AS TO THE ADMISSIBILITY OF

Application No. 26551/95
by D. I.
against **Germany**

The European Commission of Human Rights (First Chamber) sitting in private on 26 June 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 16 August 1994 by D. I. against **Germany** and registered on 17 February 1995 under file No. 26551/95;

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 1938, is a British national and resident in London. He is a **historian** by profession. In the proceedings before the Commission he is represented by Mr. H. Herrmann, a lawyer practising in Düsseldorf.

The facts, as they have been submitted by the applicant, may be summarised as follows.

On 5 May 1992 the Munich District Court (Amtsgericht) convicted the applicant of insult (Beleidigung) and blackening the memory of the deceased (Verunglimpfung des Andenkens Verstorbener), pursuant to SS. 185, 189 and 194 of the German Penal Code (Strafgesetzbuch). The Court imposed a fine amounting to DM 10,000.

The District Court found that the applicant, on the occasion of an information meeting in April 1990, had stated in his speech that no gas chambers had ever existed in Auschwitz, that these gas chambers were fakes built up in the first post-war days and that the German tax-payers had thus paid about 16 billion German marks for fakes. The District Court, referring to the case-law of the Federal Court of Justice (Bundesgerichtshof), considered that anybody denying the killing of Jews under the Nazi regime committed the offences of insult as well as blackening the memory of the killed Jews. The District Court observed that the persecution of Jews under the Nazi regime was a historical fact.

In these and the following court proceedings, the applicant was assisted by defence counsel.

On 13 January 1993 the Munich I Regional Court (Landgericht) dismissed the applicant's appeal (Berufung), and, upon the appeal lodged by the Public Prosecutor's Office (Staatsanwaltschaft), increased the fine to DM 30,000.

In its decision, the Regional Court confirmed the factual findings of the District Court. Having regard to the applicant's defence that the incriminated statements were true as, in the course of his research, he had not established any proof of the gassing of Jews in Auschwitz, the Regional Court, referring to the case-law of the Federal Constitutional Court (Bundesverfassungsgericht) observed that the gassing of Jews in Auschwitz between 1941 and 1944 was a historically proven fact (eindeutig feststehende historische Tatsache) which was common knowledge (offenkundig) and did not require any further proof.

On 30 November 1993 the Bavarian Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal on points of law (Revision). The Court of Appeal confirmed the findings of the Regional Court that the systematic murder of Jews, inter alia in the Auschwitz concentration camp was common knowledge, and did not require any further taking of evidence.

On 11 February 1994 the Federal Constitutional Court refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde). The decision was served on 22 February 1994.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention that he did not have a fair trial. In this respect, the applicant considers in particular that the Regional Court unduly refused to take evidence as to the truth of the incriminated statements and challenges the courts' findings that these events were historical facts and therefore common knowledge which did not call for a further taking of evidence. He also submits that the Regional Court failed to evaluate the incriminated statements in the context of his speech as a whole.

2. The applicant further complains that his conviction by the Munich District Court, as confirmed by the Munich I Regional Court, amounts to a breach of his right to freedom of expression.

THE LAW

1. The applicant complains under Article 6 (Art. 6) of the

Convention that he did not have a fair trial, in particular as regards the refusal to take evidence as to the truth of the incriminated statements.

The Commission finds no indication that the applicant, assisted by counsel, could not duly present his arguments in defence or could not effectively exercise his defence rights, or that the proceedings were otherwise unfair.

As regards his complaint about the taking and assessment of evidence, the Commission recalls that as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. More specifically, Article 6 para. 3 (d) (Art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it does not require the attendance and examination of every witness on the accused's behalf (cf. Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

The Commission notes that the Regional Court, in its judgment of 13 January 1993, found the taking of further evidence as to the truth of the applicant's statements unnecessary on the ground that the gassing of Jews in Auschwitz was a historically proven fact and therefore common knowledge. The Court of Appeal, referring to the case-law of the Federal Constitutional Court as to the interpretation of the term of common knowledge, confirmed these findings.

In these circumstances, the Commission finds no sufficient grounds to form the view that there were any special circumstances in the present case which could prompt the conclusion that the failure to take further evidence was incompatible with Article 6 (Art. 6) (cf. No. 9235/81, Dec. 16.7.82, D.R. 29 p. 194; No. 25096/94, Dec. 6.9.95, D.R. 82-A p. 117).

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

2. The applicant also complains about the German court judgments convicting him of insult and blackening the memory of the deceased. He invokes Article 10 (Art. 10) of the Convention.

Article 10 (Art. 10), 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 prevention of disorder or crime, ... for the protection of the reputation or rights of others ..."

The Commission considers that the impugned measure was an interference with the applicant's exercise of his freedom of expression. Such interference is in breach of Article 10 (Art. 10),

unless it is justified under paragraph 2 of Article 10, 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".

The interference was "prescribed by law", namely the relevant provisions of the Penal Code.

The interference also pursued a legitimate aim under the Convention, i.e. "the prevention of disorder and crime" and the "protection of the reputation or rights of others". It remains to be ascertained whether the interference can be regarded as having been "necessary in a democratic society".

The Commission recalls that the adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with a European supervision. Thus the measures taken at national level must be justifiable in principle and proportionate (cf. European Court H.R., Observer and Guardian judgment of 26 November 1991, Series A no. 216 pp. 29-30, para. 59).

The Commission finds that the provisions of the Penal Code at issue, and their application in the present case, aimed to secure the peaceful coexistence of the population in the Federal Republic of **Germany**. The Commission therefore has also had regard to Article 17 (Art. 17) of the Convention. This provision reads as follows:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 17 (Art. 17) accordingly prevents a person from deriving from the Convention a right to engage in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention (cf. No. 12194/86, Dec. 12.5.88, D.R. 56 p. 205, No. 25096/94, loc. cit.).

As regards the circumstances of the present case, the Commission notes the findings of the District Court, as confirmed by the Regional Court, as to the incriminated statements made by the applicant in the context of a speech, in which he had denied the existence of gas chambers at the Auschwitz concentration camp.

The Commission finds that the applicant's statements ran counter one of the basic ideas of the Convention, as expressed in its preambular, namely justice and peace, and further reflect racial and religious discrimination.

The public interests in the prevention of crime and disorder in the German population due to insulting behaviour against Jews, and similar offences, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews under the Nazi regime (cf. No. 9235/81, Dec. 16.7.82, D.R. 29 p. 194; No. 25096/94, loc. cit.).

In these circumstances, there were relevant and sufficient reasons for the applicant's conviction. The interference with his freedom of expression can therefore be considered 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 also manifestly ill-founded with the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)