AS TO THE ADMISSIBILITY OF

Application No. 30454/96
by Klaus CROISSANT
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 27 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
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 26 October 1995 by Klaus CROISSANT against Germany and registered on 15 March 1996 under file No. 30454/96;

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 1931, is a German national and resident in Berlin. He is a lawyer by profession.

A. Particular circumstances of the case

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

In 1992 criminal proceedings were initiated against the applicant on suspicion of having committed espionage (geheimdienstliche Agententätigkeit).

The trial of the applicant was held before the Berlin Court of Appeal (Kammergericht), sitting as a court of first instance, on several days in February and March 1993. In these proceedings, the applicant was assisted by defence counsel.

On 4 March 1993 the Berlin Court of Appeal convicted the applicant of espionage on behalf of the former German Democratic

Republic, pursuant to S. 99 para. 1 (1) of the German Penal Code (Strafgesetzbuch). The applicant was sentenced to one year and nine months' imprisonment on probation. The Court of Appeal further ordered the applicant to pay a sum of money amounting to DEM 10,000 to a charitable public institution.

The Court found that between 1981 and 1989 the applicant had been contacted by agents of the Ministry for State Security (Ministerium für Staatssicherheit), the secret service of the former German Democratic Republic, and he had agreed to work for the Ministry concerned. He had informed the Ministry about persons within the "left-wing" spectrum of the Federal Republic of Germany and of the former West-Berlin, in particular about the activities of the German Green Party ("Partei der Grünen"). The Court of Appeal found that the applicant had thereby committed espionage. In fixing his sentence, the Berlin Court of Appeal considered that he had got involved in his criminal conduct due to his acquaintance with a lawyer practising in the former German Democratic Republic, that he had not acted for financial motives and that his activities had not caused any measurable prejudice. The Court regarded as particularly aggravating circumstances the lengthy period of his involvement in espionage and the intensity of his collaboration with the Ministry for State Security.

On 10 September 1993 the Federal Court of Justice (Bundesgerichtshof) dismissed the applicant's appeal on points of law (Revision).

On 23 May 1995 the Federal Constitutional Court (Bundesverfassungsgericht) refused to entertain his constitutional complaint (Verfassungsbeschwerde). The Constitutional Court, in its reasoning, referred to its decision in leading cases dated 15 May 1995. The decision was served on 1 June 1995.

B. Domestic law and practice

I. Acts of Espionage

a. Under the criminal law of the Federal Republic of Germany, treason (Landesverrat) is punishable under S. 94 and espionage (geheimdienstliche Agententätigkeit) under S. 99 of the Penal Code (Strafgesetzbuch), respectively.

S. 94 of the Penal Code provides as follows:

<German>

"1. Wer ein Staatsgeheimnis

(1) einer fremden Macht oder einer ihrer Mittelsmänner mitteilt oder

(2) sonst an einen Unbefugten gelangen läßt oder öffentlich bekannt macht, um die Bundesrepublik Deutschland zu benachteiligen oder eine fremde Macht zu begünstigen,

und dadurch die Gefahr eines schweren Nachteils für die äußere Sicherheit des Bundesrepublik Deutschland herbeiführt, wird mit Freiheitsstrafe nicht unter einem Jahr bestraft.

2. In besonders schweren Fällen ist die Strafe lebenslange Freiheitsstrafe oder Freiheitsstrafe nicht under fünf Jahren. Ein besonders schwerer Fall liegt in der Regel vor, wenn der Täter

(1) eine verantwortliche Stellung mißbraucht, die ihn zur

Wahrung von Staatsgeheimnissen besonders verpflichtet, oder

(2) durch die Tat die Gefahr eines besonders schweren Nachteils für die äußere Sicherheit der Bundesrepublik Deutschland herbeiführt."

<Translation>

1. Anybody who

(1) communicates a State secret to a foreign power or one of its agents or

(2) otherwise puts a State secret at the disposal of a person not authorised to have knowledge of it, or discloses it to the public, in order to prejudice the Federal Republic of Germany or to favour a foreign power,

and thereby creates a risk of a serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment for a period of not less than one year.

