AS TO THE ADMISSIBILITY OF

Application No. 29045/95
by Horst MAHLER
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 14 January 1998, the following members being present:

MM M.P. PELLONPÄÄ, President
N. BRATZA
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 14 September 1995 by Horst MAHLER against Germany and registered on 2 November 1995 under file No. 29045/95;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the observations submitted by the respondent Government on 16 April 1997, supplementary observations on 27 June 1997 and the observations in reply submitted by the applicant on 23 May 1997 and 28 July 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1936, is a German national and resident in Berlin. He is a lawyer by profession.

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

On 16 May 1994 the Berlin Tiergarten District Court (Amtsgericht) convicted the applicant of insult, pursuant to S. 185 of the German Penal Code (Strafgesetzbuch) and imposed a fine of DM 2,700 upon him.

According to S. 185 of the Penal Code, insult (Beleidigung) is an offence punishable with a maximum of one year's imprisonment or a

fine.

The District Court found that the applicant had assisted the accused Mr. S. in criminal proceedings pending before the Berlin Regional Court. The bill of indictment, comprising more than 500 pages, had contained one unintelligible sentence, namely that the applicant had included in a letter of September 1988 a bill dated May 1990. The applicant, having the impression that the public prosecutor Mr. B. who had drafted the bill of indictment, was biased against his client Mr. S. and himself, inter alia lodged various requests for the taking of evidence. On 12 August 1993, at the trial before the Regional Court, the applicant had deliberately, and not subject to a sudden emotion, stated that the Public Prosecutor Mr. B. had apparently drafted the bill of indictment "in a state of complete intoxication" ("im Zustand der Volltrunkenheit"). He had further explained at this hearing that his statement concerned the whole bill of indictment and that the above-mentioned sentence was only one particular example.

The District Court considered that the applicant, according to his own statements, had been aware that he had attacked the professional reputation of Mr. B. With his statement the applicant had gone beyond the limits of his right to freedom of expression. While public officials such as public prosecutors had to accept even harsh criticism, such remarks had to be made in an appropriate manner. At a trial, a defence counsel was entitled to raise objective criticism as to the performance of the competent public prosecutors. However he must not claim that the person concerned performed his work in a state of "intoxication", either due to alcohol or under the influence of an excessive fanaticism in prosecuting the defendant. The remark concerned was not justified for the protection of the defendant or the applicant's rightful interests (Wahrnehmung berechtigter Interessen), but it could only result in straining the atmosphere at the trial. To the extent that the applicant had been of the opinion that the public prosecutors had acted unlawfully, he could have laid charges against them.

On 17 August 1994 the Berlin Regional Court (Landgericht) rejected the applicant's appeal (Berufung) on the ground that it was obviously ill-founded. The Regional Court, having regard to all the material before it, found the trial court's findings convincing.

On 27 February 1995 the Federal Constitutional Court (Bundesverfassungsgericht) refused to entertain the applicant's constitutional complaint (Verfassungsbeschwerde). He received the decision on 24 March 1995.

COMPLAINT

The applicant complains under Article 10 of the Convention about his conviction of insult by the Tiergarten District Court on 16 May 1994, as confirmed by the Regional Court on 17 August 1994. He considers that the incriminated statement was no more than a criticism concerning Mr. B.'s performance. In his observations of 23 May 1997, the applicant also invokes Article 7 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 September and registered on 2 November 1995.

On 27 November 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on

16 April 1997. The applicant replied on 23 May 1997. The Government's supplementary observations were submitted on 27 June 1997. The applicant replied on 28 July 1997.

THE LAW

The applicant complains under Article 10 (Art. 10) of the Convention that his conviction of insult infringed his right to freedom of expression.

Article 10 (Art. 10) of the Convention, as far as relevant, provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others ..."

The Government maintain that the applicant's complaint is manifestly ill-founded.

The Commission notes that on 16 May 1994 the Berlin Tiergarten District Court convicted the applicant of insult on the ground that, in his position as defence counsel in a hearing before another criminal court, he had deliberately, and not subject to a sudden emotion, stated that the Public Prosecutor Mr. B. had apparently drafted the bill of indictment "in a state of complete intoxication", and that he had also explained that his statement concerned the whole bill of indictment. In this respect, the District Court had noted that the rather lengthy bill of indictment had indeed contained one unintelligible sentence.

The Commission finds that this measure constituted an interference with the exercise of the applicant's freedom of expression. Such interference is in breach of Article 10 (Art. 10), unless it is justified under paragraph 2 of Article 10 (Art. 10-2), i.e. it must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 (Art. 10-2) and be "necessary in a democratic society". This is not in dispute between the parties.

The legal basis of the interference under consideration was S. 185 of the Penal Code.

The applicant considers that this provision is too vague and does not provide a sufficient legal basis for a conviction. In this respect, he also relies on Article 7 (Art. 7) of the Convention. The Government object to his views and explain that the field of application of S. 185 of the German Penal Code has been clarified in the framework of a comprehensive case-law.

