INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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HUMAN RIGHTS COMMITTEE

Fourth session

SUMMARY RECORD OF THE 96th MEETING

Held at Headquarters, New York,
on Wednesday, 26 July 1978, at 10.30 a.m.

Chairman: Mr. MAVROMMATIS

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The meeting was called to order at 11.05 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT: INITIAL REPORTS OF STATES PARTIES DUE IN 1977 (continued)

Federal Republic of Germany (continued) (CCPR/C/1/Add.18)

1. At the invitation of the Chairman, Mrs. Maier (Federal Republic of Germany) and Mr. Merkel (Federal Republic of Germany) took places at the Committee table.

2. Mrs. MAIER (Federal Republic of Germany) said that in replying to the questions raised regarding the report of the Federal Republic (CCPR/C/1/Add.18) she would focus on the basic issues mentioned and submit answers to the remaining questions in writing at a later date.

3. She drew the attention of the Committee to a booklet which had been published in the Federal Republic to acquaint its citizens with the rights guaranteed them under the International Covenant on Civil and Political Rights and with the Federal Republic's report to the United Nations.

4. In reply to questions regarding the applicability of the Covenant in the Federal Republic of Germany, she said that, under the federal law of 15 November 1973 ratifying the Covenant, its provisions had been assimilated into domestic law, with the status of a federal law. Individuals could invoke its provisions in the courts to the extent that they were of a self-executing nature. It had not been clear at the time when the Federal Republic had ratified the Covenant to what extent it contained individual rights, in addition to obligations to be observed by States. In their interpretation of that question, the federal courts would attach significance to the position of the Committee. There did exist a constitutional basis for direct enforcement of both the Covenant and the Convention for the Protection of Human Rights and Fundamental Freedoms. The courts had thus far not had to decide on that matter, since the guarantees embodied in the Basic Law and other laws in force in the Federal Republic were considered sufficient and since no contradiction arose in practice between the Basic Law and the Covenant. Yet, the applicability of the Covenant did not depend on whether the rights laid down therein were also embodied in the Basic Law or in other laws.

5. In reply to the query regarding the relationship between the Basic Law and ordinary law in the Federal Republic of Germany, she said that basic rights embodied in the Basic Law enjoyed absolute pre-eminence in the legal system of the Federal Republic and were largely inalterable. Covenant rights, ranking after the fundamental rights of the Basic Law, were thus applicable only to the extent that the basic rights of the Constitution permitted. However, since both the Covenant and the Basic Law were modelled on the Universal Declaration of Human Rights, they could be mutually referred to in the interpretation of their provisions, in order to avoid conflicts. The Federal Government had examined their compatibility and was convinced that they were compatible.

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(Mrs. Maier, Federal Republic of Germany)

6. Ordinary laws enacted prior to the Covenant were modified by it to the extent that such laws were incompatible with its provisions, provided that the right under the Covenant which conflicted with the law in question was of a self-executing nature.

7. Ordinary laws enacted after ratification of the Covenant would seem to affect the rights embodied in it only theoretically. Her Government understood that guarantees of human rights enjoyed greater priority than ordinary law and was committed to enact no legislation incompatible with them.

8. The Covenant, as a federal law, prevailed over any conflicting legislation of the Laender. Moreover, Covenant rights were binding upon the Laender, which were responsible for most of the administration and criminal prosecution as well as for the courts of first and second instance.

9. In reply to the request for an explanation of article 79, paragraph 3, of the Basic Law, she indicated that it did not prohibit any amendment of the catalogue of basic rights or the essential structural elements of the Constitution, but only such amendments as would affect the principles laid down in articles 1 and 20 of the Basic Law. Changes affecting the basic rights and structural elements of the Constitution, e.g. the federal principle or the principle of separation of powers, were thus admissible only within very narrow limits: it was possible to restrict the right of free movement in a state of emergency, but a basic right or essential element of the Constitution could never be abolished, substantially changed or restricted.

10. In reply to questions regarding safeguards under the Basic Law and the legal system to protect the free democratic basic order and the compatibility of such safeguards with the rights embodied in the Covenant, she pointed out that the free democratic basic order referred only to the central elements of the Constitution: respect for the basic rights, sovereignty of the people, separation of powers, responsibility of the Government, constitutionality of the administration, independence of the courts, the multiparty system, and equal chances for all political parties, including the right to form and act as an opposition in accordance with the Constitution. Those central elements, as distinct from the State, the Government or its policies, were integral parts of the free democratic order which fully coincided in substance with the guarantees of the Covenant. She would even venture to say that the right of peoples to self-determination, as laid down in article 1 of the Covenant, was a central element of her country's Constitution. The constitutional order of the Federal Republic of Germany reflected the will of the overwhelming majority of its people, regardless of political differences. Safeguards were designed to protect the constitutional guarantees of the free democratic order from being abolished and replaced by a dictatorship of any kind.

