



**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

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COMMITTEE AGAINST TORTURE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION**

Third periodic reports of States parties due in 1999

Addendum

Germany^{*}

[2 September 2002]

* The information submitted by Germany in accordance with the consolidated guidelines for the initial part of the reports of States parties is contained in HRI/CORE/1/Add.75.

The initial report submitted by the Government of Germany is contained in document CAT/C/12/Add.1; for its consideration by the Committee, see documents CAT/C/SR.128 and 129 and the Official Records of the General Assembly, Forty-eighth session, Supplement No. 44 (A/48/48), paras. 161-180.

The second periodic report submitted by the Government of Germany is contained in document CAT/C/29/Add.2; for its consideration by the Committee, see documents CAT/C/SR.328 and 329 and the Official Records of the General Assembly, Fifty-third session, Supplement No. 44 (A/53/44), paras. 179-196.

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I. INTRODUCTION

1. The Government of the Federal Republic of Germany herewith submits the third periodic report in accordance with article 19, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The present report is structured in accordance with the revised general guidelines (CAT/C/14/Rev.1), regarding the form and contents of periodic reports which are to be submitted by States parties under article 19, paragraph 1 of the Convention.
2. The initial report was submitted in 1992. The second periodic report, submitted in 1996, was presented to the Committee in May 1998. The third report is confined to the developments and events which have taken place since the submission of the second report, to which reference is made in other respects. The general description of Germany contained in the core document should be referred to, especially the part on the general legal framework within which human rights are protected.
3. The Federal Republic of Germany has placed the inviolability of human dignity and its commitment to human rights as supreme values at the peak of its Constitution (Article 1, paras. 1 and 2 of the Basic Law for the Federal Republic of Germany). Thus torture is outlawed under the Constitution as one of the most serious offences against human dignity conceivable. Pursuant to article 2, paragraph 2, first sentence of the Basic Law, every person has the right to life and physical integrity. This constitutional right applies not only to interference with physical integrity by the State, but also, according to the established case law of the Federal Constitutional Court, to interference by means of mental torture, emotional cruelty and other such interrogation methods. Article 104, paragraph 1, second sentence of the Basic Law explicitly states that detained persons may not be subjected to mental or physical ill-treatment.
4. In Germany, all conceivable cases of torture or other cruel, inhuman or degrading treatment or punishment are covered by a number of concrete penal provisions. In addition, the Act to Introduce the Code of Crimes against International Criminal Law, based on the work of an expert group set up in the Federal Ministry of Justice, came into force on 30 June 2002 (Federal Law Gazette 2002 I, p. 2254). This Act primarily serves to bring German substantive criminal law into line with the Rome Statute of the International Criminal Court of 17 July 1998. Along with a section containing general provisions, the Act therefore also contains a section with the specific elements of the crime of genocide, crimes against humanity and war crimes. Under this Act, torture is also deemed to be a crime against humanity. Furthermore, the crime against humanity of "other inhumane acts of a similar character" contained in the Rome Statute is incorporated into domestic law. In the section on war crimes, "cruel or inhuman treatment" by causing substantial physical or mental harm or suffering, especially by "torturing or mutilating" the victim, is also made a criminal offence. Due to the explicit wording of the elements of crimes, the injustice caused by the relevant crimes can be better dealt with in future than was already possible under general criminal law as it previously stood. In addition, by bringing the elements of crimes of international criminal law together in one single statutory instrument, the application of the law is made easier in practice, and a greater degree of legal clarity and certainty is established. Furthermore, the above-mentioned Act contains separate provisions that bring criminal liability as provided for in the Rome Statute in

conformity with established customary international law. Its fundamental aim is also to promote international humanitarian law and to contribute to a wider application of and respect for it by means of creating one relevant statutory instrument under national law. The Act makes it clear that torturers and war criminals can no longer be safe from prosecution.

5. Under article 1, paragraph 3, of the Basic Law, the fundamental rights guaranteed by the Constitution are directly binding on the legislature, the executive and the judiciary. This means that the prohibition of torture is directly applicable and must be respected by all authorities exercising sovereign power. Along with the competent supervisory authorities, effective control is ensured by means of a differentiated system of legal recourse and legal remedies. The guarantee of a right of recourse to the courts contained in article 19, paragraph 4, of the Basic Law ensures that every person has the effective right to avail himself or herself of the assistance of the courts where there has been an actual, or merely putative, violation of the prohibition of torture. The principle of the division of powers, especially the independence of the judiciary, ensures an independent evaluation of cases.

6. In order to establish an additional means of monitoring the human rights situation in Germany, the new Federal Government and the coalition parties of the German Bundestag that make up the Government have improved the domestic instruments for human rights protection. They have supported the establishment of an independent human rights institute in accordance with the Paris Principles of the United Nations. On 8 March 2001, the German Institute for Human Rights was founded in Berlin as an institution of civil society. The Institute shall provide information and documentation, conduct educational work on issues relating to human rights in Germany, pursue application-oriented research, participate in political consultation and promote dialogue and cooperation between governmental and non-governmental institutions and organizations. One particular focal point of the Institute's work will be to monitor the domestic human rights situation.

7. The German Bundestag has, for the first time, established a separate Human Rights Committee that specifically deals with the human rights situation in Germany. Similarly, the Human Rights Report of the Federal Government, which must be presented to the German Bundestag every two years, looks into the domestic human rights situation more closely than was previously the case. These improvements to the national instruments to safeguard human rights are also intended to contribute specifically to the prevention of torture and other cruel, inhuman or degrading treatment or punishment in Germany.

8. Adherence to the prohibition of torture in Germany is also monitored by international control bodies, such as the European Court of Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Federal Republic of Germany is a State party to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Under Article 3 of this Convention, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. To date, neither the European Commission of Human Rights nor the European Court of Human Rights has found Germany guilty of a violation of article 3 of the Convention.

9. The Federal Republic of Germany is also a party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987. In the context of the programme of regular visits by the European Committee for the Prevention of Torture (CPT) that was established under relevant Convention, a delegation of

the Committee visited Germany in December 2000. The Committee transmitted its report to the Federal Republic of Germany by a letter dated 2 August 2001. The Federal Government's observations are currently being drafted.

10. From 25 to 27 May 1998, an ad-hoc visit by CPT took place at Frankfurt am Main Airport to examine the detention/holding facilities for those awaiting deportation and the accommodation for asylum-seekers. Although CPT did not establish any serious deficiencies, it did set down a series of recommendations, comments and requests for information in its report dated May 1999. The Federal Government responded not only by submitting comprehensive observations on the report, but also by means of implementation of recommendations.

11. In order to enable a further objective examination of Germany's adherence to the prohibition of torture, the Federal Government decided to make declarations under articles 21 and 22 of the Convention recognizing the competence of the Committee to receive and consider communications from State parties and from or on behalf of individuals. Declarations to this effect were transmitted to the United Nations in a note dated 17 October 2001.

II. INFORMATION ON NEW MEASURES AND NEW DEVELOPMENTS RELATING TO THE IMPLEMENTATION OF THE CONVENTION

A. Information relating to individual articles

Article 2

12. As already stated in previous reports, domestic implementation of article 2 is primarily and comprehensively ensured by provisions contained in the Basic Law and in the Criminal Code (Strafgesetzbuch [StGB]). In this respect, provisions relating to offences involving bodily harm, in particular section 340 of the Criminal Code, which concerns bodily harm inflicted in the course, or in connection with the performance, of official duties, are among the most important provisions of the Criminal Code in this respect. The Sixth Act to Reform Criminal Law, which entered into force on 1 April 1998, introduced significant amendments to these offences. Through this Act, the range of penalties under the Criminal Code was harmonized with the objective of giving greater importance to personal legal interests such as life, physical integrity and freedom as opposed to material legal interests such as property, assets and the security of legal relations. This has led, *inter alia*, to an increase in the range of penalties for grievous bodily harm pursuant to section 224 of the Criminal Code and aggravated bodily harm pursuant to section 226 of the Criminal Code. Furthermore, attempted bodily harm now, generally, carries criminal liability.

13. As part of these amendments, criminal liability for an attempt to cause bodily harm was included in section 340 of the Criminal Code (bodily harm inflicted in the course of or in connection with official duties). In addition, section 340 of the Criminal Code has been strengthened as a result of the increase in the range of penalties for general offences involving bodily harm, which also applies to bodily harm caused in the course of or in connection with official duties by virtue of the reference contained in section 340, subsection 3, of the Criminal Code. Section 340 of the Criminal Code currently reads as follows:

Section 340

Bodily harm inflicted in the course of or in connection with official duties

- (1) A public official who, during the discharge of his duties or in connection with his duties, inflicts bodily harm or permits bodily harm to be inflicted, shall be punished by imprisonment from three months up to five years. In less serious cases, the punishment shall be up to five years' imprisonment or a fine.
- (2) An attempt shall incur criminal liability.
- (3) Sections 224 to 229 shall apply analogously to offences pursuant to subsection 1, first sentence.

14. The provisions of the Criminal Code to which reference is made in section 340, subsection 3, of the Criminal Code read as follows:

Section 224

Dangerous bodily harm

- (1) Whoever inflicts bodily harm:
 - (a) By administering a poison or other substances dangerous to health;
 - (b) By means of a weapon or other dangerous instrument;
 - (c) By means of a treacherous assault;
 - (d) Jointly with another participant; or
 - (e) By means of a life-threatening treatment

shall be punished with imprisonment from six months up to ten years and, in less serious cases, by imprisonment from three months up to five years.

- (2) An attempt shall incur criminal liability.

Section 225

Maltreatment of persons in another's charge

- (1) Whoever torments or roughly maltreats or, through a malicious neglect of his duty to care for the person, harms the health of a person under eighteen years of age, a person who is defenceless because of infirmity or illness, or a person who:
 - (a) Is under his care or custody;
 - (b) Is a member of his household;
 - (c) Has been entrusted to him by the person under a duty to provide care, or

- (d) Is subordinate to him within the framework of an employment or work relationship,

shall be punished with imprisonment from six months up to ten years.
- (2) An attempt shall incur criminal liability.
- (3) Imprisonment for not less than one year shall be imposed if the perpetrator, through his acts, places the person in his charge in danger of:
 - (a) Death or serious injury to health, or
 - (b) Serious harm to that person's physical or mental development.
- (4) In less serious cases under subsection 1, imprisonment from three months up to five years shall be imposed and, in less serious cases under subsection 3, imprisonment from six months up to five years shall be imposed.

Section 226

Serious bodily harm

- (1) If the bodily harm results in the injured person:
 - (a) Losing his sight in one or both eyes, his hearing, his speech or his reproductive capacity;
 - (b) Losing or being permanently unable to use an important bodily member;
 - (c) Suffering substantial lasting disfigurement or becoming infirm, paralysed, mentally ill or disabled,
the punishment shall be from one year up to ten years.
- (2) If the perpetrator intentionally or knowingly causes one of the consequences specified in subsection 1, the punishment shall be imprisonment for not less than three years.
- (3) In less serious cases under subsection 1, imprisonment from six months up to five years shall be imposed and, in less serious cases under subsection 2, imprisonment from one year up to ten years shall be imposed.

Section 227

Bodily harm resulting in death

- (1) If the perpetrator causes the death of the injured person through the infliction of bodily harm (sections 223 to 226), the punishment shall be imprisonment for not less than three years.
- (2) In less serious cases, imprisonment from one year up to ten years shall be imposed.

Section 228

Consent

A person who inflicts bodily harm with the consent of the injured person acts unlawfully only if the offence is, notwithstanding the consent, contrary to good morals.

Section 229

Negligent bodily harm

A person who negligently causes bodily harm to another person shall be punished by imprisonment for up to three years or by a fine.

Article 3

15. The legal situation described in the previous reports continues to apply. By virtue of section 53, subsection 1, of the Aliens Act (Ausländergesetz [AuslG]) of 9 July 1990, most recently amended by the Act of 16 February 2001, it is still ensured, as was previously the case, that a foreign national will not be deported to a country where there is a concrete risk that he will be subjected to torture. In addition, section 53 subsection 4, of the Aliens Act establishes that a foreign national may not be deported where the deportation is not permissible on the basis of the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, article 3 of this Convention, pursuant to which no one shall be subjected to torture or to inhuman or degrading treatment or punishment, is relevant.

16. In addition, in order to ensure compliance with article 3 in extradition proceedings, an obstacle to extradition exists where it is to be feared that a person affected by the request for extradition is at risk of torture or of inhuman or degrading treatment or punishment in the requesting State. This obstacle to extradition, which ensues from article 25 of the Basic Law in conjunction with article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, must be taken into account by the Higher Regional Courts when ruling on admissibility as well as by the Federal Government in the context of deciding on whether to grant an extradition request.

Article 4

17. It is true that there is no separate offence of torture under German criminal law. However, this is not necessary, since all the ways of acting which are punishable under article 4 are covered by penal provisions that already exist. As already explained in detail in respect of article 2 above, the amendments made within the framework of the Sixth Act to Reform the Criminal Law made the legal situation more stringent in respect of offences involving bodily harm. Furthermore, the Act to Introduce the Code of Crimes against International Criminal Law entered into force on 30 June 2002 (Federal Law Gazette 2002 I, S. 2254). This Act also includes the crime of torture as well as "other inhumane acts of a similar character" as crimes against humanity, as referred to in the Rome Statute of the International Criminal Court of 17 July 1998. The Act also makes cruel or inhuman treatment by causing substantial physical or mental harm or suffering, especially in the form of torture or mutilation, subject to punishment as a war crime.

18. By way of clarification, reference is made to the fact that German Federal Criminal Law understands bodily harm to mean physical ill-treatment or injury to health. Physical ill-treatment means harsh and excessive treatment which diminishes either the physical well-being or physical integrity by a more than insignificant amount. Physical well-being in this sense can also be diminished by the provocation of strong emotions. It is not necessary for pain to be caused. Injury to health exists in the provocation or worsening of a pathological condition, even if only temporary. Such a condition is also deemed to exist where there are merely psychological effects, for example if the victim develops a nervous disorder. This can be caused as a result of receiving terrible news just as it can arise from noise exposure caused by nocturnal nuisance telephone calls. With respect to both types of bodily harm, only insignificant cases of impairment are not covered by the offence. Such impairment may, however, be punishable as coercion pursuant to section 240 of the Criminal Code, as a threat pursuant to 241 of the Criminal Code, or as extortion of testimony pursuant to section 343 of the Criminal Code.

19. Furthermore, the penal provisions of the Military Criminal Code (Wehrstrafgesetz [WStG]) apply to the armed forces. Thus, ill-treatment and degrading treatment of subordinates are subject to punishment pursuant to sections 30 and 31 of the Military Criminal Code, as are the abuse of the authority to give orders for inadmissible purposes pursuant to section 32 of the Military Criminal Code and the suppression of complaints of a subordinate pursuant to section 35 of the Military Criminal Code. Accordingly, all of the situations and acts that must be made punishable offences pursuant to article 1, paragraph 1, in conjunction with article 4 of the Convention are covered by the relevant penal provisions in force in the Federal Republic of Germany. The relevant provisions of the Military Criminal Code are as follows:

Section 30

Ill-treatment

- (1) A person who physically ill-treats a subordinate or harms that person's health shall be punished with imprisonment from three months up to five years.
- (2) The same punishment shall be imposed on a person who encourages a subordinate to commit the act against another soldier or, who, in contravention of his obligations, tolerates a subordinate committing the act against another soldier.
- (3) In less serious cases, the punishment shall be imprisonment for up to three years.
- (4) In particularly serious cases, the punishment shall be imprisonment from six months up to five years. A particularly serious case shall, as a rule, be deemed to exist where the perpetrator persistently repeats his behaviour.

Section 31

Degrading treatment

- (1) A person who treats subordinates in a degrading manner or who maliciously makes it more difficult for him to exercise his official duties shall be punished with imprisonment for up to five years.
- (2) The same punishment shall be imposed on a person who encourages a subordinate to commit the act against another, soldier or, in contravention of his obligations, tolerates a subordinate committing the act against another soldier.
- (3) In particularly serious cases the punishment shall be imprisonment from six months to five years. A particularly serious case shall, as a rule, be deemed to exist where the perpetrator persistently repeats his behaviour.

Section 32

Abuse for inadmissible purposes of the authority to give orders

A person who abuses his authority to give orders or his official position vis-à-vis a subordinate to give orders, or demands or makes unreasonable expectations which do not relate to official duties, or are contrary to official purposes, shall be punished with imprisonment for up to two years if the act is not subject to punishment by a more severe penalty in other provisions.

