AS TO THE ADMISSIBILITY OF

Application No. 28899/95
by Hans-Jürgen STIERINGER
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. H.C. KRÜGER, 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 16 August 1994 by Hans-Jürgen STIERINGER against Germany and registered on 9 October 1995 under file No. 28899/95;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 21 October 1996 not to communicate the applicant's complaint about the alledged lack of independence of the probationary judges, sitting at the first instance court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1931, is a German national and resident in Bremen. He is a lawyer and notary by profession.

A. Particular circumstances of the case

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

In 1991 criminal proceedings were started against the applicant on the suspicion of having committed fraudulent conversion. In these proceedings the applicant was assisted by defence counsel.

On 19 October 1992 the applicant was taken into detention on remand on the basis of an arrest warrant issued by the Berlin-Tiergarten District Court (Amtsgericht) on 13 October 1992.

On 16 February 1993 the Berlin Public Prosecutor's Office drew up the bill of indictment against the applicant and a co-accused.

In March 1993 the applicant unsuccessfully requested that various private files, allegedly needed for the preparation of his trial, be made available to him for consultation in prison.

On 8 June 1993 the 19th Extended Criminal Chamber (Große Strafkammer) of the Berlin Regional Court (Landgericht), sitting as Economic Crimes Chamber (Wirtschaftsstrafkammer) and composed of three judges and two lay assessors (Schöffen), committed the applicant and the co-accused for trial.

On 30 June 1993 the Presiding Committee (Präsidium) of the Berlin Regional Court, in the exercise of its functions under S. 21e of the Courts Organisation Act (Gerichtsverfassungsgesetz), set up an auxiliary criminal chamber (Hilfsstrafkammer) for the purpose of relieving the 19th Criminal Chamber which, due to its workload, could not deal with urgent cases, such as the case of the applicant who was detained on remand.

The 19b Auxiliary Criminal Chamber was composed of the Presiding Judge le Viseur and Judges Garz-Holzmann and Appelt-Kurlemann on the understanding that their functions in the 5th Criminal Chamber had priority. On 5 July 1993 the Committee of the Berlin Regional Court decided that Judge Appelt-Kurlemann who was to leave as from 15 July, was replaced by Judge von der Decken, who had the status of a probationary judge (Richter auf Probe). On 11 October 1993 the Committee of the Berlin Regional Court, having regard to the heavy workload of Judge Garz-Holzmann following her appointment as Presiding Judge of another Criminal Chamber and the priority of her duties in that Chamber, decided that Judge Kramer, who had the status of a probationary judge, was assigned as further Judge to the 19b Auxiliary Criminal Chamber.

On 2 September 1993 the Presiding Judge of the 19b Auxiliary Criminal Chamber fixed 1 November as date for the opening of the trial hearings in the applicant's case. The trial was to be continued on the ensuing Thursdays and Mondays.

On 1 November 1993 the trial against the applicant and the co-accused opened before the 19b Auxiliary Criminal Chamber of the Berlin Regional Court, composed of the Presiding Judge le Viseur, Judges von der Decken and Kramer, as well as Ms. Heiber and Mr. Glässer as lay assessors. Ms. Heiber was sitting as principal lay assessor (Hauptschöffe), drawn by lot for the 19th Extended Criminal Chamber's session day of 2 November 1993. Mr. Glässer, initially called as substitute lay assessor (Ergänzungsschöffe), had replaced the second principal lay assessor, who was prevented from sitting.

On 4 November 1993 the applicant complained about the composition of the 19b Auxiliary Criminal Chamber, namely about the participation of two probationary judges as well as the participation of Ms. Heiber and Mr. Glässer as lay assessors.

At the hearing of 8 November 1993, the 19b Auxiliary Criminal Chamber dismissed the applicant's complaints.