The Commission has examined the question of the lawfulness of the applicant's conviction with due regard to Article 7 para. 1 (Art. 7-1), first sentence, of the Convention, which reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

The Commission recalls that, in the field of criminal law, Article 7 para. 1 (Art. 7-1) confirms the general principle that legal

provisions which interfere with individual rights must be adequately accessible, and formulated with sufficient precision to enable the citizen to regulate his conduct (cf. Eur. Court HR, Sunday Times v. United Kingdom judgment of 26 April 1979, Series A no. 30, p. 31, para. 49; Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 22, para. 52). Article 7 para. 1 (Art. 7-1) prohibits in particular that existing offences be extended to cover facts which previously clearly did not constitute a criminal offence (cf. No. 6683/74, Dec. 10.12.75, D.R. 3, p. 95; No. 8710/79, Dec. 7.5.82, D.R. 28, p. 77; No. 13079/87, Dec. 6.3.89, D.R. 60, p. 256).

The German Courts found that the applicant's conduct constituted the offence of insult within the meaning of S. 185 of the Penal Code. The Commission considers that in the field of conduct governed by the afore-mentioned provision, no absolute precision in the framing of the law can be achieved. Rather, the courts enjoy some discretion in interpreting and applying such general notions (cf. Eur. Court HR, Sunday Times judgment, loc. cit.). In the present case, the competent courts could reasonably conclude that the applicant's conduct constituted the criminal offence of insult within the meaning of S. 185 of the Penal Code. The applicant, a practising lawyer acquainted with the general legal practice in this field, could clearly foresee the risk of punishment.

The interference complained of was, therefore, prescribed by law, for the purposes of Article 10 para. 2 (Art. 10-2), without there being any indication of a violation of Article 7 para. 1 (Art. 7-1) of the Convention.

Moreover, the decisions complained of aimed to protect "the reputation or rights of others", namely the Public Prosecutor Mr. B., which is a legitimate aim under Article 10 para. 2 (Art. 10-2).

It remains to be determined whether the interference complained of was "necessary in a democratic society" and proportionate to the legitimate aim pursued.

The arguments advanced by the parties further concerned the question of the necessity of the interference.

The applicant submits that the impugned statement, even if exaggerated, was a criticism of the public prosecutor's performance and should not have given rise to criminal prosecution.

The Government, having regard to the principles established in the case-law of the Convention organs, submit that the applicant's comment was made in criminal proceedings which were of no public significance. The applicant's comment was made in the context of a trial hearing. Even if it is in principle permissible to criticise the performance of public servants such as public prosecutors, higher demands are made as to the form of such criticism if it is raised in court, in particular if such a comment is not made spontaneously, but after due consideration. Thus the applicant was not convicted for his criticism of the bill of indictment as such, but for having personally insulted the public prosecutor.

The Commission recalls that the notion of necessity implies a pressing social need. The Contracting States enjoy a margin of appreciation in this respect, but this goes hand in hand with a European supervision which is more or less extensive depending on the circumstances. In reviewing under Article 10 (Art. 10) the decisions taken by the national authorities pursuant to their power of appreciation, the Convention organs have to determine, in the light of the case as a whole, whether the reasons adduced by them to justify the interference are "relevant and sufficient" (cf. Eur. Court HR, Sunday Times (no. 2) v. United Kingdom judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50; Worm v. Austria judgment of 29 August

1997, Reports 1997-V, no. 45, para. 47).

In the present case, the applicant's conviction of insult related to his remark, in his position as defence counsel at a court hearing, that the public prosecutor concerned had drafted the bill of indictment "in a state of complete intoxication". The District Court, in a detailed reasoning, considered the context of the criminal proceedings and the court hearing at which the incriminated remark had been made. It noted in particular that the applicant had made the remark deliberately and not subject to a sudden emotion and had been aware that he was thus attacking the professional reputation of the public prosecutor concerned. Weighing the applicant's right to freedom of expression against the interest in protecting the public prosecutor's professional reputation, the District Court concluded that the applicant had gone beyond the limits of acceptable, even harsh criticism. These findings were confirmed by the Berlin Regional Court and the Federal Constitutional Court saw no reasons to entertain the applicant's constitutional complaint.

The Commission recalls that it has declared inadmissible similar cases under Article 10 (Art. 10) concerning insulting remarks made by lawyers about judges in the context of court proceedings. In these cases the Commission, having particular regard to the detailed reasoning given by the domestic courts and the balance struck by them between the lawyer's concern to protect the interests of his client and the need to protect the reputation and rights of the judges concerned, found that the interference with the respective applicant's right to freedom of expression had, in the circumstances of these cases, been "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention (cf. No. 30549/96, Meister v. Germany, Dec. 10.4.97; No. 30339/96, Bossi v. Germany, Dec. 15.4.97; No. 26602/94, Ratt v. Austria, Dec. 30.6.97, all unpublished).

In the present case, the Commission finds that the District Court duly balanced the applicant's right, in pursuing his functions as defence counsel, to criticise a public prosecutor involved in the criminal proceedings against his client, or to raise charges about possibly unlawful conduct of prosecution authorities, against the necessity, in a democratic society, to protect the reputation and authority rights of others, here the Public Prosecutor Mr B., against insult. Having regard to the general professional duties of lawyers and considering the impugned statement, the Commission finds that there were relevant and sufficient reasons to impose a fine upon the applicant for insult. This sanction, i.e. a fine amounting to DEM 2,700, does not appear disproportionate to the legitimate aim pursued.

In these circumstances, the interference complained of can be regarded as "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. Accordingly, there is no appearance of a violation of the applicant's right under Article 10 (Art. 10) 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.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber