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COMMITTEE AGAINST TORTURE

Ninth session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)* OF THE 129th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 16 November 1992, at 3 p.m.

Chairman: Mr. VOYAME

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* The summary records of the second part (closed), the third part (public) and the fourth part (closed) of the meeting appear as documents CAT/C/SR.129/Add.1, CAT/C/SR.129/Add.2 and CAT/C/SR.129/Add.3 respectively.

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The meeting was called to order at 3 p.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION (agenda item 3) (continued)

Initial report of Germany (CAT/C/12/Add.1) (continued)

1. At the invitation of the Chairman, Mr. Mayer-Ladewig, Mr. Daum, Mr. Siegismund and Mrs. Chwolik-Lanfermann took places at the Committee table.

2. Mr. MAYER LADEWIG (Germany) said that he himself and his delegation would do their best to reply to the questions that had been asked; in view of the complexity of the German legal system, which was of a federal nature, and the problems recently raised by unification, certain replies might not be complete, and in such cases his delegation would endeavour to provide additional information.

3. Since the signature of the Unification Treaty on 31 August 1990, five new Länder which previously constituted the territory of the German Democratic Republic had been united with the Federal Republic of Germany, of which they now formed an integral part. All the international treaties signed by the latter and all the laws and codes which had been in force there were accordingly fully applicable to them. The Unification Treaty admittedly provided for a number of exceptions to take into account difficulties connected with the transition period; for example, the former courts of the German Democratic Republic still functioned, although with new judges. Similarly, certain laws of the former German Democratic Republic had remained in force in so far as they were not at variance with the Basic Law of the Federal Republic of Germany. At the level of the new Länder a large number of new regulations had been promulgated with a view to the reorganization of the legal system; the older Länder had been of considerable help in that respect, both in connection with legal matters as well as problems of organization and human problems, of which there were many.

4. With regard to international instruments, the European Convention on Human Rights had immediately become applicable to the citizens of the former German Democratic Republic which had, in any event, signed the Convention against Torture.

5. The applicability of the Convention against Torture in Germany was guaranteed by article 59, paragraph 2, of the Constitution which stated that for Germany to be able to ratify an international instrument, a federal law must first be adopted with a view to incorporating in national legislation the obligations assumed under the instrument in question; that had been done in the case of the Convention against Torture, so that all German authorities were under an obligation to respect its provisions. As for the immediate application of the provisions of treaties, it depended on the way in which those provisions were formulated. For example, article 3 of the European Convention on Human Rights authorized any citizen to bring an action, unlike article 2 of the Convention against Torture which dealt only with the rights and obligations of States parties.

6. Mr. Mikhailov had asked whether there were any obstacles to the direct application of articles 2 or 3 of the Convention; the reply was no. However, what his delegation had tried to explain was that the possibility in one and the same case, of invoking several articles or several instruments, the wording of which might not be compatible, was undesirable. In the present instance it was the application of article 3 that appeared to be the most favourable from Germany's standpoint.

7. Mr. El Ibrashi had asked what happened if a court had to apply a law that was incompatible with the Convention. It would be recalled that, when Germany ratified a convention, its provisions were automatically incorporated in its domestic legislation, so that any conflict between German law and Germany's international obligations embodied in domestic legislation had to be resolved. In that regard, precedence was given to the most specific and most recent law. In other words, conflicts of that kind were purely hypothetical, since the international obligations assumed were incorporated into the German Constitution and also, in the event of any conflict, precedence was given to international obligations over any others. That had never happened however. It was also to be noted that articles 6 to 9 of the Penal Code referred expressly to the obligations assumed by Germany at the international level.

8. The situation was the same as regards the application of articles 8 and 9 of the Convention concerning extradition and legal assistance.

9. Mr. El Ibrashi had also asked, in connection with paragraph 43 of the report, whether prevention of torture could constitute grounds for a refusal to extradite. So far refusals to extradite in order to protect human rights had always been based on other criteria and the danger of torture had never had to be invoked; however, if other grounds for a refusal to extradite could not be invoked, that danger could be taken into account.

10. Mr. SIEGISMUND (Germany), referring to the question raised concerning the definition of torture, which appeared to be lacking in German legislation, said that the concept of torture was hedged about by a body of extremely strict rules. The Constitution provided such a clear basic definition of it that it seemed unnecessary to add anything; the first paragraph of article 104 of the Basic Law stated that persons who had been arrested could not be subjected to mental or physical ill-treatment. It had been asked whether moral torture was a sufficiently concrete concept to be applicable in practice. In that respect, the basic rule was article 223 of the Penal Code, under which physical or moral ill-treatment was punishable; any person causing serious bodily harm to or jeopardizing the health of another could be sentenced to a maximum of three years' imprisonment. It was interesting in that connection to note what kind of physical or mental ill-treatment had been recognized by the courts, since a number of judgements had been handed down on the subject; for example, an accused person had been convicted for having woken someone repeatedly during the night, thereby provoking psychological disorders. Another similar example involved telephone calls at night. Lastly, a person had been found guilty of mental torture because he had made the family of someone who had disappeared believe that he had died during the

war. Mental torture inflicted by an official such as a police officer, for example, would be regarded as being just as punishable as the infliction of physical torture. In other words, the accused would incur much more severe punishment than an ordinary citizen since he could be sentenced to three months to five years in prison instead of a maximum of two years for an ordinary citizen. In that connection article 340 of the Penal Code listed the sentences that could be incurred, which varied according to the seriousness of the injury caused; in very serious cases, an official could be sentenced to as much as 15 years' imprisonment.