The Chamber found in particular that S. 29 of the Law on the Judiciary, as amended by the Act on the Relief of the Administration of Justice, allowing for the participation of two probationary judges in judicial decisions, could not be objected to from a constitutional point of view nor under the European Convention on Human Rights. The Chamber observed that S. 29, as amended, took account of the circumstances following the German Unification, when the number of persons brought within the jurisdiction of the courts had considerably increased while the judiciary had not changed. Moreover, according to the Chamber, it was not feasible to assign probationary judges to the criminal chambers on the basis of fixed quotas. The Chamber further dismissed the applicant's objections as to the participation of the lay assessors, drawn by lot to sit on 1 November 1993. It considered that the Presiding Judge had brought the regular session of 2 November 1993 forward in time (Terminvorverlegung) to 1 November 1993.

Judge Kramer was appointed as permanent judge in the course of the applicant's trial, which continued for twenty-three days until 7 February 1994.

On 7 February 1994 the applicant was convicted of fraudulent conversion and sentenced to three years and six months' imprisonment. The Regional Court found that the applicant, as member of the supervisory board of a building company, had fraudulently arranged for the payment of DM 11.6 million to a third person.

On 14 July 1995 the Federal Court of Justice (Bundesgerichtshof) dismissed the applicant's appeal on points of law (Revision). The Federal Court of Justice found that the review of the judgment of 7 February 1994 in the light of the applicant's appeal submissions had not disclosed any error of law.

In its decision, the Federal Court of Justice confirmed its case-law according to which the independence of probationary judges was sufficiently ensured under SS. 12, 22 and 78 (4c) of the Law on the Judiciary. Accordingly, S. 29 of the Law on the Judiciary, as amended, which temporarily allowed for the sitting of two probationary judges in a bench, could not be objected to from a constitutional point of view. The requirements established in the case-law of the Federal Constitutional Court (Bundesverfassungsgericht), namely the existence of extraordinary circumstances and imperative necessities in the administration of justice, were met in the transitional period following the German unification. Furthermore, taking into account that Judge Kramer had already been nominated by the Committee for the Selection of Judges (Richterwahlausschuß) before the opening of the trial against the applicant and that her appointment had been imminent - she had been appointed after the seventh day of trial hearings, the decision on the composition of the 19b Auxiliary Criminal Chamber did not disclose any appearance of arbitrariness.

The Federal Court of Justice next examined the applicant's complaint about the composition of the 19b Auxiliary Criminal Chamber as far as the lay assessors were concerned. According to the applicant, the trial against him had started with an extraordinary session of the 19b Auxiliary Criminal Chamber, as the 19th Extended Criminal Chamber had been in session on 2 November 1993. Accordingly, auxiliary lay assessors should have participated, or, in the alternative, the principal lay assessors drawn by lot for the 19th Extended Criminal Chamber's next regular session.

The Federal Court of Justice noted that the 19b Auxiliary Criminal Chamber had been set up on 30 June 1993 in order to relieve the regular 19th Criminal Chamber of the Berlin Regional Court. The

19b Auxiliary Criminal Chamber held its sessions on Mondays and Thursdays, whereas the 19th Criminal Chamber held its regular sessions on Tuesdays and Thursdays. On 2 September 1993 the Presiding Judge of the 19b Auxiliary Criminal Chamber had fixed the date of 1 November 1993 for the opening of the trial, which was to be continued on the following Thursdays and Mondays. The principal lay assessors drawn by lot for the 19th Criminal Chamber's regular session of 2 November 1993 were called to sit at the applicant's trial. On that day, the 19th Extended Criminal Chamber had continued trial hearings (Fortsetzungsverhandlungen) in two other complex cases.

The Federal Court of Justice considered that in these circumstances the 19b Auxiliary Criminal Chamber's session of 1 November 1993 was not an extraordinary session, but a regular session brought forward in time, and the participation of the lay assessors could not be objected to.

In this respect, the Federal Court of Justice recalled its constant jurisprudence regarding regular criminal chambers, according to which extraordinary sessions with auxiliary lay assessors, pursuant to S. 47 of the Courts Organisation Act, presupposed a need to hold sessions in addition to the regular sessions. However, when the presiding judge of a criminal chamber fixed another date than a regular session for the opening of trial hearings, while the regular session was reserved for other purposes, the trial had opened at the regular session, "brought forward or put back in time" ("Verlegung nach vorne oder nach hinten"). Consequently, the principal lay assessors drawn by lot for the regular session had to sit at the trial hearings concerned. Having regard to the constitutional right not to be removed from the jurisdiction of the lawful judge (gesetzlicher Richter), the participation of the principal lay assessors determined in advance pursuant to S. 45 of the Courts Organisation Act had priority over the recourse to auxiliary lay assessors. The presiding judge, fixing hearing dates after due assessment of all circumstances (nach pflichtgemäßem Ermessen), had first to consider the possibility of advancing or postponing a regular session, thereby leaving the composition of the chamber unchanged. An extraordinary session could only be held, when no early date for such postponement was available. Subsequent changes of the circumstances underlying such decisions were irrelevant.

The Federal Court of Justice next addressed the question to what extent these principles also applied to auxiliary criminal chambers.

In this respect it observed that the setting up of an auxiliary criminal chamber to relieve a regular criminal chamber was a means of regulating the organisation of work in cases where judges were prevented from attending trial hearings. Thus an auxiliary criminal chamber substituted for the regular criminal chamber in cases which the latter was not able to deal with. An auxiliary criminal chamber could not, therefore, have its own principal lay assessors; and session days were assigned to auxiliary criminal chambers merely for practical purposes, in particular the organisation of administrative and technical matters regarding hearings. Rather, the principal lay assessors drawn by lot for particular sessions of the regular criminal chamber, had, ipso jure, to attend sessions of the auxiliary criminal chamber if they were not needed by the regular criminal chamber. When the regular criminal chamber, on the same session day, continued trial hearings in another case, started at an earlier date and with other lay assessors, there was no conflict between the two criminal chambers which would require the auxiliary criminal chamber to hold an extraordinary hearing with auxiliary lay assessors. Only if, at the time of fixing the date for the opening of trial hearings before the auxiliary criminal chamber, had these lay assessors already been called to sit at a trial hearing opening before the regular criminal chamber, did the session fixed by the presiding judge of the auxiliary criminal chamber constitute an extraordinary session, pursuant to S. 47 of the

Courts Organisation Act.

Moreover, apart from considerations of transparency and practicability, the close link between the auxiliary criminal chamber and the principal lay assessors of the regular criminal chamber, for which the auxiliary criminal chamber was a substitute in dealing with its cases, required that both criminal chambers applied the same principles regarding the possibility of advancing or postponing a regular session and the fixing of extraordinary sessions, in order not to remove the accused from the jurisdiction of the lawful judge.

Furthermore, the Federal Court of Justice, deviating from one of its earlier decisions, considered that when a regular session, brought forward in time, was fixed as the date for the opening of trial hearings before an auxiliary criminal chamber, the question of whether the hearings were continued at a regular session was irrelevant.

The Federal Court of Justice concluded that when the trial hearings before an auxiliary criminal chamber did not open on the date of a regular session of the regular criminal chamber, the closest regular session had to be brought forward or put back. However, such practice was only reasonable to the extent that regular sessions were postponed to the very day preceding or following a regular session.

The Federal Court of Justice also dismissed the applicant's procedural complaints concerning the taking of evidence.

The decision was served on 21 August 1995.

On 2 September 1995 a panel of three judges of the Federal Constitutional Court refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde) of 24 August 1995.

B. Relevant domestic law and practice

a. The internal organisation of courts

According to S. 21e of the Courts Organisation Act (Gerichtsverfassungsgesetz), the presiding committee of a court determines, before the beginning of the relevant year, inter alia, the composition of the benches, the replacement of judges and the allocation of work; these rules can exceptionally be changed during the year concerned, if this is necessary inter alia in view of the excessive workload of a judge or bench.

b. The lay assessors

The rules regarding lay assessors sitting in criminal chambers at regional courts are laid down in S. 77, in conjunction with SS. 30 to 57 of the Courts Organisation Act.

At a trial, lay assessors exercise the same functions as a judge. The office of a lay assessor is an honorary one; the qualifications for this office are laid down in SS. 31 to 35. Principal lay assessors and auxiliary lay assessors (Hilfsschöffen) are elected for a period of four years in accordance with a procedure laid down in SS. 36 to 42. The names of principal lay assessors and of auxiliary lay assessors are recorded in separate lists.

Pursuant to S. 45, the principal lay assessors sitting with the professional judges of a criminal chamber in a particular case are appointed to participate at the chamber's regular sessions (ordentliche Sitzungen), i.e. its weekly session days, which are fixed in advance for a period of twelve months. The order in which principal lay assessors participate in a criminal chamber's regular sessions during this period is drawn by lot at a public hearing. The order in which auxiliary lay assessors replace principal lay assessors prevented from

exercising their office is also decided by lot. Auxiliary lay assessors are called upon, inter alia, when cases require the fixing of extraordinary sessions (außerordentliche Sitzungen), pursuant to S. 47. A presiding judge may also call upon auxiliary lay assessors to attend lengthy trial hearings as substitute lay assessors for the purpose of replacing, if necessary, a principal lay assessor prevented from sitting (SS. 48, 192).

c. The judiciary

The general rules governing the judiciary are laid down in the Law on the Judiciary (Richtergesetz).

Appointment as a permanent judge (Richter auf Lebenszeit) presupposes that a person, after having obtained the qualification to exercise the functions of a judge (Befähigung zum Richteramt), has completed at least three years' service in the judiciary; this period may be reduced in special circumstances (S. 10 of the Law on the Judiciary). According to S. 12, such service in the judiciary may be completed as a probationary judge (Richter auf Probe). Probationary judges have to be appointed as permanent judges after five years of service at the latest. The conditions for dismissing probationary judges are laid down in S. 22; and S. 78 (4c) provides for a right of recourse to a disciplinary court to challenge such a dismissal.

S. 25 of the Law on the Judiciary repeats the constitutional guarantee of the independence of the judiciary, as enshrined in Article 97 of the Basic Law (Grundgesetz). The different aspects of this principle are regulated in SS. 26 to 37 of the Law on the Judiciary.

According to S. 28 of the Law of the Judiciary, only permanent judges may sit as judges in court, unless a federal law provides for an exception; the presiding judge of a court composed of several judges has to be a permanent judge. S. 59 para. 3 of the Courts Organisation Act provides that probationary judges may sit at the regional courts.

S. 29 of the Law on the Judiciary, as amended by the Act on the Relief of the Administration of Justice (Gesetz zur Entlastung der Rechtspflege) of 11 January 1993, which came into operation on 1 March 1993, provides that altogether not more than two probationary judges, or delegated judges (Richter kraft Auftrag, delegierte Richter), may sit as members of a bench. The amended version of S. 29 of the Courts Organisation Act expires on 28 February 1998, and as from 1 March 1998, S. 29 in its previous version will again be operative, limiting the number of probationary judges or delegated judges to one per bench.

According to the case-law of the Federal Constitutional Court (leading decisions of 9 November 1955, BVerfGE 4 p. 331, and of 3 July 1962, BVerfGE 14 p. 156, respectively), on the independence of the judiciary, Article 97 para. 2 of the Basic Law guarantees the personal independence of the permanent judges in order to ensure their requisite objective independence. Recourse to judges who do not benefit from the guarantee of personal independence must remain the exception. Courts with professional judges must in principle be composed of permanent judges. Probationary judges may only participate within the limits set by the necessity to train new judges or other imperative reasons, such as imperative necessities in the administration of justice (unumgängliche Bedürfnisse der Rechtspflege). The existence of a necessity justifying the participation of probationary judges may vary according to the various branches of the judiciary, courts or chambers and senates, and must, therefore, be determined in the particular circumstances of each individual case. The training of law assessors for the purpose of their permanent employment, the delegation of permanent judges employed at lower courts to a higher court for the purpose of testing their abilities, as well as the necessity to replace permanent judges temporarily prevented from