Section 35

Suppression of complaints

- (1) A person who, by means of orders, threats, promises, gifts or in another manner in contravention of his obligations, prevents a subordinate from submitting requests, information or complaints to the parliament of the Federal Republic of Germany or one of the German Länder, to the Parliamentary Commissioner for the Armed Forces, to an official department or to a superior, or from reporting a criminal offence or filing a legal remedy, shall be punished with imprisonment for up to three years.
- (2) The same punishment shall be imposed on a person who suppresses a statement in respect of which he is under an official obligation to examine or pass on.
- (3) An attempt shall incur criminal liability.

20. According to the most recent statistics available on criminal prosecution, in 1997 there was a total of 24 convictions for bodily harm inflicted in the course of or in relation to official duties under section 340 of the Criminal Code; in the years 1998, 1999 and 2000 there were 21, 22 and 24 convictions, respectively. In this context, the observation made in the previous reports should be repeated here that, in practice, these are cases which do not correspond to the typical notion of torture. It should also be pointed out that the statistics on criminal prosecutions do not contain any further details on the type of offence committed causing bodily harm. Rather, the small number of convictions also includes cases of teachers who castigated pupils. In 1997 there was one conviction for extortion of testimony under section 343 of the

Criminal Code; in 1998 and 1999 there were five convictions in each year, and in 2000 there were four. The consequences of such final and binding convictions of public officials are of such a lasting nature that this has a significant preventive effect. In addition to criminal proceedings, also disciplinary proceedings are conducted against perpetrators, which can result in various sanctions and, in certain circumstances, can also be continued even if the investigation proceedings or criminal proceedings are terminated. If a public official is sentenced in criminal proceedings to imprisonment for at least one year for an intentionally committed act, he must leave the public service.

Articles 5 to 9

21. As already stated in previous reports, the Federal Republic of Germany emphatically supports the further development and enforcement of international criminal law as well as the concomitant development of human rights protection by international courts. In this context, it must be added that the Federal Government vigorously supported the creation of a permanent International Criminal Court. It became a signatory to the Rome Statute of 17 July 1998 as early as 10 December 1998 and deposited its instrument of ratification in New York on 11 December 2000. The Rome Statute entered into force on 1 July 2002. Furthermore, the Act to Amend Article 16, paragraph 2, of the Basic Law, which will make it possible for German nationals to be extradited to an international court, entered into force on 2 December 2000. The national laws were brought into line with the requirements of the Rome Statute with effect from 1 July 2002 by means of an implementing act (Federal Law Gazette 2002 I, S. 2144).

Article 10

22. As was stated in the previous reports, members of relevant occupations are informed and educated regarding the prohibition of torture and of inhuman or degrading treatment. The efforts made by the Federal Government and the Länder to improve initial and further training are aimed primarily at increasing the expert knowledge and enhancing the social and personal skills of civil servants, as well as enhancing their ability to adapt to new developments and responsibilities. In particular, police officers of the Federation and the Länder are to be taught conflict resolution without the use of force as the main objective of their intervention. In order to achieve this aim with the necessary emphasis, special communication and behavioural training methods are increasingly being used in initial and further training courses in order to convey the syllabus content, whereby conflict situations are discussed in theory as well as rehearsed in practice, e.g. by means of role playing. This type of training programme with a behavioural orientation is aimed at increasing social skills in respect of communication as well as in respect of stress management and conflict resolution. It is available to a large extent to civil servants at all the different professional levels along with the assistance of the psychological services. Recent incidents are also dealt with in classes.

23. As a reaction to the allegations of ill-treatment of foreigners by police officers of the Federation and the Länder, which will be addressed under II.B, the syllabus content relating to combating racism and xenophobia in initial and further training has been further updated and expanded. Thus, for example, the border police participate regularly in special training courses to improve intercultural skills. The protection of human dignity and the prohibition of all forms of torture is accorded an especially high status at these courses, which occasionally involve the participation of private human rights organizations. In addition, programmes on intercultural communication and special seminar series on the subject of "The Police and

Foreigners" are organized, at which primarily an understanding of value systems and behavioural attitudes of non-European cultures is imparted to German police officers. This understanding of other cultures is also being furthered by the recruitment of foreign citizens to the German police service.

24. With respect to the initial and further training of military personnel, it must be noted that section 33 of the Military Personnel Act establishes the obligation that sufficient legal knowledge be taught to soldiers. Legal instruction with respect to constitutional law, military law and international law is also emphasized in the various phases of initial and further training of members of the armed forces. Such instruction contributes to ensuring compliance of military superiors at all levels with the principles of a State governed by the rule of law and to ensuring that orders are only issued for official purposes and in compliance with international law, domestic law and service regulations. The aim of instruction is also to place subordinates in a position where they can recognize that a command that violates human dignity or that would fulfil the elements of a penal provision, if followed, is not binding.

Article 11

25. The statements made in the initial report with regard to the general system, which serves to examine the effect of the existing provisions, still apply. A detailed scrutiny of the measures implemented to protect persons in police custody against ill-treatment was made for instance in the observations by the Federal Government on the report of the European Committee for the Prevention of Torture dated 27 May 1999, taking into account the recommendations made by the Committee. In addition, the Federal Republic of Germany, in 1999, responded in detail to the checklists and observations made by the monitoring unit of the Council of Europe on the subject of "police and security forces" and carried out corresponding examinations. Reference is made to the statements under margin no. 37 regarding further mechanisms of scrutiny in the Länder.

Articles 12 and 13

26. The legal situation described in the initial report continues to apply.

Article 14

27. The observations made in the initial report are still valid. The Federal Republic of Germany provided the United Nations Voluntary Fund for Victims of Torture with US\$ 119,841 in 1999 and with US\$ 121,510 in 2000. Beyond its duties under article 14, the Federal Government has for many years supported rehabilitation of refugees who come to Germany as victims of torture. Thus, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, in 2002, provided funds amounting to a total of € 760,000 with four psychosocial centres for the counselling and treatment of victims of torture.

Article 15

28. With regard to this article reference is made to the observations made in the initial report concerning the extensive prohibition of the use of evidence obtained through prohibited methods of examination, as contained in section 136a, subsection 3, of the Code of Criminal Procedure.

Article 16

29. With regard to the requirement stated in article 16, paragraph 1, first sentence, to also comply with the obligations contained in articles 10, 11, 12 and 13 in respect of other manifestations of cruel, inhuman or degrading treatment or punishment, reference is made to the information provided concerning those articles.

B. Accusations of torture and other cruel, inhuman or degrading treatment or punishment

30. In recent years, accusations have been levelled from various sides against the Federal Republic of Germany concerning the conditions of airport procedure and detention pending deportation and, in particular, the treatment of foreign nationals by police officials of the Federation and the Länder, especially in connection with deportation (see for example, Amnesty International's Annual Report 2000). The Federal Government takes these accusations very seriously and has looked into the matter in cooperation with the Länder concerned. It was determined that investigation proceedings had been initiated in all the known cases. Criminal as well as disciplinary proceedings are pursued in respect of every proven misconduct. In this context, media reports and information, for instance from NGOs, among other sources, have further sensitized law enforcement authorities to cases of suspected ill-treatment by officials. This is also true of cases in which the investigations were terminated pursuant to section 170, subsection 2, of the Code of Criminal Procedure. On the whole, however, those cases in which the investigations did reveal misconduct by officials were unfortunate isolated cases that should not be generalized. It should be noted in this context that by far the bulk of an annual average of 30,000 deportations from German airports take place without any hint of misconduct. This does not mean, however, that the Federal Government does not take appropriate action as a result of the cases that have come to its attention. The following, based on concrete examples, describes the countermeasures taken by Germany to prevent further occurrences of this kind.

1. General conditions of the airport procedure

31. An issue much criticized for some time is the so-called airport procedure under section 18a of the Asylum Procedure Act (AsylVfG) applied at Frankfurt am Main Airport as well as at Berlin-Schönefeld, Hamburg, Düsseldorf and Munich Airports. Pursuant to section 18a, subsection 1, of this Act, the asylum procedure is to be conducted immediately at the airport prior to the decision on entry for persons from a safe country of origin who apply for asylum at the airport or who arrive at the airport without a valid passport or surrogate passport and ask for protection. If the Federal Office for the Recognition of Foreign Refugees rejects the asylum application as being manifestly unfounded, then the asylum-seeker is to be notified that he will be deported and is refused entry pursuant to section 18 a, subsections 2 and 3, of AsylVfG. For more information on the legal background of the airport procedure, reference is made to page 12 et seq. of the Federal Government's observations on the recommendations, comments and requests for information made by CPT on the occasion of its visit to the detention/holding facilities at Frankfurt am Main Airport from 25 to 27 May 1998.

32. Although the law provides for the airport procedure to be concluded after 19 days at the latest, it does happen that, after an asylum application has been rejected, the person concerned remains in the airport facilities for an extended period of time, if immediate return to his home

country is not possible due to missing documents or if the person concerned does not make use of the opportunity to leave voluntarily. These cases are mostly attributed to a lack of cooperation on the part of the persons concerned and/or to the often lengthy procedure of obtaining a passport from the competent authority abroad. The Federal Government tries, within its possibilities, to induce countries of origin to comply with their obligation to readmit their own nationals in a timely manner.

33. A prolonged stay may result in problems concerning accommodation and care for the rejected asylum-seekers as the airport facilities are not actually designed to accommodate people over a period of several months. The public became aware of this by a tragic case of suicide. On 6 May 2000, the 40-year-old Algerian asylum-seeker Naimah H. hanged herself in her room in the transit area after staying at Frankfurt am Main Airport for eight months. The accusations made by human rights organizations against the Federal Government in this respect are, however, not justified.

34. Early in 1999, an inter-ministerial working group was set up to work out a better and longer-term solution for accommodating asylum-seekers and persons whose applications have been rejected at Frankfurt am Main Airport. Since March 1999, staff members of the Land Government of Hesse, FRAPORT AG, the Airport's social service, the Federal Border Police, the Federal Office for the Recognition of Foreign Refugees, the Federal Ministry of the Interior and the Federal Commissioner for Matters relating to Foreigners have been involved in a joint project aimed at improving the accommodation facilities. On behalf of the Land of Hesse, FRAPORT AG has erected a building on the former United States air base in which the facilities for asylum-seekers, a branch office of the Federal Office, parts of the Border Guard Frankfurt am Main and the Social Service of the Churches have been housed. Special units for families, unaccompanied women and minors and rejected asylum-seekers awaiting return were also created. The new building provides facilities for accommodation and care which are adapted to the needs of the persons concerned. The new building became operational on 16 May 2002.

35. A number of steps were taken to improve the situation until the new building was ready. These measures were also maintained after the move to the new building. The Land of Hesse has provided appropriate rooms and care for unaccompanied minors. A staff member of the Airport's social service is now present overnight to provide support to asylum seekers. The provision of medical care has been improved by the attendance of a doctor and a nurse three times a week.

2. Deportation

36. The accusations made against the Federal Republic of Germany concern in particular, in addition to the airport procedure, the conditions of detention pending deportation and the way in which deportation is conducted. Information on the legal basis for deportation and the conditions of detention pending deportation can be found in the observations contained in annex II to the second periodic report. Non-governmental organizations have criticized the applications for deportation orders and court decisions ordering detention pending deportation as well as judicial review thereof. In individual cases, such legal issues are dealt with in appeals made to the German courts, including the Federal Constitutional Court. There have been two recent Constitutional Court decisions that clarified, for the whole country, inter alia, the issue of proportionality of detention pending deportation and effective legal protection of

foreign detainees awaiting deportation. These cases were decided in favour of the persons concerned (Federal Constitutional Court decisions 2 BvR 527/99 of 5 December 2001 and 2 BvR 347/00 of 15 December 2000). An enquiry has been made to the Länder responsible for implementing the law governing aliens regarding the current practice and length of detention pending deportation. The replies received thus far demonstrate that long periods of detention are rather the exception and that the Länder apply the relevant regulations very cautiously. According to the Länder, long periods of detention usually occur where the person concerned refuses to cooperate in the deportation process and the aliens authorities are forced to ensure deportation by using time-consuming measures. Nevertheless, the principle of proportionality must be observed in these cases, too. In other words, it must be demonstrated in a given case that there is a high probability that deportation can actually be carried out within the period applied for. The longer the detention lasts (up to 18 months), the stricter the standards to be applied must be.

37. Thus it can be said that the Länder, in recent years, have taken more initiatives to improve the conditions of detention. For instance, in the detention centre at Offenbach in Hesse, which has been in operation since March 1995, special attention by qualified staff members is given to the specific psychological pressures arising in connection with being detained and awaiting deportation; the centre has a high staff/detainee ratio, an organizational structure adapted to the needs of the detainees, and small units (three units with about 10 double rooms each). Thus, in this detention centre, a climate was created in which the negative effects of detention have been reduced as much as possible. In Berlin, an independent advisory council was established in March 1997 which gathers information about the situation of detainees awaiting deportation, gives reports and receives complaints. The advisory council, which consists of five independent honorary members, also participates in organizing the regime of deportation custody and the care for the detainees. The members of the advisory council meet for regular, monthly deliberations at Köpenick detention centre. In Bremen, too, an independent advisory council is to be set up for the centres for detainees pending deportation. However, it is not yet clear how the membership of the advisory council will be constituted. In addition, in all three detention centres for persons awaiting deportation of the Land of North Rhine-Westphalia there are advisory councils which participate in organizing the detention regime and the supervision of detainees. In the course of this involvement they can, in particular, be told of wishes, suggestions and complaints, inform themselves about the detainees' situation and inspect the institution and its facilities, on the occasion of which they may visit the detainees in their rooms. Neither conversations nor written correspondence are monitored.

38. Officers of the Federal Border Police are said to have used excessive force repeatedly when enforcing deportation orders. Thus, a Sudanese national, whose repatriation to his home country by air was repeatedly attempted on 9 August 1998, 27 October 1998 and 12 November 1998, made accusations of ill-treatment against the escorting police officers of the Federal Border Police. Due to his somewhat substantial resistance, the above attempts were stopped for reasons of air traffic safety. The competent public prosecution office at Frankfurt am Main Regional Court did not see any need to initiate investigation proceedings against the escorting officials of the Federal Border Police. Rather, Frankfurt am Main Local Court on 11 June 1999 issued a penal order, which has not yet become final, against the Sudanese national for resisting to law enforcement officials and causing serious bodily injury.

39. The escorted return of a Turkish national planned for 11 May 1999 from Stuttgart Airport failed due to his aggressive behaviour. The accusations he made against officers of the Federal Border Police for bodily injury committed in the course of their duties gave rise to an investigation by the public prosecution office. The investigation was terminated pursuant to section 170, subsection 2, of the Code of Criminal Procedure for lack of sufficient evidence for a charge. The complaint lodged against the termination of the proceedings was dismissed.

40. On 7 April 1999, a Guinean national was to be returned without escort from Berlin-Schönefeld Airport. While being transported to the Airport, he put up substantial bodily resistance so that the removal had to be stopped. Misconduct by the Federal Border Police officers involved could not be established. The investigation initiated against them by the Berlin public prosecution office was terminated on 13 August 1999 pursuant to section 170, subsection 2, of the Code of Criminal Procedure for lack of sufficient evidence to sustain a charge.

41. In another case, a group of 15 Guinean nationals was to be returned to Conakry on 17/18 March 1999. The return failed; escorting officers of the Federal Border Police were accused of having attacked the detainees physically and verbally during the flight. In addition, prior to departure one detainee was allegedly made to wear a helmet and during take-off his head was allegedly pressed down between his knees for 20 minutes. The public prosecution office at Düsseldorf Regional Court on 1 December 2000 terminated the investigation proceedings against the Federal Border Police officers involved pursuant to section 170, subsection 2, of the Code of Criminal Procedure.

42. On 28 May 1999, a Sudanese national, Amir Ageeb, died shortly after take-off on a flight from Frankfurt am Main to Khartoum, by which he was to be deported to Sudan. He was escorted by three Federal Border Police officers, against whom the public prosecution office at Frankfurt am Main Regional Court filed negligent homicide charges on 16 January 2002. The three officers are charged with having pressed Mr. Ageeb into his seat during take-off in order to counter the substantial bodily/physical resistance to deportation, and having thereby contributed to his death. The preliminary disciplinary investigations against the officers have been suspended pursuant to section 17, subsection 2, of the Federal Disciplinary Code until the criminal proceedings have been concluded.

43. As a result of this death, it was decided on 29 May 1999 to suspend deportation escorted by Federal Border Police officials in cases where resistance can be expected. At a conference in the Federal Ministry of the Interior on 18 June 1999, police doctors from the Federation and the Länder, Federal Border Police officials with practical experience, and forensic medicine experts discussed means of preventing health risks to persons whose deportation requires the use of force. The conclusions drawn from this discussion have been implemented in practice, so that deportations were resumed on 25 June 1999.

44. The death gave rise to a comprehensive and diligent review of the overall deportation practices of the Federal Border Police. As a result of this review, the new "provisions on the return of foreign nationals by air" were put into effect on 15 March 2000. These provisions reflect the current information and practical experience gained by border guard officials and doctors. The provisions are intended to give Federal Border Police officers an overview of the principles of procedure and conduct to be observed and of the rules to be applied when direct force is being used, so that appropriate and lawful action of the individual officers can be

ensured. This is also meant to ensure maximum protection for the life and limbs of both the persons to be deported and the officers involved.

45. Generally, the Federal Ministry of the Interior thoroughly investigates any allegation of ill-treatment by Federal Border Police officials. In addition to resolving such cases internally, the Ministry informs the competent public prosecution office, which then has the authority to decide whether investigation proceedings are to be instituted, if this has not already been done. Examination by the public prosecutor is particularly in the interest of the Federal Border Police.

46. The experience gained so far suggests that, in many cases, foreign nationals subject to a deportation order make allegations of ill-treatment in order to prevent or at least delay their deportation. In fact, some of the complaints bear close resemblance as regards their contents, which apparently is due to collusion between the persons to be deported.

47. Some of the individuals subject to a deportation order have shown substantial active resistance to their lawful removal. It should be noted in this context that serious injuries have been inflicted on some of the Federal Border Police officers involved in the enforcement of deportation orders.

3. Treatment of foreign nationals

48. The Federal Republic of Germany has been faced with accusations ill-treatment by police officers of the Federation and the Länder mainly of foreign nationals not only in connection with the enforcement of deportation orders. A Congolese national filed charges against two police officers for bodily injury caused in the course of their duties, unlawful detention, coercion and insult because they had allegedly ill-treated him after a dispute with another driver in Essen on 1 September 1999. Essen Public Prosecution Office initiated investigation proceedings without delay against the two police officers and the complainant, because the police officers had also suffered substantial injuries. The investigation proceedings against the complainant for resistance to police enforcement officers and bodily injury were terminated by Essen Local Court upon payment of 2,000 DM pursuant to section 153a of the Code of Criminal Procedure. The investigation proceedings against the two officers were terminated pursuant to section 170, subsection 2, of the German Code of Criminal Procedure for lack of sufficient evidence to sustain a charge. No complaint was lodged against termination of the proceedings.

49. This example, too, demonstrates that allegations made against police officers are taken very seriously and that great importance is attached to thorough scrutiny. The Federal Government is determined to prevent xenophobic assaults by public officials. The training programmes of the Federation and the Länder are developed with a view to avoiding such occurrences. In this respect, reference is made to the observations made relating to article 10. Neither good training nor severe sanctions can, however, prevent misconduct by individuals in isolated cases. Nevertheless, misconduct, particularly by police officers, must under no circumstances be excused, but must be dealt with rigorously with all the legal means available under criminal and disciplinary law.

III. OBSERVATIONS ON THE COMMITTEE'S CONCLUSIONS AND RECOMMENDATIONS

50. The Federal Government values the intensive exchange of views and the good collaboration with the Committee against Torture. Comments on the Committee's conclusions and recommendations of 11 May 1998 are made in response to individual paragraphs, where this has not already been done in the above statements. Observations on paragraph 186^{1/} are contained in paragraphs 30 and 38 et seq. of the present report; on paragraph 187 in paragraphs 33 et seq.; on paragraph 190 in paragraph 17; and on paragraph 194 in paragraphs 22 et seq. In addition, reference is made to the letter of the Federal Government of 14 October 1998 to the Committee against Torture, in which paragraphs 185, 186, 188, 189, 192, 193 and 195 were dealt with.

Paragraph 185

51. The supposition made by the Committee that certain cases of torture are not punishable in Germany is erroneous. In the German view, criminal law must be based on offences whose elements are as precise and clearly identifiable as possible. This is why the Federal Republic of Germany has refrained from including provisions in general domestic criminal law which make a very general reference to torture and other cruel, inhuman or degrading treatment or punishment which would depend on the concrete fulfilment of these undefined legal concepts. Instead, Germany complies with its obligations under the Convention by virtue of a series of specific penal provisions which cover all conceivable cases of torture or other cruel, inhuman or degrading treatment or punishment (see also the above statements in respect of article 4).

52. On 30 June 2002, the Act to Introduce the Code of Crimes against International Criminal Law, which incorporates the offences contained in the Rome Statute of the International Criminal Court of 17 July 1998 and in other sources of international humanitarian law into German substantive criminal law (see the statements already made in paragraph 4), entered into force. The Act includes torture in two chapters entitled "Crimes against humanity" and "War crimes".

Paragraph 188

53. The Federal Government has no findings at its disposal that support the Committee's statement that the rate of prosecution and conviction in alleged incidents of ill-treatment by the police, especially of people of foreign descent, is particularly low compared to the general clarification rate. Furthermore, the Federal Government also has serious reservations as to the informative value of such a rate as there are numerous reasons why a conviction may not result.

54. Pursuant to section 152, subsection 2, of the Code of Criminal Procedure (Strafprozessordnung [StPO]), the public prosecution office is, except as otherwise provided by law, obliged to take action in all criminal offences which may be prosecuted, provided there is a sufficient factual basis. Under section 160 of the Code of Criminal Procedure, any criminal charges filed that raise suspicion of a criminal offence set in motion investigation proceedings

^{1/} Report of the Committee against Torture, A/53/44.

by the public prosecutor. The authorities and officers of the police are, pursuant to section 163, subsection 1, of the Code of Criminal Procedure, under an obligation to investigate criminal offences; pursuant to section 163, subsection 2, of the Code of Criminal Procedure, they must transmit their records to the public prosecutor's office without delay. These provisions impose a comprehensive obligation to clarify any criminal offence that may have been committed, an obligation which applies regardless of the perpetrator's profession and/or the victim's nationality.