11. The extortion of testimony by mental torture was also an offence. For example, a police officer who falsely announced the death of a relative or made threats against the family of a person who had been arrested would be liable to very severe punishment; that kind of thing was regarded as mental torture and, under article 343 of the Penal Code, the person concerned could be sentenced to up to 10 years' imprisonment. Article 136 (a) of the Code of Criminal Procedure stated that confessions obtained by duress could not be used before a court and that the freedom of decision of the accused could under no circumstances be impaired by ill-treatment, fatigue, deception, hypnosis, etc.

12. In response to a question from the Chairman of the Committee who had asked what preventive measures had been introduced, he said that the various measures adopted included directives concerning the training of officials with a view to making them aware of the need to respect strictly article 136 (a) of the Code of Criminal Procedure. Indirect prevention was also ensured in that any statement obtained by ill-treatment was regarded as null and void, even if the accused agreed to its use; an official would therefore not be tempted to obtain information by illegal methods. It was to be noted in that respect that the court could initiate an investigation without the accused being required to provide proof of the ill-treatment of which he complained.

13. It would therefore seem that there were no gaps in German law concerning the definition of torture, and particularly mental torture. Case law on the subject was so detailed and specific that it was unnecessary to define acts of torture any further, and all cases of torture were severely punished.

14. The Chairman of the Committee had also asked whether, under German law, a foreigner suspected of having committed torture abroad could be brought before a German court; the reply was yes. It had already been explained that, under the Penal Code, German criminal law was applicable to offences committed abroad and that an accused person could be prosecuted in Germany if an international agreement to that effect had been concluded. For example, a foreigner arrested in Germany and accused of torture was liable to the punishment provided for by German criminal law, and the government instituted proceedings and, if necessary, ordered his arrest if there was any danger of his fleeing the country. If the country of origin did not request his extradition, he would be tried under German law.

15. Admittedly the government procurator could not, under article 153 (c) of the Code of Criminal Procedure, institute proceedings in certain circumstances, as when the person concerned had already been sentenced abroad for the same offence or if an additional sentence might constitute unduly severe punishment. It was to be noted that, in the case of torture, article 153 (c) of the Code had been supplemented by an administrative directive stating that proceedings once initiated could in no case be interrupted if, under international agreements, the government procurator was required to pursue them. The applicable legislation was therefore rather complex, since the government procurator had the power not to pursue proceedings if the case had already been tried abroad but was required to do so if international instruments so obliged him - in which case article 153 (c) of the Code of Criminal Procedure was not applicable.

16. It had been asked how the judiciary reacted to the injustices committed in the past in the German Democratic Republic. Three questions arose in that connection. First, were persons who had been imprisoned or subjected to ill-treatment in the German Democratic Republic entitled to compensation, and what was specifically done to help them? Quite recently a law providing compensation for injustices committed in the German Democratic Republic had been promulgated. If would be followed by a series of other laws that would benefit the victims; previous sentences would be quashed and persons who had been imprisoned unjustly would be compensated. Later on the property of thousands of citizens who had been wronged would be restored and administrative injustices that had affected the career of many persons would be corrected.

17. The second question that arose in that context concerned the punishment of members of the security forces or public officials who had ill-treated prisoners and even caused their death in the German Democratic Republic. Hundreds of proceedings had been initiated in the new Länder for torture and extortion of confessions. The number of cases of that kind was unknown, and new ones emerged with each passing day. The problem of retroactivity did not arise in such cases since ill-treatment had also been punishable in the German Democratic Republic even if at the time no proceedings had been initiated. In that connection he noted that the statistics kept in the German Democratic Republic had been of a purely political nature and took absolutely no account of the actual situation concerning criminality or the treatment of prisoners. He recalled the case of a judge who, during the 1950s, had been associated with trials that were a mere mockery during which hundreds of persons had expeditiously been given severe sentences; charges were at present being brought against him in one of the new Länder.

18. Lastly, there was the question whether a body of case law now existed ensuring the applicability of the law to persons accused of offences committed in the former German Democratic Republic. The reply was yes, and indeed several members of the militia had been sentenced for killing persons who had tried to cross the Berlin wall. Two of those sentences had been confirmed on appeal, the Supreme Court having ruled that although the act of having opened fire had been in conformity with the law then in force in the German Democratic Republic, certain basic legal principles nevertheless took

precedence over that law, and that those principles were familiar to the members of the militia in question. The Court had therefore concluded that they were guilty and that there was no retroactivity; that decision was important in connection with current and future cases.