working in circumstances where the permanent judges determined in advance as substitute judges are unable to cope with the extra burden of work, or in cases where a temporarily extraordinary volume of work has to be handled, are mentioned as examples. In the latter cases, the recourse to probationary judges is nevertheless unjustified if the workload was due to an insufficient number of posts or delays in the appointment of permanent judges to vacant posts. Moreover, the principle of the independence of judges demands that the total number of probationary judges in a given branch of the judiciary is limited to what is strictly required and that the distribution of probationary judges among the courts, chambers and senates must be as fair as possible.

COMPLAINTS

The applicant complains that the criminal proceedings against him have, in several respects, not complied with Article 6 paras. 1 and 3 (b) of the Convention.

The applicant submits in particular that the 19b Auxiliary Criminal Chamber was no "tribunal established by law" within the meaning of Article 6 para. 1. The setting up of this Auxiliary Criminal Chamber and its composition had not been regulated in advance, namely at the beginning of the calendar year. He also complains about the composition of this Chamber with regard to the lay assessors.

The applicant further alleges that, due to the participation of two probationary judges in the bench of the 19b Auxiliary Criminal Chamber, the trial had not been conducted by an "independent" tribunal within the meaning of Article 6 para. 1.

The applicant finally considers that, as a consequence of the refusal to put his personal files at his disposal for consultation in prison, he could not duly prepare his defence and exercise his defence rights, pursuant to Article 6 para. 3 (b).

THE LAW

1. The applicant complains about the criminal proceedings against him before the Berlin Regional Court which resulted in his conviction of fraudulent conversion. The invokes Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention.

Article 6 (Art. 6), as 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:
...

b. to have adequate time and facilities for the preparation of his defence;
..."

2. The applicant complains that the 19b Auxiliary Criminal Chamber was not a "tribunal established by law" within the meaning of Article 6 para. 1 (Art. 6-1).

a. The Commission recalls that it is the purpose of the requirement in Article 6 para. 1 (Art. 6-1) that courts shall be "established by law" that the judicial organisation in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament. However, Article 6 para. 1

(Art. 6-1) does not require the legislature to regulate every detail in this area by a formal Act of Parliament if the legislature establishes at least the organisational framework for the judicial organisation (cf. Zand v. Austria, Comm. Report 12.10.78, D.R. 15, p. 80; see also Eur. Court HR, Piersack v. Belgium judgment of 1 October 1982; Series A no. 53, p. 16, para. 33).

b. The applicant's first argument relates to the establishment of the 19b Auxiliary Criminal Chamber of the Berlin Regional Court. He considers that he should have been tried by the 19th Extended Criminal Chamber and not by an auxiliary chamber which, according to him, had not been set up in accordance with pre-fixed rules. Moreover, the 19b Auxiliary Criminal Chamber was composed of judges principally assigned to another criminal chamber.

The Commission, even assuming that this matter had been properly raised in the applicant's appeal on points of law with the Federal Court of Justice, notes that the applicant's case was within the competence of the 19th Criminal Chamber of the Berlin Regional Court which committed him for trial in June 1993. The applicant, who had been detained on remand since October 1992, was subsequently tried by the 19b Auxiliary Criminal Chamber of the Berlin Regional Court. This Auxiliary Criminal Chamber had been set up by the Presiding Committee of the Berlin Regional Court for the purpose of relieving the 19th Criminal Chamber which, due to its workload, could not deal with urgent cases.

The Commission finds that the Presiding Committee thereby exercised its functions under S. 21e of the Courts Organisation Act, namely to organise the distribution of cases and the replacement of judges or benches and, if necessary in view of the excessive workload of a bench, to change the rules governing a particular year. The decision of the Presiding Committee setting up the 19b Auxiliary Criminal Chamber as well as fixing its jurisdiction was therefore taken on the basis of the relevant legislation.

Moreover, the Commission considers that in the present circumstances, there were reasonable grounds to set up an auxiliary criminal chamber for the purpose of relieving the 19th Criminal Chamber which, due to its workload, could not deal with urgent cases. In this context, the Commission recalls that domestic courts are obliged to conduct the proceedings within a "reasonable time", and that Article 6 para. 1 (Art. 6-1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements (cf. Eur. Court HR, Muti v. Italy judgment of 23 March 1994, Series A no. 281-C, p. 57, para. 15; Thomann v. Switzerland judgment of 10 June 1996, para. 36, to be published).

c. As regards the applicant's further complaint about the lay assessors, the Commission notes that the applicant was tried by the 19b Auxiliary Criminal Chamber, composed of three judges and Ms. Heiber and Mr. Glässer as lay assessors. Ms. Heiber had been drawn by lot for the 19th Criminal Chamber's session on 2 November 1993, Mr. Glässer, a substitute lay assessor, had replaced the other principal lay assessor who had been prevented from sitting. The principal lay assessors were called in accordance with SS. 45, 77 of the Courts Organisation Act, as interpreted by the Federal Court of Justice. According to this case-law, the rule according to which principal lay assessors are sitting at particular, previously fixed, session days and continue to participate in the trial hearings having opened on that date, covers situations where the date of a regular session, brought forward or put back in time, was fixed for the opening of trial hearings, and that this also applies to trial proceedings before an auxiliary criminal chamber which sits with the principal lay assessors of the parallel regular criminal chamber.

The Commission recalls that the logic of the system of safeguards

established by the Convention sets limits to the scope of the power of review exercisable by the Convention organs in respect of compliance with the relevant domestic legislation. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law: the national authorities are particularly qualified to settle the issues arising in this connection (Eur. Court HR, Barthold v. Germany judgment of 25 March 1985, Series A no. 90, p. 22, para. 48; No. 13274/87, Dec. 6.9.90, D.R. 66, p. 164).

The Federal Court of Justice based its interpretation of the relevant provisions of the Courts Organisation Act on the constitutional principle that no one shall be removed from the jurisdiction of his or her lawful judge, as well as on considerations of transparency and practicability. The applicant's submissions do not disclose any failure to observe the legislation in question.

d. In these circumstances the Commission finds no indication that the criminal proceedings against the applicant were not conducted by a tribunal "established by law" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

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

3. The applicant further alleges that, due to the participation of two probationary judges in the bench of the 19b Auxiliary Criminal Chamber, the trial had not been conducted by an "independent" tribunal within the meaning of Article 6 para. 1 (Art. 6-1).

The Commission recalls that, in determining whether a court may be considered to be "independent" both of the executive and of the parties to the case, regard must be had to the manner of appointment of its members and the duration of their term of office, to the existence of guarantees against outside pressures and to whether the body presents an appearance of independence (cf. Eur. Court HR, Campbell and Fell v. the United Kingdom judgment of 28 June 1984, Series A no. 80, pp. 39-40, para. 78). In this context, the irremovability of judges by the executive during their term of office must be considered as a corollary of their independence and thus included in the guarantees of Article 6 para. 1 (Art. 6-1) (cf. Eur. Court HR, Campbell and Fell judgment, loc. cit., p. 40, para. 80; Zand v. Austria, loc. cit., para. 80). What is at stake is the confidence which the courts in a democratic society must inspire in the public (cf. Eur. Court HR, Sramek v. Austria judgment of 22 October 1984, Series A no. 84, p. 20, para. 42; De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 14, para. 26).

In the present case, the 19b Auxiliary Criminal Chamber of the Berlin Regional Court, when dealing with the applicant's case, was composed of the Presiding Judge le Viseur, a permanent judge, and two probationary judges, Ms. von der Decken and Ms. Kramer. The latter was at the time of the opening of the applicant's trial hearings proposed for appointment as permanent judge; her appointment took place after seven hearing days.