Paragraph 189

55. We do not share the Committee's concern that in the Federal Republic of Germany it may, under certain circumstances, be permissible for the legal guarantees of persons in police custody to be significantly restricted. The legal position of suspects and convicted prisoners is precisely defined and leaves no room for arbitrary decisions, which are prohibited by the German Constitution. A relative of the person detained or a person of his confidence must be notified immediately in every case. Furthermore, the person detained is in principle afforded the possibility of giving notification himself. In principle, this also applies to persons who, pursuant to the police laws of the Federation and the Länder, have been taken into police custody not within the framework of criminal prosecution measures, but for reasons of averting danger. If a foreign national is arrested, the competent authorities are, pursuant to article 36, paragraph 1, of the Vienna Convention on Consular Relations, additionally obligated to inform the consular post of the State of origin of the person concerned at his request and to forward any communication addressed to the consular post by the person concerned without delay. The authorities are also obligated to inform the person concerned without delay of these rights on their own initiative.

Paragraph 191

56. The Committee recommended that Germany make the necessary declarations under articles 21 and 22 of the Convention recognizing the competence of the Committee to receive and consider communications from State parties and from or on behalf of individuals. The Federal Government has taken up this recommendation and made declarations required under articles 21 and 22 of the Convention. The corresponding declarations were transmitted to the United Nations in a note dated 17 October 2001.

Paragraph 192

57. The additional statutory measures recommended by the Committee to strengthen criminal prosecution in respect of offending police officers are considered not to be necessary. Under the current statutory provisions, the principle of mandatory prosecution established in section 152, subsection 2, of the Code of Criminal Procedure already obliges the public prosecutor to prosecute *ex officio*, and without exception, all criminal offences committed by police officers and prison employees; this applies, in addition, to punishment under disciplinary law. In all cases, the victim can claim compensation for damages sustained by means of adhesive procedures (*Adhäsionsverfahren*) or civil procedures. The victim can turn to a lawyer of his confidence to safeguard his rights, the costs being paid by the state where the victim lacks financial means. Under the law, the procedures must be conducted as quickly as possible. Apart from the offences subject to private prosecution, which are not dealt with here, in the Federal Republic of Germany a victim of ill-treatment would not pursue criminal proceedings in the place of a public prosecutor. If the public prosecutor does not see any

reason for filing a criminal complaint, the aggrieved party can compel the public prosecution office to file a criminal complaint, if necessary by means of a specially regulated procedure. The Committee's recommendations aim, in part, at changing the German legal system in line with the model of criminal proceedings in the United States, something which is not required by the Convention against Torture.

Paragraph 193

58. Given the nature of the German criminal procedure law it is also not possible to comply with the Committee's recommendation that further legislative measures be taken to prevent all evidence obtained directly or indirectly through torture from reaching the deciding judges in all judicial proceedings. Pursuant to section 136a of the German Code of Criminal Procedure, certain methods of examination are prohibited (such as ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception and hypnosis). The use of a statement obtained by such means of examination is also prohibited even with the consent of the accused person. However, it is solely up to the court to decide on whether the statement was obtained in breach of section 136a of the Code of Criminal Procedure and therefore may not be used. In order to establish the truth, the court must, proprio motu, extend the taking of evidence to all facts and means of proof relevant to the decision. Together with the judgment itself, the decision on whether the statement may be used can be challenged by means of an appeal on points of law only, the decision on the appeal then being made by the court competent to do so. Given that implementation of the Committee's recommendation would lead to a restriction of the principle of judicial investigation, which is a dominant principle of German criminal procedure, the Federal Republic of Germany cannot act on this recommendation.

Paragraph 195

59. The Committee's recommendation to introduce forms for detainees in police custody, too, has already been implemented in a number of Länder. A form of the Land of North Rhine-Westphalia detailing the rights of persons detained in police custody is regularly handed to detainees at the outset of their custody to improve the level of information of foreign persons. In addition to explaining why they are being detained, it also contains, inter alia, information on the conducting of a search upon being taken into police custody, on obtaining a judicial decision, on the possibility of medical help, on the right to establish contact with a lawyer, a relative or a person of their confidence, as well as the right to have the responsible consular mission notified. The form is kept in reserve in German, English, French, Greek, Italian, Kurdish, Dutch, Polish, Portuguese, Russian, Serbo-Croatian, Spanish and Turkish by all the local police authorities of the Land of North Rhine-Westphalia.

60. Apart from these forms, in Germany, all detainees are informed of their rights and duties at several stages in a language which they understand. In addition to being informed orally by the police and the judge at their first hearing, suspects and convicted prisoners are given comprehensive written information in a language they understand on their rights and duties when being committed to a penal institution. Furthermore, at this point in time foreign nationals are given information from their native Governments on their rights and duties, in so far as they wish to receive this. Detainees can contact a lawyer of their choice whenever they wish to do so. Comprehensive medical care is ensured.

Paragraph 196

61. With respect to the form of personal identification for police officers proposed by the Committee, the Federal Government would like to point out that sufficient account is already taken of the interests of those concerned warranting protection in respect of establishing the identity of police officers. Police officers are in principle obliged to identify themselves when requested to do so. In doing so, they must at least state the police station at which they work, and give their names or official identity card numbers. This does not apply where such information can be obtained from the identity document.