11. In reply to questions regarding the possibility of declaring a political party unconstitutional under article 21, paragraph 2, of the Basic Law, she stated that competence to declare a party unconstitutional lay exclusively with the Federal Constitutional Court, in order to prevent a governing party from eliminating an opposition party for political reasons. The Court had thus far banned two

(Mrs. Maier, Federal Republic of Germany)

parties: the Sozialistische Reichspartei (the apparent successor to the National Socialist Party) in 1952 and the Communist Party of Germany in 1956. A party could thus be declared unconstitutional and abolished only if it actively undermined the basis of the Federal Republic's free democratic order through an aggressive policy aimed at replacing it by an authoritarian régime. The Federal Constitutional Court considered such cases only upon application by constitutional bodies and was required to ban only parties which constituted a real danger for the constitutional order.

12. The Federal Republic of Germany favoured unrestricted political competition with parties of the extreme left and right, all the more so since its people had proved to be largely immune to political radicalism: the extreme left had obtained 5.7 per cent of the vote in the parliamentary elections of 1949, but only 0.45 per cent in those of 1976.

13. There was a somewhat precarious balance between banning political parties and ensuring the freedoms contained in articles 5, 8, 9 and 21 of the Basic Law and articles 19, 21 and 22 of the Covenant. However, it was both admissible and imperative to prevent such guarantees from being used to abolish basic rights, in accordance with articles 5, 19 and 22 of the Covenant, which confirmed the right to check such abuses of the rights and freedoms of others. The Communist Party of Germany, for example, on being declared unconstitutional in 1957, had applied to the European Commission of Human Rights on the ground that the relevant provisions of articles 9, 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had been violated. By its decision of 20 July 1957, the European Commission of Human Rights had declared that complaint inadmissible, pointing out that, by its own admission, the Communist Party advocated the dictatorship of the proletariat, which was incompatible with the European Convention since it would lead to the destruction of many rights guaranteed under it. The activities of the Communist Party thus constituted a violation within the meaning of article 17 of the European Convention, under which rights could not be exercised in performing any acts aimed at their destruction.

14. In connexion with the Committee's questions regarding the requirements to be met by civil servants under article 33 of the Basic Law and under public service laws designed to promote the basic elements of the Constitution, in particular loyalty requirements for civil servants, she pointed out that, in the Federal Republic of Germany, public administration was performed, as a rule, by public officials appointed for life. Those officials undertook to observe and enforce the provisions of the Basic Law and of other laws. A public official could be dismissed before the age of 63 only on the basis of conclusive evidence of gross malfeasance. Public officials thus enjoyed a degree of social and legal protection and independence comparable to that of a judge. The right of equal access to public office was ensured in the Federal Republic of Germany. Although it was sometimes said that personal contacts and family ties helped to secure appointments, a conclusively established violation of the principle of equality

(Mrs. Maier, Federal Republic of Germany)

could serve as a basis for the injured person to contest such action in court. There was also completely free access to universities for anyone who had passed secondary school examinations. Even those opposed to the State could take university examinations and subsequently exercise any profession of their choice.

15. However, those who applied for posts in public service as officials for life must provide some security, not only as to their professional qualifications, but also as to whether they were capable of performing functions of the State in regard to its citizens and above all whether they recognized and were ready to promote the Basic Law and human rights and to respect the will of the people as expressed in free elections on the basis of majority suffrage. Examination of a candidate's loyalty to the Constitution was also governed by specific rules. The reasons for which he might be refused access to a post were made known to him and he was given the possibility of removing any doubts which might have led to his rejection and challenging the decision before the courts. It was presumed, in principle, that citizens of the Federal Republic of Germany were in fact loyal to the Constitution; an investigation was made only where there were special reasons to doubt such loyalty. A routine check with the Office for the Protection of the Constitution could not be regarded as an "investigation" or a "suspicion" any more than a mere inquiry with the criminal police for previous convictions could be considered an investigation. Only in a very few cases, i.e. less than 0.1 per cent of all inquiries where information was available to the Office for the Protection of the Constitution, did a hearing take place. The applicant was informed about the apprehensions which had led to his rejection and the reasons for them, and was given an opportunity to state his opinions. In the great majority of cases, the existing doubts were dispelled by the candidate, who was then appointed. The administration could base its action only on evidence admissible in court, which it must fully disclose to the applicant and the court.