19. In response to a question put by Mr. Burns concerning remand custody and pre-trial detention, he said that the police was required to bring any person who had been arrested before a judge on the day following his arrest; the judge informed the person of the charges against him as well as of his rights. If he had to be remanded in custody because he might flee or jeopardize the conduct of the investigation, a warrant for his arrest could be issued; the detention decision was governed by the principle of proportionality, namely, it depended on the charges brought against the person in question and the sentence to which he was liable. The police could not prevent a detainee from having contact with his family or a lawyer. On the contrary, the suspect could call the lawyer of his choice and refuse to make any statements in the absence of a lawyer.

20. Persons who were suspected or accused of terrorism were treated in the same way as other offenders. A person placed in remand custody could at any time request the judge to interrupt his detention. Within a period of six months at most the Supreme Court of the Land had to rule whether remand custody was still in conformity with the principle of proportionality, in other words, it had to decide whether detention was not too severe a measure in relation to the charges and circumstances of the case. The Supreme Courts of the Länder ensured that the courts dealt with cases expeditiously and in accordance with the law; the control exercised was very strict.

21. It had been asked whether the police could use violence within the limits authorized by law. That question usually arose in connection with questioning, body searches, fingerprinting, etc. Such measures were obviously necessary in connection with the investigation, and in some cases they served to prove the innocence of the person who had been accused. A suspect who refused to have a blood sample taken, for example, must obviously be held down firmly. In that kind of situation, the police acted in accordance with the principle of proportionality, in other words the restraint used should be proportional to the end sought.

22. Mrs. CHWOLIK-LANFERMANN (Germany) informed members of the Committee that investigations were being carried out in the two cases referred to by Amnesty International. The authorities responsible for the proceedings had so far been unable to identify the various persons requesting asylum who complained of ill-treatment in addition to the three mentioned, who had testified. Moreover, the young man who had been arrested on drug charges and who had allegedly been ill-treated at the time of his arrest had not reported to the police station to make a statement. The German authorities would not fail to inform Amnesty International of the result of the inquiries conducted in the two cases.

23. Referring to a question voiced by Mr. Mikhailov who had asked whether article 1, paragraph 3 of the German Basic Law was sufficient to prohibit torture, she explained that according to that provision the principle of the

inviolability of human dignity had to be respected by all public authorities and was not confined to criminal law. It was admittedly a general principle but one that had been confirmed on many occasions by the Constitutional Court, which had the last word on the interpretation of legislative provisions by lower courts. The prohibition of torture, as one of the most serious violations of the dignity of the individual, was therefore clearly expressed in the Constitution. Nevertheless, the German authorities were quite prepared to consider ways of making the situation even clearer.

24. Replying to another question from Mr. Mikhailov concerning paragraph 53 of the report, she said that the statistics available concerned the former Länder. Data concerning the new Länder were not known with accuracy; the German Federal Government had been informed through the press and specialized journals of a number of cases of ill-treatment that had allegedly occurred in previous years in the former Länder. Referring to paragraph 87 of the report, she explained that the normal rule of responsibility for the commission of illegal acts applied to public officials; any wrong done to persons or damage to property justified a request for compensation for material and non-pecuniary damage. Requests for compensation had to be addressed to the administration and then to a court.

25. One member of the Committee had requested information about the organization of the judicial system; Germany had five kinds of courts, namely, the ordinary courts (civil and criminal), administrative courts, labour courts, social affairs courts and tax courts, and each kind was structured hierarchically. The highest court was the Constitutional Court. Judges were independent and could not be removed from office.

26. Mr. Sorensen had raised the very important question of the treatment of torture victims and the training of the personnel responsible for it. It was obviously necessary that personnel responsible for the application of laws - but also medical personnel, health workers, psychologists, psychiatrists and social educators - should be fully informed about matters connected with torture. Her delegation readily accepted the suggestion that work in that field should be intensified. Mr. Ben Ammar had rightly emphasized the need to provide more training in human rights matters, particularly in the new Länder. It was vital that emphasis should be placed on the protection of human rights and action to curb torture in the schools and universities of the new Länder. Civic instructions explaining the system of human rights values and the principle of the inviolability of the individual had already been circulated. In addition, a political education institute in Bonn was preparing manuals and instructions for teachers and citizens.

27. Mr. El Ibrashi had asked how far persons who were completely unable to pay the costs of legal proceedings could expect to be provided with legal aid. She explained that the State provided financial assistance to such persons at all stages of the proceedings. When a person alleged that he had sustained an injury, an investigation was conducted to determine whether his complaint was justified; if so, he received State assistance. In a criminal case, the accused also received State assistance, regardless of the chances of his winning his case; it had nothing to do with whether he was guilty or not. In

any event the State must, if the situation so required, assign a lawyer to assist a person suspected of a crime; the State also assisted the presumed victims.

28. The CHAIRMAN thanked Mr. Mayer-Ladewig, Mr. Siegismund and Mrs. Chwolik-Lanfermann for their valuable replies. As members of the Committee had no further questions, the Chairman invited them to continue their discussion in a closed meeting.

The German delegation withdrew.

The first part (public) of the meeting rose at 4.20 p.m.