2. In particularly serious cases, the punishment shall be life imprisonment or imprisonment for a period of not less than five years. In general, a case had to be regarded as a particularly serious one if the offender

(1) abuses a responsible post where he was under a particular duty to keep State secrets, or

(2) as a consequence of the offence, creates a risk of a particularly serious prejudice to the external security of the Federal Republic of Germany."

S. 99 of the Penal Code, as far as relevant, provides as follows:

<German>

"1. Wer

(1) für den Geheimdienst einer fremden Macht eine geheimdienstliche Tätigkeit gegen die Bundesrepublik Deutschland ausübt, die auf die Mitteilung oder Lieferung von Tatsachen, Gegenständen oder Erkenntnissen gerichtet ist, oder

(2) gegenüber dem Geheimdienst einer fremden Macht oder einem seiner Mittelsmänner sich zu einer solchen Tätigkeit bereit erklärt,

wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft, wenn die Tat nicht in § 94 oder ... mit Strafe bedroht ist.

2. In besonders schweren Fällen ist die Strafe Freiheitsstrafe von einem Jahr bis zu zehn Jahren. Ein besonders schwerer Fall liegt in der Regel vor, wenn der Täter Tatsachen, Gegenstände oder Erkenntnisse, die von einer amtlichen Stelle oder auf deren Veranlassung geheimgehalten werden, mitteilt oder liefert und wenn er

(1) eine verantwortliche Stellung mißbraucht, die ihn zur Wahrung solcher Geheimnisse besonders verpflichtet, oder

(2) durch die Tat die Gefahr eines schweren Nachteils für die Bundesrepublik Deutschland herbeiführt.

..."

<Translation>

"1. Anybody who

(1) commits, on behalf of a secret service of a foreign power, espionage against the Federal Republic of Germany, aiming at communicating or forwarding facts, objects or findings, or

(2) agrees with the secret service of a foreign power or one of its agents to pursue such an activity,

shall be liable to imprisonment for a period not exceeding five years or a fine, unless the offence is punishable under S. 94 ...

2. In particularly serious cases, the punishment shall be imprisonment for a period of from one to ten years. In general, a case had to be regarded as a particularly serious one if the offender communicates or forwards facts, objects or findings, which are kept secret by a public authority or upon the instruction by a public authority, and if he

(1) abuses a responsible post where he was under a particular duty to keep such secrets, or

(2) as a consequence of his offence, creates a risk of a serious prejudice to the Federal Republic of Germany.
..."

The provisions of the Penal Code are applicable to offences committed within the territory of the Federal Republic of Germany (Inlandstaten), pursuant to S. 3 of the Penal Code. According to S. 5 (4), SS. 94 and 99 are also applicable to offences committed abroad (Auslandstaaten).

b. The Penal Code of the former German Democratic Republic also contained provisions regarding the punishment of espionage and treason to the disadvantage of the former German Democratic Republic or one of its allies. These provisions also extended to espionage on behalf of the Federal Republic of Germany.

II. The German Unification Treaty of 31 August 1990

The Treaty between the Federal Republic of Germany and the former German Democratic Republic on the German Unification (Einigungsvertrag) of 31 August 1990 abolished, with effect as from 3 October 1990, the Penal Code of the German Democratic Republic and extended the applicability of the criminal law of the Federal Republic of Germany to the territory of the former German Democratic Republic (with some exceptions irrelevant in the present context).

In the course of the negotiations on the above Treaty, an amnesty for persons having committed acts of espionage on behalf of the German Democratic Republic was considered. However, this matter was not pursued on account of hesitations in the general public and of envisaged difficulties in the Federal Diet. Further attempts to introduce such an amnesty in 1990 and 1993, respectively, remained unsuccessful.

III. Procedure before the Federal Constitutional Court

According to Article 93 para. 1 (4a) of the Basic Law (Grundgesetz), the Federal Constitutional Court (Bundes-

verfassungsgericht) shall decide on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph 4 of Article 20, under Articles 33, 101, 103, or 104 has been violated by a public authority.