The Commission notes that the principle of the independence of permanent judges is enshrined in Article 97 of the German Basic Law and further regulated in the Law on the Judiciary. The appointment as permanent judge presupposes, in accordance with the relevant provisions of the Law on the Judiciary, as a rule, a three-year-service in the administration of justice, e.g. as probationary judge, after having obtained the qualification to exercise the functions of a judge. Any dismissal of judges in the course of their probationary period is susceptible to judicial review. The participation of probationary judges is regulated in the Law on the Judiciary and the Courts Organisation Act. These legal instruments reflect the constitutional

limitations on the use of probationary judges in the judiciary, as established in the jurisprudence of the Federal Constitutional Court. According to this jurisprudence, recourse to judges who, considering the possibility of their dismissal during the probationary period, do not fully benefit from the guarantee of personal independence must remain the exception, namely if a necessity to train judges or other imperative reasons, such as reinforcing courts, exist.

In the present case, the Federal Court of Justice, in its decision of 14 July 1995, found that, in the light of the above principles, the independence of probationary judges was sufficiently ensured under SS. 12, 22 and 78 (4c) of the Law on the Judiciary. S. 29 of the Law on the Judiciary, as amended, which temporarily allowed for the sitting of two probationary judges in a bench, was the solution to the imperative necessities in the administration of justice in the transitional period following the German unification.

The Commission finds that, in examining the situation of Judges von der Decken and Kramer, regard must be had not only to the legal provisions regarding probationary judges but also to how these provisions are interpreted and how they actually operate in practice. Under the German system, the participation of probationary judges serves at the same time the purposes of training and selecting candidates for appointment as permanent judges and of allowing the courts to benefit from the work of these judges who, following legal studies and training, obtained the general qualification to exercise the functions of judges. In the exercise of their function as judges, they enjoy the full guarantees as to their objective independence. The fact that for the sole purpose of training, they remain for a period regularly not longer than three years liable to removal by the judicial authorities does not justify the conclusion that their objective independence is no longer established. Accordingly, in the Commission's view, this system does not, in itself, amount to a situation which could seriously affect the confidence which the courts must inspire in a democratic society.

The Commission further refers to its above finding that the decision of the Presiding Committee of the Berlin Regional Court to set up the 19b Auxiliary Criminal Chamber cannot be objected to under Article 6 para. 1 (Art. 6-1). The Commission considers that this Committee's related decision on the composition of the 19b Auxiliary Criminal Chamber, in particular the assignment of the two probationary judges Ms. von der Decken, who was about to be appointed as permanent judge, and Ms. Kramer does not disclose any concrete reasons to doubt the independence of the Chamber in question. Nor does the Chamber's handling of the applicant's case, and in particular the conduct of Ms. von der Decken and Ms. Kramer, give rise to any legitimate doubts as to these persons' independence.

Against this background, the Commission finds that the 19b Auxiliary Criminal Chamber which determined the criminal charges against the applicant was an "independent tribunal" within the meaning of Article 6 para. 1 (Art. 6-1).

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

4. The applicant finally considers that, as a consequence of the refusal to put his personal files at his disposal for consultation in prison, he could not duly prepare his defence and exercise his defence rights, pursuant to Article 6 para. 3 (b) (Art. 6-3-b) of the Convention.

The Commission observes that the applicant, assisted by defence counsel throughout the criminal proceedings against him, failed to show how far he pursued the matter at the trial hearings. His appeal on points of law did not include any complaint that he had thereby been

unduly restricted in the exercise of his defence rights. However, even assuming compliance with Article 26 (Art. 26) of the Convention, the Commission finds no sufficient grounds to conclude that the applicant had been prevented from duly preparing his defence and exercising his defence rights at the trial against him.

Consequently, these aspects of the applicant's submissions do not disclose any appearance of a breach of Article 6 (Art. 6), either.

It follows that this complaint is likewise 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.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission