In the course of the trial proceedings, the applicant's defence counsel repeatedly claimed that the applicant was incapable of taking part in the proceedings (verhandlungsunfähig). On 26 February 1992 the Berlin Regional Court, having regard to medical expertise, refused to discontinue the proceedings on account of the applicant's alleged incapacity to take part therein. However, having regard to his bad state of physical health, the court fixed one hour as maximum duration for a hearing. On 16 November 1992 the Regional Court dismissed the request, lodged by the applicant's defence counsel, not to continue the hearing on that day on the ground that only one witness was to be questioned. On 5 July 1993 the Regional Court, referring to its earlier decision on the question whether the applicant was fit to be kept in detention (haftfähig), dismissed the applicant's request to

discontinue the trial proceedings on account of his alleged incapacity to take part therein. The Regional Court considered that the trial could be conducted on condition that the hearings did not last too long. In this respect, the Regional Court relied on medical expertise as to the applicant's health, i.e. on two opinions dating back to 1991 as updated by a third expert in an opinion of 11 May 1993, as explained in court on 28 May 1993.

On 26 October 1993 the Regional Court convicted the applicant of two counts of murder and one count of attempted murder and sentenced him to six years' imprisonment.

In its judgment which comprises 180 pages, the Regional Court found that in 1931 various riots on the "Bülowplatz" had required the intervention of the police authorities. On several occasions, death threats had been made against the police officers of the local police station, in particular against Police Officers B., A. and W. On 7 August 1931 they had been threatened that their last hour had come, and that the "R.F.B." ("Rote Frontkämpfer-Bund") would take its revenge. On 9 August 1931 a plebiscite had taken place, initiated by the National Socialists and the Communists for the purpose of dissolving the Diet of the Land of Prussia and thereby overthrowing the Social Democrat Government of Prussia. The Berlin Police Authorities had expected riots and had regularly checked the streets in the area of the "Bülowplatz" where the central office of the Communist Party had been located. The applicant, who had been active in the German Communist Party and associated organisations, as well as other members of the self defence organisation of the Communist Party had been at the "Bülowplatz", and, when Police Officers A., W. and L. had gone for a further check in the streets, the applicant, the co-accused Z. and two other persons had followed them. After having passed the two brothers M., the applicant and Z. had shot the Police Officers from behind. Police Officers A. and L. had died and W. had been seriously injured. The applicant and Z. had absconded and, still in August 1931, had emigrated to the Soviet Union. After having left the Soviet Union, the applicant had participated in the Spanish War between 1936 and 1939 and had emigrated to Belgium and France between 1939 and 1945, when he had returned to the Soviet Occupied Zone of Berlin. As from April 1949 he had held several posts in the Ministry for State Security of the former German Democratic Republic and, in 1957, he had been appointed as Minister for State Security.

The Regional Court, in assessing the evidence before it, noted that the applicant had pleaded not guilty, but had made no further statements. The Regional Court's evaluation of evidence was based on documents and the testimony of two witnesses as far as the applicant's course of life was concerned. As regards the situation in the area of the "Bülowplatz" in August 1931, the Regional Court relied upon the testimony of the witness M., one of the brothers who had been overtaken by the applicant and the three others shortly before the shooting, and the records concerning the questioning by a judge (richterliche Vernehmung) of Police Officers B. and W. in November 1933, as well as the records of the statements made to the police on 19 July and 3 August 1933 by the co-accused B. as well as his statements to a judge on 20 September 1933, respectively. These records had been read out at the trial.

The findings as to the shooting as such were based on the records concerning the statements made by Police Officer W. as well as three other witnesses to judges in November 1933, which had been read out at the trial, the statements made by the witness M. at the trial before the Regional Court and on the records concerning the statements made by the co-accused B. in July, August and September 1933. The Regional Court found that the testimony of the witness M. was reliable and consistent with the statements of the other witnesses as recorded in 1933 as well as those of the accused B., who had seen the applicant as well as Z. closely following Police Officers A., L. and W. Moreover,

the applicant's participation in the shooting was confirmed by his own statements as contained in his curriculum vitae which he had drafted inter alia during his stay in the former Soviet Union and in which he had referred to his participation in a "Bülowplatz action". Similar documents drafted by Z. had also referred to the "Bülowplatz" as last "action". The Regional Court regarded the photographs of these documents as authentic: they had undoubtedly been taken of the originals kept in Soviet archives and corresponded to photocopies filed by the Russian Government in proceedings under letters rogatory. The Court, on the basis of a graphological expert opinion, found no indications that the documents were false.

The Regional Court considered that it was not prevented from having recourse to the means of evidence obtained in 1933. Even considering the situation in Germany at that time there was nothing to show that the evidence had been obtained in a procedure contrary to the principle of the rule of law (Rechtsstaatsprinzip). In particular there was no indication that the truth had been manipulated. Having inter alia heard witnesses, the Regional Court found nothing to show that the investigating police officers and the examining judge who had mainly done the questioning had, in examining the case, used methods contrary to the principle of the rule of law. This approach did not conflict with the fact that records concerning the statements of other co-accused could not be used in evidence as they had been detained by the SA or the SS and ill-treated during their detention. Moreover, the trial in 1934 had not aimed at manipulating the events. Thus, some of the co-accused, including the main accused, were acquitted of the charges of murder. The same conclusion could be drawn from written statements of one of the accused on the course of the criminal investigations. Furthermore, the Regional Court, having heard an expert, who had been charged by the Berlin judiciary to investigate possible manipulation of files, in particular under the Nazi regime, found no indication that the files, though some parts were missing and other parts had been renumbered, had been manipulated for the purpose of distorting the facts. Considering all circumstances, the Regional Court had no doubts that the investigations at the relevant time solely aimed at establishing the truth. Moreover, the Regional Court, in a detailed reasoning, came to the conclusion that the means of evidence used, in particular the records concerning the statements of the witness C. and the co-accused B., had not been obtained in an unlawful manner. Moreover, the Regional Court, weighing some discrepancies in B.'s statements and between his statements and those of other witnesses, found them on the whole credible, the more, as his account regarding the general course of the events coincided with the statements of the other witnesses. In this respect, the Regional Court explained that, to the extent that it had consulted records concerning statements of some of the co-accused which had been obtained by ill-treatment, it had done so solely for the purpose of verifying, for the benefit of the applicant, B.'s credibility.

The Regional Court further considered the forensic expert opinions of 12 and 26 August and 18 September 1931, respectively, which had, inter alia, confirmed that the shots had been fired from behind.

For the aforesaid reasons, its evaluation of evidence had not violated the applicant's right to a fair trial, either.

The Regional Court, on the basis of the established facts, found that the applicant had been an accomplice to two counts of murder and one count of attempted murder within the meaning of S. 211 of the Penal Code (Strafgesetzbuch), as amended in 1941. Thus, the applicant when shooting at the police officers, had acted with treachery (Heimtücke) as he had shot from behind at the unsuspecting and therefore defenceless police officers. The Regional Court observed that the constituent elements of the offence of murder, as defined in the old version as well as in the 1941 version of S. 211, namely the intentional killing of a person, had remained unchanged. However, the

1947 version was applicable as it defined the offence in a more restrictive manner and imposed a lighter penalty.

Turning to the question whether the applicant's prosecution was statute-barred, the Regional Court recalled that the offences committed by the applicant constituted murder, both under the old and the 1941 version of S. 211 of the Penal Code. Thus, in 1931 a limitation period (Verjährung) of 20 years had commenced, pursuant to the old version of S. 67 of the Penal Code.

On 23 April 1934, when the proceedings against the applicant had been provisionally discontinued, the running of this limitation period had been interrupted (unterbrochen), and had commenced afresh. As from 1 May 1945, the running of the limitation period had been suspended (gehemmt) on the ground that no German jurisdiction could be exercised as a consequence of the Soviet occupation. It had resumed on 1 November 1945. Furthermore, even assuming that the arrest warrant of 7 February 1947 had not again interrupted the running of the limitation period, the prosecution had not become statute-barred for the following reason. In accordance with the old version of S. 69 of the Penal Code and Article III (d) of the Law No. 4 of the Allied Control Council (Kontrollrat) of 30 October 1945, the running of the limitation period had been suspended in February 1947 when the Berlin Headquarters of the Soviet Armed Forces did not react to the inquiry of the Berlin Head of Public Investigations and had not returned the criminal files sent to them. The Headquarters of the Soviet Armed Forces had thereby acted in such a manner as to indicate their unequivocal intention (konkludente Entscheidung) to withdraw this case from German jurisdiction. The German judicial authorities had been prevented from prosecuting the applicant until 1990 when the files were recovered. However, under the Code of Criminal Procedure as amended in 1979, the limitation period for the prosecution of murder had been abolished. The Regional Court dismissed the applicant's request to take further evidence on matters relating to the determination of the limitation period. In particular, the question whether or not the arrest warrant of 1947 had been validly issued, was irrelevant.

Moreover, in the Regional Court's view, the length of the proceedings did not bar the applicant's prosecution, as, under the case-law of the Federal Court of Justice (Bundesgerichtshof), the violation of an accused's right to a hearing within a reasonable time did not constitute a technical bar to the proceedings (Verfahrens-hindernis). Rather, considerable delays imputable to the judicial authorities had to be taken into account in fixing the sentence. However, the applicant, having kept the criminal files in his safe while under the protection of a dictatorial regime, had himself been responsible for the length of the proceedings against him. The German legislator, when abolishing the limitation period for the prosecution of murder, had manifested the intention not to accept the lapse of time as exemption from punishment. In doing so, the legislator had been aware of the problems in ascertaining the truth and, as confirmed by the Federal Constitutional Court (Bundesverfassungsgericht), had been prepared to accept those problems.

The applicant's arguments that the evaluation of evidence had violated his right to a fair trial and that the exercise of his defence rights had been restricted were also rejected. On the latter point, the Regional Court recalled that its evaluation of evidence was not solely based on the records concerning the questioning of persons who had died in the meantime. In any event, pursuant to S. 251 paras. 1 and 2 of the Code of Criminal Procedure, the conviction of an accused could solely be based on such records. It was for the trial court to ascertain whether there was convincing evidence.

In fixing the sentence, the Regional Court recalled that the statutory punishment for murder was life imprisonment. However, in accordance with the case-law of the Federal Constitutional Court, the

criminal court had to decide whether life imprisonment was exceptionally disproportionate. Taking into account that 62 years had elapsed since the commission of the offence and that the applicant was 85 years old, the present case was so exceptional as to warrant a mitigation of the applicant's sentence. Weighing all aggravating and extenuating factors, the Regional Court took the view that a sentence of six years' imprisonment was adequate.

c. The proceedings for review on points of law (Revision)

Both the applicant and the Public Prosecutor's Office lodged appeals on points of law with the Federal Court of Justice, and submitted their respective statements on the grounds for appeal (Revisionsbegründung). The Federal Court of Justice fixed 8 March 1995 as the date for hearing the appeals.

Furthermore, the Federal Court of Justice ordered that a psychiatric expert opinion be prepared on the question whether the applicant was capable of taking part in the proceedings (verhandlungsfähig) concerning his appeal on points of law. In this respect, the Federal Court of Justice had regard to the Berlin Regional Court's decision of 3 November 1994 to discontinue, on account of the applicant's permanent incapacity to take part in the trial, a further set of criminal proceedings which had related to the killing of refugees at the border between the Federal Republic of Germany and the former German Democratic Republic. In his opinion of 15 January 1995, the psychiatric expert M. stated that the applicant's intellectual abilities, in particular his cognitive abilities, had deteriorated due to his age to such an extent that he had to rely on his defence counsel and to give them wide decision-making powers. However, he knew about the importance of the appeal proceedings and his intellectual abilities were sufficient to achieve a basic understanding with his defence counsel on the question whether to pursue or to withdraw his appeal on points of law.

aa. The interim proceedings relating to the applicant's capacity to take part in the proceedings

On 4 February 1995 the applicant's defence counsel requested the Federal Court of Justice to set aside the arrest warrant issued against the applicant. They claimed that the applicant was incapable of taking part in the proceedings.

On 8 February 1995 the Federal Court of Justice dismissed the applicant's respective requests to discontinue the proceedings and to set aside the arrest warrant.

As to its competence, the Federal Court of Justice observed that, as a rule, the lower court was competent in matters relating to detention on remand. The Regional Court had in fact dismissed the applicant's earlier request to set aside the arrest warrant. However, the court deciding on an appeal on points of law could exceptionally set aside an arrest warrant, if it quashed the conviction and if it was obvious that the conditions for ordering the accused's detention on remand were no longer met or if his detention on remand was no longer proportionate. Such a decision could be taken prior to the appeal hearing, if there was a technical bar to the proceedings, such as that invoked by the applicant's defence counsel.

The Federal Court of Justice observed that there was no clear case-law on the question whether and, if so, to what extent an accused had to be capable of taking part in the proceedings concerning his appeal on points of law. Having regard to several decisions of the Supreme Court of the German Reich (Reichsgericht), the Federal Court of Justice considered that persons were capable of taking part in criminal proceedings (strafrechtliche Verhandlungsfähigkeit) as long

as they were capable of safeguarding their interests in and out of court, of exercising their defence rights in a reasonable and understandable manner, and of making or receiving procedural declarations (Prozeßerklärungen).

There was a difference in standards between the proceedings before a trial court (Tatgericht) and proceedings on appeals on points of law. Thus, in the proceedings before the trial court, the accused's statements were an important means of evidence, the accused could lodge procedural requests and put questions to witnesses, and he was heard in addition to his defence counsel. The accused could thereby participate in the proceedings in a position independent of his defence counsel. Proceedings concerning appeals on points of law were limited to reviewing whether the trial court had correctly applied the substantive and procedural laws. The accused had only few possibilities to influence the latter proceedings: he could, on his own, only lodge or withdraw his appeal, but had to be assisted by counsel for the purposes of determining the scope of his appeal and of submitting the reasons therefor. Moreover, at the hearing on his appeal, the accused, if at liberty, merely had a right to be present and to make a final statement, and, if detained, he or she was not even entitled to be present in addition to defence counsel.

The Federal Court of Justice concluded that, as a minimum, the accused had to be capable of responsibly deciding whether or not to lodge an appeal on points of law. In this respect, the Federal Court of Justice, having taken medical expert evidence as to his state of health, found that the applicant was capable of understanding the importance of the appeal proceedings and of achieving a basic agreement with his defence counsel on the continuation of the proceedings.

Moreover, the Federal Court of Justice, noting the date for the appeal hearing, found that the continuation of the applicant's detention on remand was not disproportionate.

On 24 February 1995 the Second Senate of the Federal Constitutional Court, sitting with three judges, refused to entertain the applicant's constitutional complaint (Verfassungsbeschwerde) concerning the decision of 8 February 1995.

The Federal Constitutional Court found that the applicant's constitutional complaint did not raise any constitutional question of fundamental importance and had no prospect of success. The impugned decision could not be objected to from a constitutional point of view.

The Federal Constitutional Court considered in particular that the Federal Court of Justice had applied the general notion of an accused's capability to take part in criminal proceedings, as developed in German jurisprudence and legal writings. This notion met the demands of the protection of human dignity and of the principle of the rule of law, according to which accused persons should not be treated as objects of the proceedings against them. The principle of the rule of law did not require that an accused was in fact capable of exercising his procedural rights fully on his own and without legal assistance. As long as restrictions in mental or physical capacities could, in their negative effects on the exercise of defence rights, be compensated by procedural assistance (verfahrensrechtliche Hilfen), e.g. through the assistance of defence counsel or, in case of deaf or dumb accused, through the assistance of interpreters as well as defence counsel, there was no reason to consider an accused incapable of taking part in the proceedings. The limit had been reached where, even with procedural assistance, an accused could not responsibly decide on basic questions regarding his defence or reasonably exercise his personal procedural rights. Neither the general assumption of an adult accused's capacity to take part in the criminal proceedings against him, nor the case-law of the criminal courts according to which only serious mental, psychological or physical disturbances rendered an accused permanently

incapable of taking part in the proceedings, could be objected to from a constitutional point of view.

The Federal Constitutional Court found that the Federal Court of Justice, in applying particular standards to proceedings concerning an appeal on points of law, had not gone beyond these constitutional limits. In particular, the Federal Court of Justice had not been required to accede to the defence argument that the applicant would have to be capable of thoroughly studying a lengthy judgment or of drawing his counsel's attention to possible deficiencies or contradictions in the findings of the trial court or its evaluation of evidence. In this respect, the Federal Court of Justice had rightly considered that the accused's defence counsel was responsible for submitting the reasons for the appeal on points of law and had to check the trial court judgment for possible procedural mistakes in the establishment of the facts without being assisted by his client. Moreover, the Federal Court had conformed to the constitutional demands when establishing the applicant's capacity to take part in the proceedings before it. Thus, the relevant facts had been duly established on a reliable basis, namely a detailed medical expert opinion, which had been prepared for the purposes of the proceedings. Moreover, there were no indications that the conduct of the appeal hearing would have any repercussions on the applicant's mental or physical health.

bb. The resumed appeal proceedings

On 2 March 1995 the Federal Court of Justice ordered the expert M. who had already prepared opinions on this case in May 1994 and January 1995, respectively, to present a supplementary medical expert opinion on the applicant's capacity to take part in the appeal proceedings. The expert examined the applicant on 3 March 1995. He submitted his opinion on 5 March 1995. According to the expert, the applicant's mental status had been lucid, he had been orientated as to his identity, had recognised the expert and had known about the appeal hearing. He had been able to name his defence counsel and had to some extent known about the distribution of tasks between them. He had stated his expectation that, as a result of the appeal hearing, the proceedings would be discontinued or he would be acquitted. Having read the Court's order concerning his repeated examination, he had asked whether his defence counsel had been informed; as regards other procedural questions, he had also referred to his counsel. The expert also stated that the decline in the applicant's capabilities had become more and more obvious. However, while he was no longer able reasonably to contribute to the solution of factual issues and apparently left any decisions to the discretion of his counsel, the applicant was still capable of achieving a basic understanding with his counsel on the question whether to withdraw or to pursue his appeal.

The hearings were held before the Federal Court of Justice between 8 and 10 March 1995.

On 10 March 1995 the Federal Court of Justice dismissed both the applicant's and the Public Prosecutor's appeals on points of law.

In its decision comprising 51 pages, the Federal Court of Justice, having summarised the relevant facts, first examined procedural prerequisites.

The Federal Court of Justice upheld its legal position, as confirmed by the Federal Constitutional Court, on the applicant's capacity to take part in the proceedings before it. Moreover, the Federal Court of Justice, based on the expert opinion of 5 March 1995, found no new facts calling for another conclusion. The Federal Court of Justice rejected the counter-arguments of the defence and stressed that the fact that the applicant could no longer reasonably assist his defence counsel was irrelevant at this stage of the proceedings. The

request of the applicant's defence counsel again to hear an expert on this point was dismissed.

The Federal Court of Justice also rejected the applicant's claims that the bill of indictment and the decision to commit him for trial had not sufficiently specified the time and the place of the offence and that the bill of indictment had not contained any precise charge (Anklagesatz).

As regards the defence arguments concerning the alleged manipulation of the criminal files to the applicant's detriment, the Federal Court of Justice accepted that incomplete investigation files could complicate the preparation of the defence and the finding of the truth. However, referring to its case-law, the Court found that such shortcomings did not constitute a technical bar to the proceedings. Rather, the trial court had to consider allegations concerning manipulated files when evaluating the evidence. In the present case, the Regional Court had taken the state of the criminal files into account and, having taken expert evidence, had come to the conclusion that there was no indication of deliberate manipulation. The hearing of an expert on that matter, as requested by the defence at the appeal hearing, was not necessary.

The Federal Court of Justice also considered that, contrary to the applicant's appeal submissions, the fact that the trial court, due to the lapse of time between the offence charged and the trial, had largely had recourse to records concerning the earlier questioning of witnesses and co-accused, did not constitute a technical bar to the proceedings. The Code of Criminal Procedure expressly provided for the use of such records, obliging the trial court to assess of its own the probative value of such evidence. The fact that no direct questions could be put to deceased witnesses or co-accused did not prevent such records from being used in evidence.

The Federal Court of Justice next set out in detail that the prosecution of the applicant was not statute-barred. The Federal Court of Justice concurred with the Regional Court's line of reasoning on the qualification of the offence, the initial limitation period of 20 years and its interruption in 1934 and its suspension between 1 May 1945 and 30 October 1945.

Contrary to the Regional Court, the Federal Court of Justice took the view that the running of the limitation period had again been interrupted on 7 February 1947 when a new arrest warrant had been issued against the applicant. This arrest warrant had, contrary to the defence arguments, been no specious measure. While similar to the arrest warrant of 1933 against the applicant and a co-accused, the new arrest warrant had solely related to the applicant whose whereabouts were known, and there had also been a practical reason, namely to avoid prosecution measures being taken on the basis of an arrest warrant dating back to 1933. Moreover, the arrest warrant was not invalid for having been issued by an "auxiliary" judge (Hilfsrichter) at the District Court. At that time, "auxiliary" judges had been charged with judicial activities, as permanent judges accepted by the Military Government had not been available in sufficient number, and there was nothing to show that the judge concerned had not been duly appointed. Finally, the alleged lack of the District Court's hierarchical competence could not have tainted the arrest warrant with voidness.

Following the splitting up of the judicial system in Berlin in February 1949, the proceedings against the applicant had continued to be pending before the Regional Court set up in the East Sector of Berlin where the "Bülowplatz" was situated and where the applicant had been living. In this respect, the Federal Court of Justice, in the absence of any specific rules, relied on the general rules of the forum delicti and the forum domicilii. Accordingly, the limitation period had to be determined in accordance with the laws of the former German

Democratic Republic as lex fori. Considering in detail the relevant provisions of the legislation of the former German Democratic Republic, the Federal Court of Justice concluded that, in the applicant's case, the limitation period had not yet expired on 3 October 1990, the date of the German unification. In this respect, the Federal Court of Justice found in particular that the running of the limitation period had been suspended during the applicant's membership in the People's Chamber (Volkskammer) between 1958 and 1989. It further noted that the limitation period had been extended to 25 years under the 1968 Penal Code of the former German Democratic Republic.

Moreover, even assuming that the laws of the Federal Republic of Germany applied, the prosecution was not statute-barred as, pursuant to the 1965 Act on the Calculation of Limitation Periods (Gesetz über die Berechnung strafrechtlicher Verjährungsfristen) and the Penal Code as amended in 1969 and 1979, the limitation period would have commenced afresh in 1950 and, having been extended to 30 years in 1969, it had not yet expired in 1979 when the limitation period for the prosecution of murder was abolished.

The Federal Court of Justice next considered in turn the particular points raised in the applicant's appeal on points of law, namely the applicant's alleged incapacity to take part in the trial proceedings as well as various matters regarding the Regional Court's taking and assessment of evidence.

In particular, the Federal Court of Justice found nothing to show that the applicant had been incapable of taking part in the trial hearing of 16 November 1992, when only one witness had been questioned for less than a minute; even more so, as the defence had subsequently not requested the renewed questioning of the witness concerned. The Regional Court's further decision of 5 July 1993, dismissing the applicant's request to discontinue the trial proceedings on account of his alleged incapacity to take part therein, had been taken on the basis of medical expert evidence on the applicant's health. The trial court had reached its conclusion after careful analysis of the experts' findings, and the appeal statements did not cast doubt on the trial court's decision that the applicant's participation, limited in time, had been possible. The hearing of an expert on that matter was not necessary.

The Federal Court of Justice also rejected various procedural complaints regarding the taking and evaluation of evidence. It confirmed in particular the use in evidence of the statements made by the co-accused B. as it was unlikely that in 1933 these statements had been obtained in circumstances contrary to S. 136 (a) of the Code of Criminal Procedure, prohibiting that statements be obtained by way of ill-treatment, fatigue, deception or other means affecting the freedom of the will. Moreover, the Regional Court had correctly refused to postpone the trial for the purpose of a Moscow journey by the applicant's defence counsel, as there had been no point in carrying out further investigations in Moscow archives. The Regional Court's evaluation of evidence had been based on a wide range of material belonging to two independent elements of corroborating evidence, namely the curriculum vitae drafted by the applicant and the co-accused Z. and other related evidence, and the statements of the co-accused B. The Regional Court had duly considered the doubts raised by the defence at the trial and had also been aware of the problems in using evidence obtained in 1933/34.

Finally, the Federal Court of Justice rejected the Public Prosecutor's complaint about the applicant's sentence.

d. The proceedings relating to the constitutional complaint

On 8 May 1995 the applicant, assisted by his counsel, lodged a constitutional complaint with the Federal Constitutional Court against

the Regional Court's judgment of 26 October 1993 and the judgment of the Federal Court of Justice of 10 March 1995.

On 18 July 1995 the Second Chamber of the Federal Constitutional Court, sitting as a panel of three judges, refused to admit the applicant's constitutional complaint. The Federal Constitutional Court found that the complaint raised no question of fundamental importance and had no prospect of success. In particular, it was not for the Constitutional Court to decide upon the establishment of the facts, the evaluation of the evidence and the interpretation and application of the general laws, as criticised by the applicant. In these matters, the Constitutional Court could only exceptionally intervene in case of manifest arbitrariness. However, in the present case, the reasoning of the Federal Court of Justice in its judgment of 10 March 1995, concerning the limitation period, the applicant's capacity to take part in the proceedings, the use in evidence of the statements made by the co-accused B., the alleged unfairness of the proceedings, was reasonable (nachvollziehbar), at least not arbitrary and did not breach any other of the applicant's constitutional rights. The Federal Court of Justice had also duly taken into account the doubts raised by the defence as to the due administration of justice (Justizförmigkeit) in 1933 when the records relating to the questioning of the co-accused B. had been drawn up.

The applicant's counsel received the Constitutional Court's decision on 31 July 1995.

COMPLAINTS

1. The applicant complains under Article 5 of the Convention that his detention on remand and his detention after conviction amounted to an unlawful deprivation of his liberty. He submits that the prosecution for the offences concerned had already become statute-barred. The German courts had arbitrarily and contrary to the principle in dubio pro reo decided that the arrest warrant of 1947 had been valid and had accordingly interrupted the running of the limitation period. The applicant claims that the "auxiliary" judge who had issued the arrest warrant had not been duly appointed by the Allied Forces, but had merely been a trainee (Referendar).

2. The applicant further complains under Article 14 of the Convention that the conduct of the criminal proceedings and his conviction discriminated against him on account of his political views and his political background as one of the important and well known figures of the former German Democratic Republic. He alleges that his prosecution on the basis of a bill of indictment dating back to 1933 was pursued for the sole reason that the general public called for the prosecution of the leading political figures of the former German Democratic Republic.

3. The applicant also considers that the criminal proceedings against him were unfair. He invokes Article 6 in general and also Article 6 para. 3 (d) of the Convention.

He maintains in particular that the criminal files had been manipulated. Moreover, according to the applicant, the Regional Court's judgment was mainly based on the statements of the co-accused B., as contained in the records on his questioning in the early thirties. As the applicant had left Berlin in August 1931 and only returned in 1947, he had never been able to put questions to the witness who had died a long time before the trial. Thus the applicant and his defence counsel had not been in a position to verify their doubts as to the credibility of the witness concerned.

Moreover, the applicant claims that he had not been capable of taking part in the trial proceedings before the Regional Court or the

proceedings before the Federal Court of Justice. In particular, the approach taken by the Federal Court of Justice, as confirmed by the Federal Constitutional Court, namely substantially to reduce the requirements for an accused's capacity to take part in the proceedings on appeal on points of law, had deprived the applicant of his position as responsible participant (Subjektstellung) in the proceedings and thereby deprived him of a fair hearing.

THE LAW

1. The applicant complains under Article 5 (Art. 5) of the Convention that he had been unlawfully deprived of his liberty.

Article 5 para. 1 (Art. 5-1), so far as relevant, provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
> ...
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> ..."

The Commission recalls that the terms "in accordance with a procedure prescribed by law" and "lawful detention" in Article 5 para. 1 (Art. 5-1) refer to the applicable domestic law. It follows that disregard of the domestic law may entail a breach of the Convention. However, the scope of review by the Convention organs is limited and it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (cf. Eur. Court HR, Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, p. 18, para. 39, p. 20, paras. 45-46; No. 9997/82, Dec. 7.12.82, D.R. 31, p. 245).

The Commission notes that, in the context of criminal proceedings on charges of two counts of murder and one count of attempted murder, the applicant was detained on remand on the basis of an arrest warrant issued by the Berlin Regional Court on 28 November 1991. On 26 October 1993 the Berlin Regional Court convicted the applicant and sentenced him to six years' imprisonment. This judgment was confirmed by the Federal Court of Justice. The Commission considers that the applicant's submissions, in particular his arguments regarding the running of the limitation period, do not establish any non-observance of German penal law, let alone the Convention. In sum, there is no ground to conclude that his detention was not "lawful" or not ordered "in accordance with a procedure prescribed by law" within the meaning of Article 5 para. 1 (a) and (c) (Art. 5-1-a, 5-1-c) of the Convention.

It follows that the applicant's complaint under Article 5 para. 1 (Art. 5-1) of the Convention is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains under Article 14 (Art. 14) of the Convention that his criminal prosecution amounted to discrimination on political grounds.

According to Article 14 (Art. 14), the "enjoyment of the rights and freedoms set forth in this Convention shall be secured without

discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

The Commission recalls that Article 14 (Art. 14) complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by those provisions. There can be no room for application of Article 14 (Art. 14) unless the facts of the case fall within the ambit of one or more of such provisions (Eur. Court HR, Inze v. Austria judgment of 28 October 1987, Series A no. 126, p. 17, para. 36).

The Commission considers that the applicant's complaint about discrimination relates in substance to his complaints under Articles 5 and 6 (Art. 5, 6) of the Convention about his criminal prosecution, his conviction and his detention. His complaint therefore falls within the ambit of Article 14 (Art. 14).

Article 14 (Art. 14) safeguards individuals, placed in similar situations, from discrimination in the enjoyment of the rights and freedoms set forth in the Convention and its Protocols. A distinction is discriminatory if it "has no objective and reasonable justification". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (Eur. Court HR, Stjerna v. Finland judgment of 25 November 1994, Series A no. 299-B, pp. 63-64, para. 48).

The Commission finds that the applicant's allegations of discrimination against him on account of his political views and his political functions in the former German Democratic Republic are of a very general and speculative nature. There is no indication that the German judicial authorities, in particular the German courts, embarked upon the continuation of the criminal proceedings against the applicant on charges of two counts of murder and one count of attempted murder, which eventually resulted in his conviction, for any other motives than the investigation and prosecution of crime in general, and in particular the determination of the criminal charges against the applicant in accordance with the mandatory provisions of German law.

It follows that there is no appearance of a violation of Article 14, taken in conjunction with Article 5 or 6 (Art. 14+5, 14+6) of the Convention.

Consequently, this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also considers that the criminal proceedings against him were unfair. He invokes Article 6 in general and also Article 6 para. 3 (d) (Art. 6-3-d) of the Convention.

Article 6 (Art. 6) of the Convention, so far as relevant, provides as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
..."

The Commission finds it appropriate to examine the applicant's complaints about the alleged unfairness of the proceedings from the point of view of paragraphs 1 and 3 of Article 6 (Art. 6-1, 6-3) taken together, especially as the guarantees in paragraph 3 represent aspects of the concept of a fair trial contained in paragraph 1 (Eur. Court HR, Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, para. 29; Artner v. Austria judgment of 28 August 1992, Series A no. 242-A, p. 10, para. 19).

a. The applicant's arguments concerning the alleged manipulation of the criminal files in his case as well as the use in evidence of the records concerning the statements made by the co-accused B. to the police and a judge in 1933 both relate to the taking and evaluation of evidence by the Berlin Regional Court.

The Commission recalls that it is not for the Convention organs to substitute their own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The task under the Convention is to ascertain whether the proceedings in their entirety were fair (cf. Eur. Court HR., Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

As regards the alleged manipulation of the criminal files, the Commission notes that the Berlin Regional Court, in its judgment of 26 October 1993, examined in detail whether it was prevented from having recourse to the means of evidence obtained in 1933. The Court found that, even considering the situation in Germany at that time, there was nothing to show that the statements made by several witnesses as well as by the co-accused B. had been obtained in a procedure contrary to the principle of the rule of law, or that the truth had been manipulated. In this respect, the Regional Court noted, inter alia, the incompleteness of part of the files and the renumbering of other parts. However, having heard an expert, it found no indication that the files had been manipulated or that the facts had been distorted. The Federal Court of Justice, in its judgment of 10 March 1995, confirmed these findings, having due regard to the applicant's appeal statements. This approach was approved by the Federal Constitutional Court in its decision of 18 July 1995.

On this point, the Commission finds that the Regional Court, as confirmed by the Federal Court of Justice, carefully examined whether there had been a manipulation of the relevant criminal files and, consequently, a distortion of the facts, preventing it from using the evidence obtained in the initial stage of the proceedings. There is nothing to show that relevant material or the arguments in defence were not taken duly into account or that any arbitrary conclusions were drawn.

With regard to the use in evidence of the records of the statements made by the co-accused B., who had meanwhile died, the Commission recalls that, although the Berlin Regional Court did not hear Mr. B., he should, for the purposes of Article 6 para. 3 (d) (Art. 6-3-d), be regarded as a witness - a term to be given an autonomous interpretation (cf. Eur. Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 25) - because his statements, as taken down by the police and a judge in 1933 and read out at the trial against the applicant, were used in evidence by the Regional Court.

The Commission notes that the charges against the applicant to be determined by the Berlin Regional Court related to criminal offences committed in August 1931. While trial was held against various co-accused in 1934, the proceedings against the applicant and a further co-accused had to be provisionally discontinued on the ground that they had absconded. The applicant had subsequently stayed in the Soviet Union, in Spain, Belgium and France; in 1947 he had returned to the East Sector of Berlin. Prosecution by the German authorities was taken up in 1990 when the criminal files concerning this case, which had been forwarded to the Headquarters of the Soviet Armed Forces in 1947, had been found upon a search at the applicant's premises.

The Commission recalls that, if there has been no negligence on the part of the authorities, the impossibility of securing the appearance of a witness at the trial does not make it in itself necessary to halt the prosecution. In such a situation it is open to the national court, subject to the rights of the defence being respected, to have regard to the statements obtained by the police and the investigating judge, in particular if the court can consider those statements to be corroborated by other evidence before it (cf., mutatis mutandis, Artner judgment, loc. cit., paras. 20-22; Ferrantelli and Santangelo v. Italy judgment of 7 August 1996, para. 52, to be published in Reports 1996).

The Commission, considering the course of the proceedings against the applicant, finds that the Berlin Regional Court was allowed to rely upon the statements made by Mr. B. to the police and a judge in 1933. In the Commission's view, the Regional Court, in accordance with the German Code of Criminal Procedure, carefully considered the conclusiveness of these statements as well as the credibility of the witness on the basis of all material available. The doubts, raised by the applicant's defence, as well as the general problems in using evidence obtained in 1933/34 were duly taken into account. Moreover, as confirmed by the Federal Court of Justice, the Regional Court's evaluation of evidence had been based on a wide range of material belonging to two independent groups of corroborating evidence, namely, apart from the statements of Mr. B., the curriculum vitae drafted by the applicant and the co-accused Z., in which reference had been made to the relevant events, and other related evidence. The Regional Court further relied on the evidence given by Mr. M., an eye-witness of the offences, at the trial.

In these circumstances the fact that the use of Mr. B.'s statements, despite the fact that Mr. B. could not be examined at the hearing before the Berlin Regional Court, did not infringe the rights of the defence in breach of Article 6 paras. 1 and 3 (d) (Art. 6-1+6-3-d) , taken together.

The Commission finds no sufficient grounds to conclude that the Regional Court's taking and assessment of evidence was incompatible with Article 6 (Art. 6).

b. Moreover, the applicant claims that he was not capable of taking part in the trial proceedings before the Regional Court and the proceedings before the Federal Court of Justice.

The Commission recalls that, although this is not expressly mentioned in paragraph 1 of Article 6 (Art. 6-1), the object and purpose of this provision taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing (cf. Eur. Court HR, Colozza v. Italy judgment of 12 February 1985, Series A no. 89, p. 14, para. 27; Brozicek v. Italy judgment of 19 December 1989, Series A no. 167, p. 19, para. 45; F.C.B. v. Italy judgment of 28 August 1991, Series A no. 208-B, p. 21, para. 33; T. v. Italy judgment of 12 October 1992, Series A no. 245-C, p. 41, para. 26; see further Helmers v. Sweden judgment of 29 October 1991, Series A no.

212-A, pp 15 et seq., paras 31-39; Kremzow v. Austria judgment of 21 September 1993, Series A no. 268-B, pp. 43 et seq., paras. 57-69). The Commission considers that the effective exercise of this right presupposes that the accused is capable, from a mental and physical point of view, of taking part in the criminal proceedings against him.

The Commission notes that, in the practice of the German criminal courts, persons are regarded as capable of taking part in criminal proceedings as long as they are capable of safeguarding their interests in and out of court, of exercising their defence rights in a reasonable and understandable manner, and of making or receiving procedural declarations. The Federal Constitutional Court, in its decision of 24 February 1995, stated that this notion did not infringe constitutional principles, such as the protection of human dignity and the principle of the rule of law. In particular, an accused whose mental or physical capabilities were restricted to an extent that he could not exercise his procedural rights fully on his own and without legal assistance, was nevertheless capable of taking part in criminal proceedings, if assisted by defence counsel and possibly by an interpreter. The limit had been reached where, even with procedural assistance, an accused could not responsibly decide on basic questions regarding his defence or reasonably exercise his personal procedural rights.

In applying these criteria in the particular circumstances of the present case, the Commission notes that the Berlin Regional Court carefully examined the question of the applicant's capacity to take part in the proceedings in the course of the trial. As from 26 February 1992 the maximum duration of hearings was limited, on account of the applicant's bad state of health, to one hour. However, the repeated requests raised by the applicant's defence counsel to discontinue the proceedings were to no avail. The Regional Court reached its conclusion that the applicant was, within the fixed time-limits, capable of taking part in the trial, on the basis of extensive medical expert opinions. There are no indications that the Regional Court, in reaching these findings, which were confirmed upon the applicant's appeal on points of law by the Federal Court of Justice, had disregarded the applicant's defence rights or otherwise acted in a manner incompatible with the right to a fair trial under Article 6 (Art. 6). In this respect, the Commission notes that at the trial the applicant had in turn been assisted by six defence counsel.

With regard to the proceedings before the Federal Court of Justice, the Commission recalls that in appeal and cassation proceedings the manner in which paragraphs 1 and 3 (c) of Article 6 (Art. 6-1, 6-3-c) are to be applied depends upon the special features of the proceedings in question. Account must be taken of the entirety of the proceedings conducted in the domestic legal system and the role of the particular appellate court therein (cf., mutatis mutandis, Eur. Court HR., Monnell and Morris v. the United Kingdom of 2 March 1987, Series A no. 115, p. 22, para. 56; Granger v. the United Kingdom of 28 March 1990, Series A no. 174, p. 17, para. 44; Jan-Åke Andersson v. Sweden of 29 October 1991, Series A no. 212-B, pp. 43-44, para. 22; Tripodi v. Italy judgment of 22 February 1994, Series A no 281-B, p. 45 para. 27; Kremzow judgment, loc. cit., para. 58).

In this connection, the Commission observes that the proceedings before the Federal Court of Justice were limited to points of law as set out in the respective statements on the grounds for appeal. The Federal Court of Justice, in its decision of 8 February 1995, as confirmed by the Federal Constitutional Court on 24 February 1995, referred to the differences between trial proceedings and proceedings concerning appeals on points of law, the latter being limited to a review of whether the trial court had correctly applied the substantial and procedural law. The accused had accordingly few possibilities to exert influence on the latter proceedings: he could, on his own, only

lodge or withdraw his appeal, but had to be assisted by counsel for the purposes of determining the range of his appeal and of submitting the reasons therefor. Moreover, at the hearing on his appeal, the accused, if at liberty, merely had a right to be present and to make a final statement, and, if detained, he or she was not even entitled to be present in addition to defence counsel. On the basis of these considerations, the Federal Court of Justice found that, as a minimum, the accused had to be capable of responsibly deciding whether or not to lodge an appeal on points of law.

In the present case, the Federal Court of Justice, having twice taken medical expert evidence as to the applicant's state of health, found that, while he was no longer able reasonably to contribute to the solution of factual issues and left decisions to the discretion of his counsel, he was still capable of understanding the importance of the appeal proceedings and of achieving a basic agreement with his defence counsel on the continuation of the proceedings. The Federal Court of Justice reached this conclusion after careful consideration of the applicant's capabilities and with due regard to the defence arguments. The Federal Constitutional Court acceded to the standards applied by the Federal Court of Justice and also confirmed its establishment of the relevant facts in the applicant's case.

The Commission observes that the opportunity to have recourse to legal or other assistance forms part of the mimimum rights guaranteed to persons charged with a criminal offence under paragraph 3 (c) and (e) of Article 6 (Art. 6-3-c, 6-3-e). In the Commission's view, the concept that limitations in an accused's capacity to take part in the proceedings are compensated by means of procedural assistance, in particular the assistance of defence counsel, is, therefore, not in itself contrary to Article 6 (Art. 6). The Commission further finds no indication that the Federal Court of Justice, either in its decision on the request to discontinue the proceedings or in its judgment of 10 March 1995, failed to display the diligence required to ensure the effective enjoyment of the rights guaranteed under Article 6 (Art. 6) (cf., mutatis mutandis, Eur. Court HR., T. v. Italy judgment, loc. cit., p. 42, para. 29).

In these circumstances the Commission finds that the conduct of the proceedings before the Federal Court of Justice, notwithstanding the applicant's poor state of health and accordingly limited capacity to take part in these proceedings, did not infringe the rights of the defence to such an extent that the applicant did not receive a fair hearing.

Accordingly, the applicant's submissions do not disclose any appearance of a violation of his rights under paragraphs 1 and 3 of Article 6 (Art. 6) of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

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