Article 100 para. 1 of the Basic Law provides inter alia that, if a court considers unconstitutional a law the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Federal Constitutional Court if the Basic Law is held to be violated. According to paragraph 2 of this provision, the court shall obtain a decision from the Federal Constitutional Court if, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual.

According to S. 93a and S. 93b of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz), a constitutional complaint is not admitted for an examination on its merits, if it raises no constitutional issue of fundamental importance and if its examination is not necessary for the protection of the complainant's constitutional rights.

IV. Federal Constitutional Court decision of 15 May 1995

On 22 July 1991 the Berlin Court of Appeal (Kammergericht) suspended criminal proceedings relating to charges of espionage, treason and corruption in order to obtain a decision by the Federal Constitutional Court on the question whether persons who had been living in the former German Democratic Republic and had committed the above offences from the territory of the former German Democratic Republic, could be punished. Furthermore, numerous persons convicted of such offences lodged constitutional complaints with the Federal Constitutional Court, claiming that their respective convictions violated in particular their rights of liberty, as guaranteed under Article 2 para. 2 of the Basic Law, as well as their right to equality, as guaranteed under Article 3 of the Basic Law.

On 15 May 1995 the Federal Constitutional Court rendered a leading decision on the request submitted by the Berlin Court of Appeal and three constitutional complaints.

In its decision, the Federal Constitutional Court recalled its case-law according to which the prosecution for treason and espionage as provided for under SS. 94 and 99 of the Penal Code amounted to an interference with the rights to liberty under Article 2 of the Basic Law which was justified from a constitutional point of view. This finding also applied to the extent that secret agents of the former German Democratic Republic were liable to punishment even if they had only acted within the territory of the former German Democratic Republic or abroad. In this respect, the Constitutional Court considered that the relevant provisions of the Penal Code aimed at protecting the external security of the Federal Republic of Germany, and took into account that the offences in question had been committed at a time when the Federal Republic of Germany was particularly exposed to secret service operations of its enemies.

However, according to the Constitutional Court, the question arose whether or not the accession of the German Democratic Republic to the Federal Republic of Germany required a new appraisal of the constitutional issues, in particular with regard to acts of espionage within the meaning of SS. 94 and 99 of the Penal Code, committed from the territory of the German Democratic Republic by persons who were citizens of the German Democratic Republic and living there.

The Constitutional Court found that the fact that espionage on

behalf of the former German Democratic Republic was prosecuted as a criminal offence whereas the penal provisions of the former German Democratic Republic regarding espionage committed by agents of the Federal Intelligence Service had been repealed in the context of the Unification Treaty did not amount to discrimination. Rather, such difference in treatment resulted from the particularities of national security rules (Staatsschutzrecht), which protected the State against espionage by foreign powers. Thus, espionage against the Federal Republic of Germany on behalf of the German Democratic Republic remained a punishable act even after the accession of that State.

Moreover, the punishment of espionage on behalf of the former German Democratic Republic following the unification of Germany did not breach any general rules of public international law, contrary to Article 25 of the Basic Law. The Constitutional Court, having regard to a legal opinion of the Heidelberg Max-Planck-Institute for foreign public law and public international law of 1 July 1994, observed that, under public international law, a State was entitled to enact legislation relating to criminal offences committed within its territory as well as to offences committed by foreigners abroad to the extent that its existence or important interests were at risk. There was no justification for espionage under public international law and there were no rules on the punishment of espionage by a State following the accession of another State.

Furthermore, the punishment of espionage on behalf of the former German Democratic Republic on the basis of the penal laws in force in the Federal Republic of Germany at the time of the offences concerned did not amount to a violation of the rule that no act could be punished if it was not a criminal offence under the relevant law at the time when it was committed. The Constitutional Court noted that the scope of the provisions on treason and espionage was determined by SS. 3, 5 and 9 of the Penal Code, which had been in force before the time of the offences in question. The extension of the jurisdiction of the Federal Republic of Germany regarding such offences was a consequence of the accession and the Unification Treaty.