16. Under federal law an applicant for a public service post simply had to identify himself with the free and democratic social order of the State as a State governed by the rule of law. Within that framework, he was free to make critical remarks and work towards changes in the existing situation through constitutional means without giving rise to doubts as to his loyalty to the Constitution. Furthermore, behaviour patterns from an applicant's student days could not be used to draw conclusions regarding his personality. Where appointment to public office was denied, the administrative body concerned had to furnish evidence conclusively proving the applicant's opposition to, or at least his non-acceptance of, the essential elements of the Constitution. Membership in a political party which advocated dictatorship or the use of force to overthrow the constitutional order constituted in that context an element in the assessment of a candidate's personality. The political question of whether a party could participate in political life had to be separated from the legal question of whether members of that party could be expected to commit themselves to a free democracy as public officials for life. It was unfortunate that applicants who had not been admitted to public posts because of their membership in a leftist party organization had failed to exhaust the legal remedies available to them; thus far, the Federal Constitutional Court had not been able to decide whether or not active membership in the Communist Party was sufficient reason to doubt a person's loyalty to the

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Constitution. In any case, less than one in a thousand applicants was rejected for lack of loyalty to the Constitution, and rejections could be challenged in the courts; some such challenges had been successful. There had even been instances where appointments had been made by court decision. In the circumstances, there were no grounds for maintaining that the rights embodied in articles 19, 21 and 22 of the Covenant were restricted.

17. Some members of the Committee had raised the question as to whether the Contact Ban Law of 30 September 1977, providing for curtailment of contacts between an accused detained in custody and his legal counsel, did not constitute a violation of articles 7 and 14 of the Covenant. It must be stressed that that was strictly an emergency measure taken in response to a series of terrorist acts and could be imposed only to avert imminent danger to life, limb or freedom of a person and when the suspicion that such danger emanated from a terrorist association was based on hard evidence. Its application was hedged with protective restrictions, including a strict time-limit. It was a question of giving protection of the life of a hostage precedence over the temporary restriction of the prisoner's right to defend himself.

18. In reply to the question concerning the sphere of application of the Covenant, she said that it was applied by the Federal Republic only to those individuals under its jurisdiction, in full conformity with the normal practice of States based on the general rules of international law. With regard to article 1 of the Covenant, her country's position was one of unqualified observance of and support for the universal right to self-determination and it regarded that right as a decisive factor in evaluating the situation in South Africa. It felt that that right should be secured without violence and had undertaken consistent efforts to bring about the peaceful accession of Namibia to independence as soon as possible.

19. In connexion with the rights of the accused under article 14, paragraph 3, of the Covenant, and the question of a trial being conducted in the absence of the defendant, she said that under federal law a trial interrupted for more than 10 days was automatically cancelled and had to start again. The right to be present at the trial was necessary to ensure the defendant of an effective defense. However, since the accused could interrupt and finally cancel trial proceedings by deliberately preventing his own participation through a hunger strike, the law provided that the trial could take place in his absence. The defence lawyer would certainly participate in the trial in any case. The acceptability of that arrangement had recently been confirmed by the European Commission of Human Rights and was not inconsistent with the European Convention.

20. National hatred was covered by several different provisions of the Penal Code rather than by one specific provision. The principle of nulla poena sine lege was applied in the manner described in article 15, paragraph 1, of the Covenant, on the understanding that laws abolishing crimes could be retroactive. The Covenant did not impose an obligation on States parties to apply paragraph 2 of that article. The subject had been covered in the Federal Republic by an extension of the period of limitation.

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(Mrs. Maier, Federal Republic of Germany)

21. Foreign workers in the Federal Republic enjoyed full protection of their human rights in conformity with the country's legal system and were virtually on a par with nationals of the Federal Republic in terms of employment law and social law. The Federal Government had reported fully on the subject in reports to the Committee on the Elimination of Racial Discrimination and the International Labour Organisation. Furthermore, the situation of foreign workers in the Federal Republic had been described as satisfactory by the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, who had visited the country and been provided with full information on the subject.

22. Turning to the questions raised in connexion with article 17 of the Covenant, she said that the Federal Republic attached great importance to the problem of interference with privacy by data-processing plants and that comprehensive laws for the protection of personal data had recently been enacted. She would provide the Committee with further details in writing.

23. In connexion with article 24 of the Covenant, she noted that in the Federal Republic children born out of wedlock enjoyed the same rights as legitimate children and were guaranteed equal opportunity for development under the Basic Law. Paragraph 1 of that article was being implemented in the Federal Republic.

24. In conclusion, she said her Government would be pleased to furnish additional information in writing on those issues which it had not been possible to cover in the time available.

25. Mrs. Maier (Federal Republic of Germany) and Mr. Merkel (Federal Republic of Germany) withdrew.

The meeting was suspended at 12.05 p.m. and resumed at 12.30 p.m.

ORGANIZATIONAL AND OTHER MATTERS

26. The CHAIRMAN informed the Committee that he had requested Mr. Lallah to carry out informal contacts and to make suggestions for a formulation aimed at solving the problem concerning the specialized agencies. It was his understanding that an agreed formulation would be made available before the end of the week.

27. With regard to communications, certain members had suggested that work would be speeded up if the Committee, having studied the individual communications and the recommendations of the Working Group, were to entrust the finalization of decisions on, or connected with, admissibility to an open-ended working group. Otherwise the Committee would be unable to finish consideration of those cases which presented difficulties.

28. Mr. TARNOPOLSKY, speaking as Chairman/Rapporteur of the Working Group, said there were few cases before the Committee that did not require an urgent decision. Since, however, the formulation of those decisions might be technical, they should preferably be held over until the Committee's October session.

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29. Mr. PRADO VALLEJO inquired whether the procedure suggested by the Chairman would mean that members unable to participate in the working group would learn of decisions only after they had been taken.

30. The CHAIRMAN said he hoped that every member of the Committee would be present in the working group, so that it could act as a committee of the whole but without the limitations that accompanied meetings of the plenary Committee. The suggested procedure, which was aimed at avoiding duplication and speeding up the Committee's work, would empower the working group to finalize the decisions without reference back to the plenary Committee.

31. Mr. MORA ROJAS said he had doubts as to whether such a procedure accorded with the Optional Protocol.

32. Sir Vincent EVANS said that in his view the suggested procedure would not cause any problems. The Committee would decide how to proceed with regard to the communications concerned. All that remained to be done would be to finalize the drafting of the decisions in the light of the discussions in the Committee. Such a procedure was normal for any Committee of that kind.

33. Mr. PRADO VALLEJO said he could agree to such a procedure, provided the final decision was left open for any member of the Committee to request that it be discussed in the plenary Committee.

34. The CHAIRMAN accordingly suggested that, if any member of the Committee so requested, he could have the decision referred back to the plenary Committee.

35. It was so decided.

36. The CHAIRMAN also informed the Committee that he had requested Sir Vincent Evans to draft a letter to be sent to the General Assembly through the Economic and Social Council in order to explain why the Committee would not be submitting its annual report to the General Assembly at its thirty-third session, as well as any other difficulties that the Committee was facing.

37. Sir Vincent EVANS, introducing the text which he had drafted of the letter that the Chairman would send to the President of the Economic and Social Council, pointed out that the letter, drafted at the request of the Chairman but without the Committee's guidance, should be regarded only as a first draft.

38. He explained that the reason for the letter was that, since the Committee would be holding its fifth session in October 1978, its annual report to the General Assembly could not be prepared until after October, with the result that the General Assembly would not have the report before it until its thirty-fourth session.

39. The letter, which would be addressed to the General Assembly through the Economic and Social Council, would also bring certain organizational matters to the attention of the Council and the Assembly for any observations they might wish to make. It was therefore necessary to explain the background of the matters in question.

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(Sir Vincent Evans)

40. The letter explained in very broad terms the progress and development of the Committee's work. He emphasized that the letter was in no way intended to replace the annual report, which would be adopted in October, and the letter therefore contained the briefest possible description of the progress of the Committee's work.

41. He had set out briefly the procedures and experience of the Committee in dealing with its two main functions. He had indicated the way in which the Committee foresaw how the dialogue between it and the reporting States would develop and had pointed out that the Committee foresaw the possibility of a significant increase in the number of communications in the not too distant future.

42. He had also indicated the reasons why the Committee found it necessary to hold three sessions in 1978 and 1979 respectively. In addition, in view of the financial implications, he had sought to explain why the Committee felt that three sessions were preferable to two longer sessions.

43. Finally he had indicated that, as the Committee's work progressed and developed, the Committee foresaw the possibility of making additional demands on the services of the Secretariat.

44. He suggested that the members of the Committee should study the draft text and let him have informally their comments and suggestions, so that he could prepare a more generally acceptable text on which the Committee would be able to take a decision at a subsequent meeting.

45. Mr. MOVCHAN said the Committee should think very carefully about the purpose and contents of the letter. One possibility, in line with the customary practice in the United Nations, would be to draft a brief letter explaining that, since the Committee would be holding a session in October 1978, its report covering the current calendar year would not be available until some time after October, which would be too late for consideration by the General Assembly at its thirty-third session. The other possibility would be to prepare a fuller letter, in which case the Committee should give careful consideration to what the appropriate formulation should be and whether the letter was to be regarded as the interpretation of the Chairman alone. In that case, many questions might arise on the part of States parties and members of the Economic and Social Council.

46. Mr. PRADO VALLEJO suggested that, since the Committee's report for the calendar year would not be available for consideration by the General Assembly until its thirty-fourth session, it would be well to consider the possibility of submitting the annual report in the summer, in time for the following session of the Assembly. It was vital that the Assembly should be kept abreast of the Committee's work in the field of human rights.

47. The CHAIRMAN replied that that change in the procedure for submitting reports could apply only to future years. He hoped the members of the Committee would indicate their reaction to that suggestion so that the Rapporteur and the secretariat could bear it in mind for the October session.