The Constitutional Court next examined whether or not the results of this extension of the jurisdiction of the Federal Republic of Germany amounted to a breach of the rule of law (Rechtsstaatsprinzip), and, in particular, the principle of proportionality.

The Constitutional Court found that, in the unique situation of the unification of Germany, the punishment of citizens of the former German Democratic Republic, who had been living in the former German Democratic Republic and had acted solely within the territory of the German Democratic Republic or of other States where they were safe from extradition or punishment, violated the principle of proportionality. Consequently, there was a technical bar to prosecution (Verfolgungshindernis) regarding this group of persons. Criminal prosecution and punishment as a means of protecting legal interests should not result in a disproportionate interference with the rights of the persons concerned.

In this context, the Constitutional Court considered the difference between the punishment for espionage and for other criminal offences. Public international law did not prohibit espionage, but also allowed the State spied on to punish spies even if this person had only acted abroad. There was no differentiation between espionage on behalf of a totalitarian State or espionage on behalf of a State with a free democratic basic order. Thus, espionage had an ambivalent nature: it served the interests of the observing State where it was accordingly regarded as lawful, and prejudiced the interests of the State being spied on where it was therefore regarded as a punishable offence. Punishment of foreign spies was not, therefore, justified on account of a general moral value-judgment of reproach (Unwerturteil) regarding the espionage act, but only for the purpose of protecting the

State spied on.

According to the Federal Constitutional Court, the fall of the German Democratic Republic, and thereby the termination of any protection for its spies, together with the replacement of its legal order by that of the Federal Republic of Germany which rendered prosecution possible, resulted in a disproportionate prejudice to the group of offenders who had committed espionage on behalf of the German Democratic Republic solely within the latter's territory and had not left the sphere of its protection, or had only been within the territory of other States where they had not risked extradition or punishment in respect of such acts. The unification had at the same time repealed the punishment of espionage activities on behalf of the Federal Republic of Germany. The Court further found that any punishment of this group of persons would counteract the process of creating the German unity.

With regard to other citizens of the former German Democratic Republic who had committed espionage within the territory of the Federal Republic of Germany or one of its allies, or in a third State where they had risked extradition or punishment, there was no general bar to prosecution as the above conditions were not necessarily all met. However, those persons had, as a consequence of the fall of the German Democratic Republic, also lost the protection of that State, if only the expectation to be exchanged in case of their arrest. Moreover, even if they knew about the legal order of the Federal Republic of Germany, these persons possibly mainly adjusted their sense of culpability (Unrechtsbewußtsein) to the legal order of the former German Democratic Republic. Above all, they were meanwhile prosecuted by their own State in respect of espionage activities committed at a time when they regarded that State as a foreign State. In such cases all relevant circumstances had to be weighed in the light of the above considerations with a view to determining whether or not prosecution should be continued, or in fixing the sentence.

In their separate opinion to the Federal Constitutional Court's judgment, three judges of the Second Senate explained that they disagreed with the judgment as far as the finding of a technical bar to the prosecution of a group of persons having committed espionage was concerned.

COMPLAINTS

1. The applicant complains under Article 7 of the Convention about his unlawful conviction pursuant to S. 99 of the Penal Code. The applicant submits that S. 99 of the Penal Code is formulated imprecisely and is incorrectly applied to the disclosure of general information.

2. The applicant further complains that his conviction amounts to a violation of his right to freedom of expression within the meaning of Article 10 of the Convention.

3. The applicant also complains under Article 14 of the Convention that his conviction of espionage amounted to discrimination on political grounds. Moreover, citizens of the former German Democratic Republic having committed espionage on behalf of the Federal Republic of Germany or its allies were not prosecuted or, to the extent that they had been convicted by the courts of the former German Democratic Republic, they had been rehabilitated or could be rehabilitated. Furthermore, the punishment of citizens of the former German Democratic Republic was less severe, or in particular circumstances, there was even a technical bar to their prosecution.

THE LAW

1. The applicant complains under Article 7 (Art. 7) of the

Convention that his conviction of espionage was based on an incorrect application of S. 99 of the Penal Code.

Article 7 (Art. 7) of the Convention, so far as relevant, provides as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act ... which did not constitute a criminal offence under national ... law at the time when it was committed. ..." In the sphere 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. Grece 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. This implies that constituent elements of an offence may not be essentially changed by the case-law of the domestic courts. It is not objectionable that the existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the 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).

In the present case, the Berlin Court of Appeal found that the applicant's conduct constituted the offence of espionage within the meaning of S. 99 of the Penal Code. Its reasoning was confirmed by the Federal Court of Justice. In its decision of 15 May 1995, the Federal Constitutional Court confirmed that espionage committed by citizens of the Federal Republic of Germany remained punishable after the German unification.

The Commission considers that the interpretation, by the German courts, of S. 99 of the Penal Code such as to comprise espionage aiming at the communication of other than secret facts or findings is covered by the general wording of S. 99 of the Penal Code, as confirmed by a comparison to S. 94 of the Penal Code which concerns treason. The applicant could thus clearly foresee the risk of punishment for his activities on behalf of the Ministry of State Security of the former German Democratic Republic.

Consequently the Commission finds no appearance of a violation of Article 7 para. 1 (Art. 7-1) 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.

2. As regards the applicant's complaint under Article 10 (Art. 10) of the Convention, the Commission, having regard to its above findings under Article 7 (Art. 7) of the Convention, considers that, to the extent that the applicant's conviction for espionage pursuant to S. 99 of the Penal Code entails restrictions of his freedom of expression, such interference can be considered to be justified under paragraph 2 of the Article 10 (Art. 10-2) as being prescribed by law and necessary in a democratic society for the national security. The applicant's submissions do not, therefore, disclose any appearance of a violation of his right under Article 10 (Art. 10). Consequently, this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

3. The applicant further complains under Article 14 (Art. 14) of the

Convention that his conviction of espionage 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).

In the present case, the applicant's complaint about discrimination relates in substance to his complaints about his conviction for espionage, raised under Articles 7 and 10 (Art. 7, 10). His complaint about discrimination 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", that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. 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 (cf. Eur. Court HR, Stjerna v. Finland judgment of 25 November 1994, Series A no. 299-B, pp. 63-64, para. 48).

The applicant submits that citizens of the former German Democratic Republic having committed espionage on behalf of the Federal Republic of Germany or its allies were not prosecuted or, to the extent that they had been convicted by the courts of the former German Democratic Republic, they had been rehabilitated or could be rehabilitated. Moreover, the punishment of citizens of the former German Democratic Republic was less severe, or in particular circumstances, they were not prosecuted.

As regards the first argument, the Commission notes that the applicant, a citizen of the Federal Republic of Germany, was convicted of espionage pursuant to S. 99 of the Penal Code of the Federal Republic of Germany, i.e. of having committed, on behalf of a foreign power, espionage against the Federal Republic of Germany. The Federal Constitutional Court, considering the possible consequences of the accession of the German Democratic Republic to the Federal Republic of Germany, found that the fact that espionage on behalf of the former German Democratic Republic was prosecuted as a criminal offence whereas the penal provisions of the former German Democratic Republic regarding espionage committed by agents of the Federal Intelligence Service had been repealed in the context of the Unification Treaty did not amount to discrimination.

The Commission has already found that, apart from the question whether individuals in these two groups were in analogous situations, the difference of treatment between them, in the application of the laws in force, had an objective and reasonable justification and did not amount to discrimination on political grounds (cf. No. 29742/96, Dec. 24.6.96, D.R. 86-A, p. 163).

As regards the applicant's complaint about discrimination as

compared to citizens of the former German Democratic Republic, the Commission, having regard to the findings of the Federal Constitutional Court, finds that there is an objective and reasonable justification in this respect (cf. No. 29742, loc. cit.).

It follows that there is no appearance of a violation of Article 14, taken in conjunction with Articles 7 and 10 (Art. 14+7, 14+10), 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.

For these reasons, the Commission, unanimously

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber