



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

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**Consideration of reports submitted by States
parties under article 19 of the Convention**

Fifth periodic report of States parties due in 2007

Germany*, **

[15 December 2009]

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- * The third periodic report submitted by the Government of Germany is contained in document CAT/C/49/Add.4; it was considered by the Committee at its 600th and 603rd meetings, held on 7 and 10 May 2004 (CAT/C/SR.600 and 603). For its consideration, see CAT/C/CR/32/7.
- ** In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

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I. Introduction

1. The Government of the Federal Republic of Germany herewith submits the fifth periodic report in accordance with Article 19, para. 1, second sentence, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: the Convention). The period under review covers the years 2004 to 2008. In individual cases, account has been taken of current developments up until June 2009.

2. The initial report was made in 1992. The second periodic report of the Federal Republic of Germany, submitted in 1996, was presented to the Committee in May 1998; the 2002 submitted combined third and fourth periodic reports were presented in May 2004.

3. In this fifth periodic report the Federal Republic of Germany has for the first time applied the principles of the new reporting procedure introduced by means of the harmonized guidelines of 21 May 2007 for all reporting procedures before the contractual committees of the United Nations. The common core document of the Federal Republic of Germany was revised in accordance with the harmonized guidelines and adopted by the German Cabinet on 3 June 2009.

4. Further to the constitutional principles of human rights protection in Germany which are delineated in the common core document, this report will first briefly detail the specific fundamental principles of the German legal system in regard to protection against torture and other cruel, inhuman or degrading treatment, as well as some measures for assisting the victims of torture.

5. The report will then address four key issues. It concludes with a statement from the Federal Government on the Committee's conclusions and recommendations of 11 June 2004. By concentrating on the most important key issues, the report seeks to address important and current problems despite its shorter form on account of the harmonized guidelines. The Federal Government trusts that the Committee will give timely indications before the presentation as to whether it requires further explanations regarding other issues.

6. The Federal Republic of Germany has placed the inviolability of human dignity and its commitment to human rights as supreme values right at the peak of its constitution (Article 1, paras. 1 and 2 of the Basic Law for the Federal Republic of Germany – Basic Law). Thus, torture is constitutionally outlawed as one of the most serious offences against human dignity conceivable. According to Article 2, para. 2, first sentence, of the Basic Law, every person has the right to life and physical integrity. This right to privacy from state interference (*Abwehrrecht*) not only covers interference with physical integrity by the state, but also, according to the established case-law of the Federal Constitutional Court, interference by means of mental torture, emotional cruelty and other such interrogation methods. Article 104, para. 1, second sentence, of the Basic Law explicitly states that detained persons may not be subjected to mental or physical ill-treatment.

7. In Germany, all conceivable cases of torture or other cruel, inhuman or degrading treatment or punishment are covered by a number of concrete criminal provisions. As well as general criminal law, reference is hereby in particular made to the Code of Crimes against International Law, which entered into force in 2002 and which adopts the definitions of crimes in the Rome Statute of the International Criminal Court of 17 July 1998 (genocide, crimes against humanity and war crimes). Under this law, crimes against humanity include torture, among other things. The section on "War crimes" states that whoever treats a person "cruelly or inhumanly" by causing substantial physical or mental harm or suffering, especially by "torturing or mutilating" that person, will be punished.

8. Under Article 1, para. 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. Effective control is guaranteed through the competent supervisory authorities as well as by means of a differentiated system of legal recourse and legal remedies. The guarantee of the right of recourse to the courts under Article 19, para. 4 of the Basic Law guarantees every person the effective right to effective legal protection in the case of an alleged violation of the prohibition of torture. The principle of the division of power, especially the independence of the judiciary, ensures an independent evaluation of cases.

9. The German Bundestag has its own Committee on Human Rights and Humanitarian Aid which also and specifically looks into the human rights situation in Germany. Moreover, the Federal Government submits a human rights report to the German Bundestag every two years in which the domestic human rights situation is addressed in detail.

10. Compliance with the prohibition of torture in Germany is also monitored by international control bodies. Reference is here in particular made to 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 (ECHR) of 4 November 1950. Under Article 3 of the ECHR, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. In the period under review the European Court of Human Rights delivered two judgements relating to Article 3 of the ECHR in proceedings against Germany; these judgements will be addressed in more detail in chapter II, section A 2 (c) below.

11. 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) established under this Convention, a delegation of the Committee visited Germany in November and December 2005. The Committee adopted its report on 7 July 2006. The Federal Republic of Germany submitted its response to the report in February 2007.

12. International monitoring mechanisms have also been established within the framework of the United Nations. Reference is hereby first made to the fact that by Note Verbale to the United Nations of 17 October 2001 the Federal Republic of Germany submitted its response according to Articles 21 and 22 of the Convention and thus recognised the Committee's jurisdiction to take receipt of inter-State and individual applications.

13. The Federal Republic has so far not been involved in any inter-State applications according to Article 21 of the Convention. In the only individual application according to Article 22 of the Convention to date in which the Federal Government was notified of a complaint, the Committee on 12 May 2004 found that the reviewed decision of the German authorities did not constitute a violation of Article 3 of the Convention and that it saw no reason to interfere with the decision.

14. Further, during the period under review the Federal Republic of Germany ratified the Optional Protocol to the Convention, as a result of which the Subcommittee on Prevention of Torture (SPT) may now also exercise its monitoring function in respect of Germany. More details will be provided in this regard in chapter II, section A 1 below.

15. Within the framework of the advice and assistance provided to foreign refugees the Federal Government has for years been sponsoring four psychosocial centres which look after and treat those who have become victims of torture and human rights violations. The

centres provide specialised health and psychosocial care to refugees and victims of torture. The help they give is without regard to gender, race, religion or political views. The following receive funding from the federal budget: the Berlin Centre for the Treatment of Torture Victims (German Red Cross), the Cologne Psychosocial Centre for Refugees (German Caritas Welfare Association), the Frankfurt am Main Psychosocial Centre for Refugees and Victims of Organised Crime, and the Düsseldorf Psychosocial Centre for Refugees (both Diakonisches Werk). The majority of the 790,000 euros in funding provided annually to these centres is used to pay the specialist staff who work there.

16. The centres primarily treat and look after those who have become victims of state violence and torture abroad, seriously traumatised refugees from war zones and, in individual cases, the victims of racially motivated crimes in Germany. Roughly half of those seeking help are women, half men. Some 1,500 people, mostly women, begin some form of therapy every year. One main focus of the work of the centres is therapeutic work with young people and unaccompanied refugees, since these have often lost their families and those who are most important to them.

17. Through its foreign representations and local non-governmental organisations (NGOs) the Federal Government regularly sponsors projects around the world to combat torture abroad. In the context of its support for the Office of the United Nations High Commissioner for Human Rights, the Federal Government in 2008 provided 500,000 euros to the United Nations Voluntary Fund for Victims of Torture and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

II. Key issues

A. International cooperation

1. OP-CAT

18. The Federal Republic of Germany signed the Optional Protocol to the Convention (OP-CAT), which entered into force on 22 June 2006, in New York on 20 September 2006. The domestic legislative procedure has since been completed. The ratifying legislation required under constitutional law to transpose the OP-CAT into national law was promulgated on 2 September 2008 (Federal Law Gazette 2008 II p. 854); the instrument of ratification was deposited on 4 December 2008. The OP-CAT thus entered into force for Germany on 3 January 2009.

19. Under Part IV of the OP-CAT, Germany is obligated to establish an independent national prevention mechanism. On account of Germany's federal structure, this national prevention mechanism will comprise two institutions: a Federal Office for the Prevention of Torture established by organisational order of 20 November 2008 for the Federation's jurisdiction (detention facilities operated by the Bundeswehr and Federal Police) and a Joint *Länder* Committee to be established on the basis of a treaty between the federal *Länder* for the jurisdiction of the *Länder* (prison system, police custody, detention facilities in psychiatric clinics). As the procedure to establish an interstate treaty requires the involvement of the legislative bodies in the *Länder* and it cannot be predicted with any certainty when that process will be completed, Germany made use of the possibility when ratifying the OP-CAT of postponing the application of Part IV for three years initially. However, since the interstate treaty was signed on 24 June 2009, it is becoming apparent that the interstate treaty procedure could be concluded by late 2009, so that the national prevention mechanism would be completely established within the period provided for under Article 17 of the OP-CAT.

20. The independence of the national prevention mechanism is guaranteed. Both the order establishing the Federal Office and the interstate treaty of the Länder explicitly state that the respective institutions are not bound by instructions and are independent. The Secretariat which will assist the national prevention mechanism in its work will have its offices in the German Institute of Criminology, a joint academic facility of the Federation and the Länder, and will be able to use its resources.

21. The Federal Government is aware that the prevention mechanism has been criticised by various parties as too small and too poorly equipped. Once the Joint Länder Committee has submitted its first reports it will thus be necessary to review whether the mechanism is adequately equipped. The evaluations of the Federal Office and the *Länder* Committee themselves will thereby be of decisive importance.

22. The Federal Office's Secretariat, which has one research assistant and one member of office staff, took up its work on 1 May 2009. The Federal Government would like to point out that the Federal Office's jurisdiction is restricted to the institutions assigned to the Federation within Germany's federal structure (Bundeswehr and Federal Police). The overwhelming majority of detention facilities (police, judicial, psychiatric establishments) fall within the jurisdiction of the *Länder* and the Joint Committee to be established (§ 19). The Federal Office has already announced that it will carry out its initial visits in the near future.

23. At the request of the Sub-Committee on the Prevention of Torture, Germany by Note Verbale of 2 February 2009 appointed five experts in accordance with Article 13, third sentence, of the OP-CAT; their names have been added to the list of experts kept there.

2. Cooperation at European level

(a) Cooperation with the European Committee on the Prevention of Torture

24. The European Committee on the Prevention of Torture (CPT) carried out its fourth regular visit to Germany from 20 November to 2 December 2005. In its report, the Committee welcomed the very good degree of cooperation with the German federal and Länder authorities during its visit.

25. In its conclusions the report explicitly welcomed some improvements which had been made in the various detention facilities in the light of the previous CPT report of 2000. Among other things, the Committee criticised the following:

(a) The use of physical restraint (*Fixierung*) on those in detention, especially long-term physical restraint without continuous, direct personal supervision by a member of staff (known as *Sitzwache*) and the use of inadequate fettering devices;

(b) Material conditions in various detention facilities (in particular detention pending deportation);

(c) Access to medical staff;

(d) Inadequate staffing levels and overcrowding in various facilities.

26. The Federal Government submitted a response to the CPT's report; the report and the Federal Government's response were published on 18 April 2007. The relevant authorities were informed about the Committee's comments and were asked to take remedial action.

27. The CPT on two occasions asked the Federal Government to comment on planned precautionary measures in respect of possible detention situations within the context of large-scale events.

28. In May 2007 the CPT's enquiry concerned measures planned within the context of the G8 Summit in Heiligendamm. The CPT was provided with detailed information in this regard; the local police's situation reports were also promptly made available to the CPT. In March 2009 a similar enquiry was made in regard to the measures in the context of the NATO Summit in Strasbourg and Kehl. The CPT was here also provided with the requested information. Moreover, the CPT was given the opportunity by the local police to inspect the detention facilities in question in advance. In both cases the CPT stressed that cooperation with the Federal Government had been good.

29. A further enquiry submitted by the CPT concerned the case of Ö., details of which will be provided in section D 2 below. The CPT was sent a summary of the events as well as the final order issued by Hagen Public Prosecution Office.

(b) Cooperation with the Secretary-General and the Parliamentary Assembly of the Council of Europe

30. On 22 November 2005 the Secretary-General of the Council of Europe, Terry Davis, asked the Federal Government to respond to a number of questions concerning reports of secret arrests and transports of people by "foreign services". The Federal Government responded to these questions by letter from the Federal Minister of Foreign Affairs, Dr Frank-Walter Steinmeier, of 17 February 2006.

31. The reply explained the legal bases for preventing secret deprivations of liberty, the criminal prosecution of violations and options available to possible victims for claiming damages.

32. In November 2005 the Parliamentary Assembly of the Council of Europe commissioned its Committee on Legal Affairs and Human Rights with investigating whether secret detention facilities were being maintained in Europe in connection with the international fight against terrorism and whether illegal transfers of detainees had been carried out. The Committee appointed Mr Dick Marty as its Rapporteur; he submitted an interim report in June 2006 and a final report in June 2007.

33. In its report to the Parliamentary Control Committee of the German Bundestag on events in connection with the Iraq War and the fight against international terrorism, the Federal Government responded as follows in regard to the questioning of persons imprisoned abroad conducted by members of German intelligence services.

34. "Questioning has always been carried out in close cooperation with the responsible security authorities of the states concerned. Indispensable prerequisites are that the questioning is voluntary and that those to be questioned give their explicit consent thereto. Questioning is not carried out, where, in individual cases, there are concrete indications to suggest that the person concerned has been subjected to torture in the country they were in. Where such indications are found during questioning, it is immediately terminated. (...) Members of the German investigation authorities will in future no longer be involved in such questioning."

35. The Federal Government would like to take the opportunity presented by this report to explicitly repeat and re-affirm those statements.

36. In its 16th electoral term the German Bundestag established a committee of enquiry to clarify, among other things, the question of whether in various individual cases to which reference was also made in Mr Marty's report federal employees were involved in questioning after the persons concerned had been subjected to torture or circumstances similar to torture. The committee found that all key aspects of the report submitted to the Parliamentary Control Committee were correct. As regards the violation of the basic rights of suspects in detention in a foreign country, responsibility lay exclusively with the

respective other states, it said. The Federal Government, its employees and the employees of its subordinate authorities had at all times acted in accordance with existing laws.

(c) Judgements of the European Court of Human Rights

37. In the period under review the European Court of Human Rights issued two judgements against Germany which deal with questions relating to Article 3 (prohibition of torture) of the ECHR.

(i) *J. v. Germany (application No. 54810/00)*

38. In the individual application *J. vs. Germany*, the Grand Chamber of the European Court of Human Rights found by judgement of 11 July 2006 that Article 3 of the ECHR (prohibition of torture) and Article 6, para. 1 of the ECHR (right to a fair trial) had been violated.¹

39. The main subject-matter of the application was the question of to what extent the forcible administration of emetics to obtain evidence of a drugs offence according to section 81a of the Code of Criminal Procedure was incompatible with the ECHR. The applicant complained, among other things, that the forcible administration of emetics ordered by the public prosecution office constituted inhuman and degrading treatment which was prohibited under Article 3 of the ECHR. The use of this, in his opinion illegally obtained, evidence at his trial in addition breached his right to a fair trial under Article 6 of the ECHR, in particular the *nemo tenetur* principle.

40. In providing its grounds for a violation of Article 3 of the ECHR, the Court explained in its judgement that it was neither convinced that the administration of emetics by force was indispensable in order to obtain the evidence nor that the health risk to the applicant was to be neglected. In addition, the applicant had been pinned down by four policemen during the administration and the feeding of a stomach tube must have caused him pain and anxiety. For the rest, the entire procedure, including the vomiting, had been humiliating. The alternative — detention and waiting for the drugs to pass out of his body naturally — was less humiliating. Finally, the Court expressed doubts as to whether the applicant, who spoke no German and only broken English, had been provided with sufficient information about the intervention beforehand.

41. In examining the violation of Article 6 of the ECHR, the Court initially pointed out that the administration of the emetic by force had violated one of the core guarantees under the Convention; this meant that the evidence thus obtained could no longer be used. Further, the applicant's freedom not to incriminate himself had been violated on account of the use as evidence of the sachet of drugs he had regurgitated.

42. Seven judges held dissenting opinions and two judges held concurring opinions, which were added to the judgement as special votes.

43. In the implementation of this judgement the Federal Government — as well as paying the damages awarded to the applicant by the European Court of Human Rights — informed all the Länder that the practice of administering emetics by force was not compatible with the ECHR. The five Länder which were at that time still using the technique also immediately stopped the practice after the judgement was issued and later confirmed that the practice would be discontinued.

¹ EuGRZ 2007, 150; JuS 2007, 265; NJW 2006, 3117; StV 2006, 617.

(ii) *G. v. Germany (application No. 22978/05)*

44. Details of this case will be provided in chapter II, section B below.

3. Cooperation with the United Nations

45. In the period under review the Special Rapporteur addressed two enquiries to Germany which concern the Committee's jurisdiction.

46. On 16 December 2005 the Special Rapporteur on the question of torture called on Germany to institute investigations against the former Minister of the Interior of Uzbekistan, Mr Almatov, among other things for his alleged responsibility for violations against the Convention, since he was in Germany at the time. The Special Rapporteur made reference in his request to a complaint of an offence made by torture victims on 12 December 2005.

47. The German criminal prosecution authorities had become aware that Mr Almatov was staying in Germany when a first complaint of an offence was brought against him on 5 December 2005. He had, however, already left Germany at that point. For that reason the Public Prosecutor General decided not to institute investigation proceedings against Mr Almatov.

48. On 18 December 2006 the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on the question of torture jointly asked Germany to take all measures necessary to hold those people criminally responsible who were allegedly accountable within the headquarters of the United States European Command (EUCOM) for the illegal transfer of six suspected terrorists from Bosnia-Herzegovina to Guantánamo. In addition, the Special Rapporteur requested that Germany ensure that neither German authorities nor German territory can be used to illegally transfer persons in violation of human rights conventions signed by Germany.

49. By letter of 16 February 2007 Germany reported to the Special Rapporteur within the period stipulated on the examination by Stuttgart Public Prosecution Office of the allegations against German liaison officers at EUCOM.

B. Threat of torture by Frankfurt Police

50. The generalised debate on torture, which also took place in the German media, developed into a very emotional public debate in 2002 following the case of D., which was much discussed in the public domain. The Federal Government therefore feels the need to enlarge on the events connected with this case. On 27 September 2002, the law student G. kidnapped and murdered an 11-year-old boy. Within the framework of investigation proceedings instituted by Frankfurt am Main police, the then accused G. was questioned on 1 October 2002, during which he was threatened by the police with pain if he did not reveal the boy's whereabouts.

1. The facts

51. In the early hours of 1 October 2002, Detective Officer E., on the orders of the Deputy Chief of Frankfurt police, D., told the then accused G. that a person specially trained for such purposes would cause him considerable pain if he did not reveal the child's whereabouts. The officer slapped him on the chest and shook him so hard that his head hit the wall once. Afraid of the threatened measures, the applicant after around 10 minutes then revealed the child's precise whereabouts. He was then driven by numerous police officers to Birstein, where the police found the boy's corpse under a jetty at the edge of a pond.

52. On 1 October 2002, the Deputy Chief of Frankfurt police, D., noted in the police files that the life of the boy, should he still be alive, would be in danger that morning on account of the lack of food and the outside temperature. In order to save the child's life he had therefore ordered that the then accused G. was to be questioned by Detective Officer E., who was to threaten him with pain which would not cause any injuries. The procedure itself was to occur under medical supervision. According to the note, the aim in questioning G. was not to promote the criminal proceedings in respect of the kidnapping, but solely to save the child's life. Since G. had already confessed after Detective Officer E. had threatened to inflict pain on him, no measures had been taken.

2. Criminal proceedings against G.

53. On 9 April 2003, the first day of the trial, Frankfurt am Main Regional Court found that Detective Officer E. had used prohibited interrogation methods on 1 October 2002 within the meaning of section 136a (1) of the Code of Criminal Procedure by threatening to inflict pain on the accused if he did not reveal the child's whereabouts. Therefore, pursuant to section 136a (3), second sentence, of the Code of Criminal Procedure, the accused's subsequent testimony could not be used as evidence. It was only possible to use the testimony the accused had given after he had realised that he could make an entirely new decision regarding whether he wanted to give evidence or remain silent, that is only after being given the requisite instructions (instructions regarding his right to remain silent and the fact that his entire previous testimony would not be used as evidence).

54. After the Regional Court had explicitly instructed him about his right to remain silent and about the non-use of his previous testimony, G. admitted, on the second day of the trial, that he had killed the boy. After the hearing of evidence between 9 April and 28 July 2003, he further admitted in his closing statement at the end of the trial that he had planned from the very outset to kill the child and had acted with that intent. He described his confession as the only way to accept his serious guilt and as the greatest possible apology for murdering the child.

55. On 28 July 2003 the Regional Court found G. guilty of murder in coincidence with extortionary kidnapping leading to death. The Court sentenced him to life imprisonment and established the particular gravity of the guilt. On 21 May 2004 the Federal Court of Justice dismissed the appeal on points of law (Revision) as ill-founded. On 14 December 2004 the Federal Constitutional Court, as a Chamber sitting with three judges, refused to accept the applicant's constitutional complaint for a decision as it was inadmissible.

3. Criminal proceedings against the police officers

56. On the basis of the events of 1 October 2002, Frankfurt am Main Public Prosecution Office instituted investigation proceedings against the involved police officers and preferred charges. G. was a witness in these proceedings. On 20 December 2004 Frankfurt am Main Regional Court found Detective Officer E. guilty of unlawful compulsion by a public official, issued him with a warning and reserved the right to impose a fine of 60 daily rates of 60 euros each if he committed a further offence during his probationary period. The Court further found the Deputy Chief of Frankfurt Police, D., guilty of subordination to unlawful compulsion by a public official. It also issued D. with a warning and reserved the right to impose a fine of 90 daily rates of 120 euros each. In its judgement, the Court at the same time re-affirmed the absolute prohibition against inflicting violence or threatening to inflict violence on an accused, and firmly rejected any possibility of justifying the threat of violence in an emergency. It emphasised that the absolute prohibition of torture was enshrined in the principle of inalienable human dignity, which, on the basis of historical experience, had very consciously been placed right at the beginning of the German Basic Law and which, pursuant to Article 79, para. 3, of the Basic

Law was unalterable even if a majority was in favour of amending the Basic Law. Compliance with the absolute prohibition of torture was essential for the proper functioning of the administration of justice and the preservation of the state under the rule of law.

57. The proceedings also had consequences for both officers' careers, as the Hesse Ministry of Interior transferred them to posts in which they would no longer be directly involved in the investigation of criminal offences.

4. The European Court of Human Rights' ruling

58. After his constitutional complaint was rejected, G. filed an application with the European Court of Human Rights. On 30 June 2008 the Fifth Section of the European Court of Human Rights found that G. could no longer claim to be the victim of a violation of Article 3 of the ECHR, and that there had been no violation of Article 6 of the ECHR.

59. The European Court of Human Rights listed the following as reasons why G. could no longer claim to be the victim of a violation of Article 3 of the ECHR:

(a) The fact that the Regional Court had clearly stated in the proceedings against the police officers that G.'s treatment had violated Article 3 of the ECHR; Germany had thus admitted that the violation had occurred;

(b) The fact that the evidence acquired by force had not been used; and

(c) The police officers' conviction and transfer.

60. Upon the applicant's request the case was accepted for a decision by a committee of five judges of the Grand Chamber, which will now decide again in the matter.

5. The generalized debate on torture

61. A debate about possible exceptions to the prohibition of torture had already arisen in Germany as well in connection with the attacks on the World Trade Center in New York on 11 September 2001. This debate in both the general media and the legal literature took on new relevance on account of the case of D.

62. For example, a fierce dispute arose within the professional associations of judges regarding whether, under certain circumstances, torture was conceivable, namely when a legally protected interest was violated in order thereby to save a legally protected interest of higher value. A few days after the incident the German Judges Association, however, made it clear that all forms of violence or threats of violence used to force someone to give testimony were prohibited under domestic and international law, and that the prohibition was absolute.

63. The attacks on the World Trade Center and the case of D. brought forth a wealth of academic literature. In this context attempts were increasingly made to justify academically the abolition of the absolute prohibition of torture. Prof. Dr Winfried Brugger is a prominent proponent of relativising the prohibition of torture.² Even before the attacks on the World Trade Center he had supported the position that torture should be admissible in strictly delimited exceptional cases. Following the attacks on the World Trade Center and the case of D., this opinion also in part met with the approval of other academics.

64. Nevertheless, the overwhelming majority of the academic world rejected the idea of relativising the prohibition of torture. They emphasise in this context that suspects should not be tortured under any circumstances, even if there was justified hope that it could even

² JZ 55 (2000) 4, 165–173.

lead to life-saving information coming to light.³ The Director of the German Institute for Human Rights, Prof. Dr Bielefeldt, gives a good overview of the debate in the legal literature in an essay entitled “Menschenwürde und Folterverbot — Eine Auseinandersetzung mit den jüngsten Vorstößen zur Aufweichung des Folterverbots” (Human Rights and the Prohibition of Torture — An Analysis of Recent Attempts to Water Down the Prohibition of Torture).⁴ The essay deals in detail with the arguments put forward by those in favour of permitting torture in exceptional cases and provides detailed arguments for the absoluteness of the prohibition of torture. According to Bielefeldt, a clear majority of those expressing an academic opinion on the issue of torture are in favour of the absoluteness of the prohibition of torture.

6. Reactions from the Federal Government

65. The Federal Government also took a clear stand in this debate. It affirms its commitment to the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. This also applies unreservedly in states of emergency. Correspondingly, a few days after the incident became known the Federal Government firmly rejected an amendment to the law which could permit torture under certain circumstances.⁵ It clearly described all forms of torture or degrading treatment as well as the use of insights gained on the basis of such treatment as prohibited.⁶

C. Gathering and utilization of information

66. Questions regarding the gathering and utilisation of information for use in the field of prevention and in criminal proceedings have regularly been raised by national and international bodies, as well as by NGOs in recent years vis-à-vis the Federal Government. The Federal Government would like to take the opportunity afforded by this report to clarify to the Committee the legal bases in respect of the gathering and utilisation of information.

1. Preventive and repressive measures within the German legal system

67. Firstly, as has already been made clear in the Introduction, it must be emphasised that for the Federal Republic of Germany the absolute prohibition of torture is beyond all question. The involvement of German civil servants in torture is punishable under German law and will on no account be tolerated. In instructions issued to the federal intelligence services, the Federal Chancellery expressly emphasised that indispensable prerequisites for questioning are that it is voluntary and that the individual in question has explicitly consented thereto. If, in individual cases, there are concrete indications that the person concerned has been subjected to torture in the country they are in, no questioning is

³ Ernst Benda, Wer stark ist, foltert nicht, in *Die Welt*, 26 July 2004; Arthur Kreuzer, Zur Not ein bisschen Folter?, in *Die Zeit*, 13 May 2004; Hassemer, in *Die Tageszeitung*, 24 February 2003, p. 3; Hassemer, Das Folterverbot gilt absolut – auch in der Stunde der Not, in: *Erscheinungsformen des modernen Rechts* (2007), p. 15 et seq.; Manfred Nowak, Folter macht wahnsinnig (interview), *Zeit Online*, 5 April 2006.

⁴ Available on the internet at: http://files.institut-fuer-menschenrechte.de/488/d62_v1_file_46122666028bc_IUS-028_E_Folter_RZ_WWW_ES.pdf.

⁵ 8th Human Rights Report of the Federal Government, No. 1.3.1 (<http://www.auswaertiges-amt.de/diplo/de/Aussenpolitik/Themen/Menschenrechte/8.MR.Bericht.html>); <http://www.rp-online.de/public/article/politik/2959/Folter-Bundesregierung-schliesst-Gesetzesanderung-aus.html>.

⁶ See the interview with the Federal Minister of Justice in *Die Zeit*, 26 January 2006.

possible. Where such indications emerge during the questioning, it must be discontinued immediately.

68. In criminal proceedings in a state under the rule of law, information which has demonstrably been gained under torture cannot be used as evidence, and that applies without reservation. An exception must, however, be made in situations in which there is only a suspicion of torture which cannot be clarified. Here the courts must take a decision on a case-by-case basis regarding the value of the evidence. If the origin of the evidence is open to suspicion in that respect, the evidence is of correspondingly limited value.

69. The same applies to the use of evidence to avert a threat. Here, too, clues indicating that torture has been used already point to the questionable value of the testimony. The security authorities take account of this fact in their preventive measures. The evaluation of clues, taking account of the quality of the source, is one of the core competences of the security authorities and indispensable for its practical work.

2. Questioning of people abroad by German civil servants

70. Reference is hereby first made to the Federal Government's response, cited in B.I.2.b. above, to the Parliamentary Control Committee, in which the Federal Government explicitly confirmed that German investigating officers are no longer involved in questioning carried out by members of the secret services.

71. The principle that German civil servants may not become accomplices of torture also applies to questioning conducted in the context of international legal assistance. If, during such questioning, the investigators find indications that the person being questioned was subjected to torture or ill-treatment, this must be documented. The court must thereupon decide whether the evidence may not be used according to section 136a of the Code of Criminal Procedure or — if the clues are insufficient for that — whether the testimony is still of value as evidence. The court must clarify this decision by drawing on all the available evidence according to the principle of judicial investigation under section 244 (2) of the Code of Criminal Procedure in the form of free evidence (Freibeweis). Thus, when evaluating the testimonies in proceedings against an accused charged with supporting the assassins of 11 September 2001, the Hanseatic Higher Regional Court took account of the fact that the attendant circumstances of the questioning of the three witnesses, who were being held at an unknown location in the United States, could not be determined with any certainty.

3. Diplomatic assurances

(a) Extradition

72. The current practice in Germany of extraditing persons to certain states if the requesting state gives assurances that certain conditions in respect of the treatment of the extradited person will be fulfilled is sometimes criticised in the public domain. In the opinion of the Federal Government, such diplomatic assurances can, however, in some cases be a suitable means of helping to enforce human rights standards. The Law on International Assistance in Criminal Matters (LIACM) also variously provides for the possibility of diplomatic assurances as a precondition for extradition abroad. The following points are relevant in the context of the report at hand.

73. Based on Article 3 of the ECHR, the requesting state must give assurances that the minimum standards regarding prison conditions set out in the ECHR will be complied with. According to the established case-law of the German courts, such an assurance must be requested in appropriate cases. In practice, assurances may also be given such that the

suspects will be detained in specified prisons and not elsewhere. If the assurances are met, inappropriate treatment within the meaning of the ECHR can be prevented.

74. Whether the assurance given is sufficient and whether it is met is a matter which must be reviewed. In the context of the LIACM this already occurs as part of the admissibility proceedings conducted by the higher regional court prior to the extradition. According to the case-law of the Federal Court of Justice, knowledge of the domestic situation in the state giving the assurance is a regular requirement therefor. Experience of previous assurances given by the requesting state and expectations regarding compliance with them must be included. To that end statements from the Federal Foreign Office must be obtained on a regular basis.

75. The Federal Foreign Office examines each individual case on the basis of the following criteria:

- (a) Risk prognosis and threat analysis based on the concrete situation of the person concerned;
- (b) Scope of the assurance given in terms of content and timeframe;
- (c) Form of the required monitoring (incl. the possibility of access by NGOs), possible sanctions;
- (d) Formal prerequisites for the assurance.

76. In order to be able to monitor compliance with the assurance, consular measures are a regular requirement. Permission for such measures must be given in suitable cases. Such measures may include visiting the persecuted person in prison. Permission for a consular officer to be present in the main trial as well as agreed access rights for NGOs are other possibilities.

77. Where the above-mentioned preconditions are not met — either because a formal, written assurance is denied or because there are no means of control — any assurances that may possibly be given do not minimise the threatened risk to the person to be extradited to such an extent as to permit the extradition.

78. By contrast, if the aforementioned principles are observed, the European Court of Human Rights is also of the opinion that diplomatic assurances can be a suitable means of preventing human rights violations to the detriment of the person to be extradited. In the period under review the European Court of Human Rights found in two decisions in cases pertaining to Germany that corresponding assurances had been met and Germany had undertaken the necessary reviews and controls. Accordingly, the applications were dismissed as inadmissible in both cases.⁷

(b) Deportation

79. Like other European states, the Federal Government believes that diplomatic assurances in individual cases are a suitable instrument for enabling deportation without subsequent prosecution. However, it must be carefully examined on a case-by-case basis whether an assurance is in actual fact a suitable means of sufficiently reducing the risk of the person to be deported being subjected to treatment which is in violation of the Convention. The Federal Republic of Germany's obligations under international law must be met when drawing up the corresponding assurances. In addition, the agreement must permit effective monitoring of whether the assurance is met.

⁷ *B.O. v. Germany*, decision of 16 October 2006, application no. 1101/04; *A. v. Germany*, decision of 20 February 2007, application no. 35865/03.

4. Specific cases

(a) M.K.

80. The Turkish national M. K., who grew up and lives in Germany, was arrested in Pakistan in November 2001 and taken to Guantánamo by US forces in January 2002, where he remained imprisoned until August 2006.

81. After his release, Mr K. claimed that he had been ill-treated by German soldiers of the Special Forces Command in Afghanistan in early 2002. The investigation proceedings then instituted against two members of the Special Forces Command by Tübingen Public Prosecution Office, which had jurisdiction in the matter, were terminated in May 2007 as no evidence could be provided in support of the allegations. After two fellow prisoners were named as witnesses, Tübingen Public Prosecution Office took up the investigations again, but terminated them again in March 2008 as even after the witnesses had given evidence it was not possible to establish proof of the offence.

82. The Defence Committee of the German Bundestag, acting as a committee of enquiry, looked into the allegations made against the members of the Special Forces Command. It heard a total of 49 witnesses. The Committee came to the conclusion that no evidence could be provided to prove that the offence had been committed. It was not possible to conclude from the overwhelming majority of the evidence that any ill-treatment had occurred.

(b) K.E.-M.

83. In December 2003 the German national E.-M. was arrested in Macedonia. By his own account, he was taken to a secret prison in Afghanistan by members of the CIA in late January 2004 and held there until late May 2004. He was released on the border between Albania and Macedonia.

84. Based on these statements Munich I Public Prosecution Office instituted investigation proceedings in late 2004 against an unknown person. After a series of names of possible suspects came to light in the course of 2006, among other things based on requests for legal assistance, Munich I Public Prosecution Office on 31 January 2007 applied for arrest warrants to be issued on account of serious bodily injury and deprivation of liberty against 13 persons resident in the United States of America. Munich Local Court issued the arrest warrants as applied for. An international search warrant was issued for these 13 people. However, after the United States of America had stated that it would not be meeting any request for extradition for reasons of national security, no such request was made.

85. In June 2008 Mr E.-M. filed an action with Berlin Administrative Court against the Federal Ministry of Justice aimed at obligating the Ministry to submit a request for extradition. The proceedings, which have now been handed over to Cologne Administrative Court which has jurisdiction in the matter, have not yet been concluded.

(c) M.Z.

86. The German citizen M. Z. had already been under observation by the German authorities in the run-up to the attacks of 11 September 2001 on account of his role in the violent Islamist scene in Hamburg. On a trip to Morocco he was arrested by local police in late 2001 and then taken to Syria. Germany received no official notice thereof. The Federal Foreign Office and the German embassies in Damascus and Rabat repeatedly approached the Moroccan and Syrian authorities in order to clarify Mr Z.'s whereabouts and to offer him consular support if necessary. However, since according to its ongoing practice Syria

does not recognise that Mr Z. has relinquished his Syrian nationality, consular access was not made possible until 2006, and then only to a limited degree.

87. In November 2002 Mr Z. was questioned in Damascus by members of the Federal Intelligence Service, the Federal Office for the Protection of the Constitution and the Federal Criminal Police Office. The Federal Government commented on this case within the context of its reports to the Parliamentary Control Committee for the Intelligence Services (see chapter II, section A 2 (b) above).

88. In February 2007 Mr Z. was sentenced to death by a Syrian court, among other things for membership of the banned Muslim Brotherhood; the sentence was subsequently reduced to 12 years' imprisonment.

D. Bundeswehr, police and judiciary

1. Bundeswehr

(a) Cases of ill-treatment in training

89. The prerequisites for Bundeswehr missions abroad are that the assignment is appropriate to the soldiers' qualifications and that soldiers have already undergone comprehensive training at home to prepare them for the special challenges they will face during the mission. Public interest was aroused by incidents in a basic training unit in Coesfeld in which soldiers were allegedly subjected to degrading treatment during their training, especially in connection with the re-enactment of hostage situations and interrogations.

(i) The facts

90. Once every quarter the basic training unit of a Bundeswehr battalion stationed in Coesfeld carried out general basic training for the battalion itself and for other troop units. In the second and third quarters of 2004, 30 trainers in the basic training unit on four occasions "ambushed" recruits during combat marches, tied their hands behind their backs using cable ties, blindfolded them and then took them to another location in vehicles. There they were "questioned as hostages". Some were physically assaulted. For example, individual recruits were given electric shocks using field telephones. Some also suffered cuts and bruises while being transported. The recruits were supposedly able to break off the exercise at any time using a code word, although only few availed themselves of this opportunity.

91. The practical training "Hostage situation" and "Conduct in Captivity as a Hostage" was and is not part of general basic training. Nor is it the subject-matter of instructions regarding troop training or other written training commands in the unit. It should only have been carried out as part of mission-related additional training. Only then are relevant specialists, for example troop psychologists or medical personnel, present. Army Command had explicitly pointed this out to the subordinate unit in orders issued on 26 February 2004 and on 12 April 2004.

92. Details of the incidents in Coesfeld emerged because one of the recruits concerned was later deployed as staff officer with a legal advisor to the former Army Combat Support Command and asked the legal advisor whether this type of training was lawful. The legal advisor thereupon immediately instituted disciplinary investigations. After the initial suspicion was corroborated, the Federal Ministry of Defence was informed on 22 October 2004, the Chairman of the Defence Committee of the German Bundestag on 12 November 2004. The Defence Committee thereupon began looking into the incidents in Coesfeld on 24 November 2004.

(ii) Criminal and disciplinary consequences

93. On 1 June 2005 Münster Public Prosecution Office preferred charges against one officer and 17 non-commissioned officers for ill-treatment of subordinates in particular.

94. After Münster Regional Court had first admitted the charges only for individual accused persons, Hamm Higher Regional Court fully opened the main proceedings against all the accused after the public prosecution office had filed a complaint. In 2007 judgements were handed down against five of the original 18 accused, including one prison sentence, two fines and two acquittals. In four cases Münster Public Prosecution Office filed an appeal on points of law to the disadvantage of the accused; in three cases the accused themselves did so. Two cases were terminated in 2007 after monetary conditions were imposed. One case was severed on account of the accused falling ill. Of the remaining 10 accused, five were sentenced to prison by judgement of Münster Regional Court of 12 March 2008, among other things for ill-treatment and degrading treatment of subordinates (sections 30, 31 of the Military Penal Code), of which four sentences were imprisonment for more than one year and one sentence was imprisonment for 10 months. The prison sentences were suspended on probation. One accused was sentenced to pay a fine of 7,500 euros; four of the accused were acquitted. Münster Public Prosecution Office filed an appeal on points of law to the disadvantage of three of the accused who were acquitted.

95. Based on the appeals on points of law lodged by Münster Public Prosecution Office, the Federal Court of Justice reversed the judgements of Münster Regional Court of 27 August and 26 November 2007 against four accused by judgement of 14 January 2009 and remitted the cases for a new trial and decision to another chamber of the regional court responsible for criminal matters. In each case the facts established regarding the incident were upheld. On the other hand, the Federal Court of Justice rejected the accuseds' appeals on points of law as ill-founded; the sentence for dangerous physical assault in coincidence with ill-treatment (section 30 (1) of the Military Penal Code) and degrading treatment (section 31 (1) of the Military Penal Code) to imprisonment for one year and six months against one accused is thus final. Decisions in the remaining appeals on points of law against the judgement of 12 March 2008 are still pending.

96. Disciplinary investigations were immediately instituted by the responsible superiors. At the same time the soldiers concerned were first prohibited from continuing their service according to section 22 of the Legal Status of Military Personnel Act. In four cases in which judicial disciplinary proceedings were instituted the soldiers were temporarily suspended from service, in some cases with deductions made to their pay pursuant to section 126 of the Military Disciplinary Code. Once the judgements in the pending criminal proceedings will have become final, the judicial disciplinary proceedings can continue. So far, two temporary-career soldiers in their first four years of service were released from service without notice according to the Legal Status of Military Personnel Act. In two cases in which final sentences had already been passed, the soldiers lost their status as temporary-career soldiers by operation of the law on account of their one-year prison sentences. Another soldier lost his status as temporary-career soldier by operation of the law on account of his final sentencing to more than one year in prison for wilful commission of an act. The remaining three cases in which the criminal proceedings were terminated or concluded by final judgement have already been subjected to a disciplinary appraisal.

(iii) Further measures

97. In a letter dated 26 November 2004 the Chief of Staff, Bundeswehr expressed his concern about harassment and disregard for applicable provisions in training. He made it clear that he under no circumstances tolerates violations against the values enshrined in the Basic Law or against the basic principles of internal leadership (innere Führung).

98. The Defence Committee of the German Bundestag was informed at regular intervals about both the course of the investigations and the planned and implemented measures. The Federal Government closely followed the Coesfeld case, although no further key insights could be gained thereby.

(b) In-service training

99. In the meantime, participation in training courses at the Leadership Development and Civic Education Centre, among other things, has been made just as obligatory for commanders/commanding officers, company-level commanders and company sergeant majors and comparable service officers as has participation in the training course “Central Leadership Training for Deployment Abroad” for all military leaders in operational contingents from the level of senior non-commissioned officer upwards.

100. The concept passed in May 2005 by the Chief of Staff, Bundeswehr entitled “Pre-deployment Training for Conflict Prevention and Crisis Resolution” again contains the explicit reference to the fact that the fundamental rights to human dignity, to the inviolability and freedom of the individual and the principles of internal leadership must be adhered to at all times during pre-deployment training and that practical action training regarding “Conduct in Hostage Situations/Conduct in Captivity as a Hostage” may only be carried out at specified central training facilities. The concept was also quickly implemented by the joint chiefs of staff with administrative control and military organisational units, for example by redrafting the instructions regarding “Conduct in Hostage Situations /Conduct in Captivity as a Hostage” by the Chief of Staff, Army and the Chief of Staff, Central Medical Service by means of the instructions on the implementation of the “Pre-deployment Training for Conflict Prevention and Crisis Resolution” in the Central Bundeswehr Medical Service.

101. In addition, soldiers to be deployed abroad are routinely taught during their contingent training the applicable international and national regulations and instructions concerning the taking of persons into custody and the treatment of persons taken into custody. The concrete prerequisites are thereby based on the principles of international and constitutional law, which are given their final form in the rules of deployment and the pocket guide “Rules Regarding the Use of Military Force”.

102. Further to previous instructions and regulations governing assignments, the interpretative document regarding Bundeswehr duties when holding persons in custody outside of armed conflicts, which will likely be taken into force by the Federal Ministry of Defence shortly, describes basic principles — including legal bases — and minimum standards in regard to the procedure for taking persons into custody, as well as how to treat persons in custody/detention during Bundeswehr missions outside of armed conflicts. Compliance with the respective legal rules to protect against arbitrary and inhuman treatment is thus a matter of course for the members of the Bundeswehr. The interpretative document therefore takes appropriate account of the fundamental objective of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2. Police

(a) The O.J. case

(i) *The current stage of the proceedings*

103. Following a fire on 7 January 2005 in the detention area of what was then Dessau Police Station in which the asylum-seeker O. J. from Sierra Leone died, the public prosecution office concluded its investigations on 6 May 2005 by preferring public charges

against the two police officers on duty at the time. The accused S. was charged with causing the death of an injured person through the infliction of bodily injury as a public official in the discharge of his duties (sections 227 (1), 224 (1), no. 5, 340 (3) of the Criminal Code). The accused M. was charged with causing death through negligence by omission pursuant to sections 222, 13 of the Criminal Code.

104. Investigations by the regional court established that the severely drunk O. J., who had been causing a nuisance to passers-by, was arrested by a police patrol in Dessau, during which he had put up resistance. After his identity had been established at the police station and he had been examined by a doctor, he was physically restrained in a detention cell. A fire broke out in the cell, and O. J. died of the consequences of that fire. The police officers on duty were accused of not having reacted quickly enough to the smoke alarm.

105. In the interlocutory proceedings the regional court had first ordered and instituted further investigations before taking a decision on whether to open the main proceedings. After the regional court had refused to open the main proceedings against the accused M. in autumn 2006 and this decision was reversed by Naumburg Higher Regional Court following an immediate appeal by the public prosecution office, the trial began in March 2007. The judgement was handed down on 8 December 2008, on the 59th day of the trial. The 6th Criminal Division of Dessau-Roßlau Regional Court — sitting as a trial court — acquitted the accused S. contrary to the motions filed by the public prosecution office and the joint plaintiffs, and acquitted the accused M. in line with the concurring motions of the public prosecution office and the joint plaintiffs.

106. The public prosecution office had, for its part, moved to find the accused S. guilty of causing death through negligence by omission – contrary to the accusation set out in the charges. The prosecution felt that there was evidence to prove that S. had omitted to ensure that the detained Mr J. was rescued in good time, despite having the available means and opportunities. The charge of bodily injury resulting in death could not be upheld in the trial because of the lack of evidence to prove the necessary intent to cause bodily injury.

107. On the other hand, the joint plaintiffs had felt the charge of bodily injury in public office resulting in death to be proven and moved for a corresponding conviction. The accused M. was acquitted in accordance with concurring motions because no evidence had been provided that the accused had failed to notice a cigarette lighter in a side pocket in Mr J.'s trousers when searching him prior to putting him in the detention cell. The public prosecution office and the joint plaintiffs filed an appeal on points of law against the accused S.'s acquittal within the period stipulated. The accused M.'s acquittal is final.

(ii) *The course of the proceedings*

108. The court had initially timetabled six trial dates in these proceedings, which then for various reasons ultimately stretched over a total of 59 dates. For example, it was necessary, over and above the investigations conducted by the fire expert commissioned therewith in the investigation and interlocutory proceedings, to carry out further fire experiments, among other things, and to that end to replicate the detention cell in question at Dessau Police Station at the Saxony-Anhalt Fire Institute.

109. The testimonies of a number of witnesses who were of importance in the proceedings, in particular from those within the police, deviated from statements made in the investigation proceedings, which meant that — from the perspective of various parties to the proceedings — apart from the aforementioned witnesses a large number of other officers who were on duty in Dessau Police Station on 7 January 2005 also had to be heard in regard to what they had seen and in respect of the fire and over and above that too.

110. The statements made by some police officers are currently still being examined by the public prosecution office in regard to the making of false statements while not under

oath. Along with numerous media representatives from around the world, the trial was primarily attended by citizens of African origin and visitors from African countries, as well as observers from international organisations, for instance Amnesty International. In addition, members of the deceased's family travelled from Africa to be present at the beginning and at the end of the proceedings.

(iii) *Reactions from the competent Land interior administration*

111. This case occasioned the Land of Saxony-Anhalt to enact additional regulations regarding police custody. In addition, in a meeting held on 23 February 2005 the chiefs of police in Saxony-Anhalt were issued with special instructions to comply with these regulations when detaining persons in police custody; the regulations are supplementary to the Police Regulations on Custody which have been in force since 1995. In particular, the regulations stipulate that the detained person must be searched by two officers, and that they must enter the detention cell to carry out the search. In addition, where a doctor is called in to examine whether the potential detainee is fit to be detained, this is to be comprehensively documented.

112. A working group established by order of 14 February 2005 examined the structural condition of and technical equipment in all police custody cells. The working group also investigated the following issues and submitted a report on 14 September 2005:

- (a) Legal provisions regarding police custody;
- (b) Structural and administrative regulations regarding police custody in individual authorities and offices;
- (c) Need to make improvements.

113. By order of 28 February 2006 (published in the Ministerial Gazette for Saxony-Anhalt p. 137, 219), the Police Regulations on Custody which have been applicable since 1995 were amended to take into account the suggestions put forward by the aforementioned working group. The amended Police Regulations on Custody contain a summary of the additional regulations adopted subsequent to this case in the form of one administrative provision and contain comprehensive regulations on the measures to be taken by police officers when detaining persons with health problems, as well as a form used to establish whether a person is fit to be taken into custody.

114. The disciplinary proceedings instituted against the acquitted police officers are still stayed according to section 22 of the Disciplinary Act for Saxony-Anhalt. They will be continued once the criminal proceedings have been concluded by final judgement; these proceedings have not yet been completed on account of an appeal on points of law filed by the public prosecution office.

(b) **The Ö. case**

115. On the night of 16 February 2008 the police in Hagen were called to an incident in the city centre. Two police officers there found the 26-year-old A. Ö., who appeared disorientated and, despite the cold weather, was not completely clothed. When questioned, he claimed he felt he was being followed by a black man. On the journey to the police station, Ö. showed other strange behaviour. For instance, he attempted in vain to open the door of the police car while it was moving. After the police officers had arrived at the police station with Mr Ö., the officer in charge of the police station called for an ambulance on account of Mr Ö.'s disturbed mental state. Before the ambulance arrived, Mr Ö. suddenly jumped onto the desk in the police station and threatened those present. Once the ambulance arrived, several officers tried to calm the defiant Mr Ö. Several police officers finally managed to physically restrain Mr Ö. on the floor, as he was putting up massive

resistance. The paramedics who had been admitted to the police station fetched a stretcher. Mr Ö. was laid face down on the stretcher. He continued to struggle, so that straps attached to the stretcher were also applied. Finally, one paramedic called an emergency doctor, as Mr Ö. could not be calmed down. He continued to struggle even after the emergency doctor's siren could already be heard. Right before the emergency doctor reached the police station, Mr Ö. suddenly became calm. It took between one and two minutes to remove the straps used to physically restrain Mr Ö. The emergency doctor established that his vital functions had failed and for 20 minutes attempted to resuscitate Mr Ö., and finally, despite his critical condition, Mr Ö. was in a fit enough state to be taken to Hagen City General Hospital. On arrival, the doctors on duty there diagnosed a massive cerebral edema with a risk of herniation as well as, after drug screening, positive reactions to cocaine and polytoxycomania. Despite being treated in intensive care, Mr Ö. died on 5 March 2008 in Hagen City General Hospital.

116. Hagen Public Prosecution Office instituted investigation proceedings on account of bodily injury in public office against, among others, 11 police officers in this matter. The police investigations were transferred to Dortmund Police Headquarters to safeguard the neutrality of the investigating officers. The Public Prosecution Office terminated the investigation proceedings by order of 20 June 2008 pursuant to section 170 (2), first sentence, of the Code of Criminal Procedure, as the autopsy showed that death had clearly been caused by a drug-induced brain haemorrhage and excluded both a head injury and death caused by his positioning or by the physical restraint.

117. On 24 and 25 June 2008 and on 9 July 2008 lawyers representing the Ö. family appealed against the termination of the proceedings. By notifications of 16 October 2008, Hamm Public Prosecutor General rejected these appeals as ill-founded. By decision of 22 January 2009 the Higher Regional Court dismissed an application for a court decision as inadmissible.

118. After the criminal investigation proceedings had been terminated, Hagen Police Headquarters, being the superior authority, evaluated Hagen Public Prosecution Office's investigation files as part of a disciplinary evaluation of the conduct of the involved police officers. According to that evaluation, there are insufficient factual indications for any misconduct in office within the meaning of section 47 (1) of the Act on the Status of Civil Servants on the part of the involved police officers which could have provided the grounds for initiating disciplinary measures.

119. The Land ministries of the interior and of justice on 2 April, 11 June and 20 August 2008 reported on the incident to the Committee on Legal Affairs, and on 10 April 2008 to the Committee on Internal Affairs of the *Land* Parliament of North Rhine-Westphalia.

(c) Judicial statistics (police interference)

120. The crime statistics published by the Federal Criminal Police Office at federal level include criminal offences dealt with by the police, including attempts threatened with punishment. The statistics do not include regulatory offences, offences against the security of the state or traffic offences. Each individual public prosecution office keeps its own public prosecution office statistics, which are published annually by the Federal Statistical Office broken down according to the Federation and the individual Länder. They contain data regarding cases handled by the public prosecution offices and are disaggregated according to various features, for example form of institution of proceedings, form of termination or length of proceedings. Completion of investigation proceedings is on the one hand evaluated in relation to the proceedings and on the other in relation to persons for each accused person. Judicial business statistics for the criminal courts are kept by the individual courts of instances and published annually by the Federal Statistical Office broken down according to the Federation and the individual Länder. They contain data on the incidence

and completion of criminal and regulatory fine proceedings. The criminal prosecution statistics published by the Federal Statistical Office include all accused persons against whom final orders of summary punishment have been issued or against whom criminal proceedings have been concluded by final judgement or by order to dismiss the proceedings after the trial has been opened. These statistics do not include regulatory offences, decisions prior to the opening of the trial or decisions after the judgement has become final. The data for the criminal prosecution statistics are gathered by the Land statistical offices and aggregated into a federal result by the Federal Statistical Office.

121. In 2004 the public prosecution office statistics and the judicial business statistics were expanded to include in the catalogue of subject codes the subject area “proceedings against judicial employees, judges, notaries, other civil servants and lawyers on account of criminal offences linked to the exercise of their profession (excluding corruption offences)”; the relevant statistics are now collated.

122. Efforts to provide meaningful statistics regarding the problem of allegations of ill-treatment against office-holders included taking a first step in 2006 to include a new feature in the crime statistics, according to which the definition of the crime of bodily injury in public office (section 340 of the Criminal Code) must now also include a reference to the place of commission of the offence “official building/police” or “official building/prison”, which at least permits some conclusions to be drawn regarding possible offences by police officers or prison officers.

123. In order to further improve the data available, the Committee on Judicial Statistics of the Länder in April 2008 agreed to amend the Order Regarding the Gathering of Statistical Data by Public Prosecution Offices and Public Prosecutors at Local Courts (Public Prosecution Office Statistics).

124. Accordingly, from 1 January 2009 the following acts by police employees in the exercising of their duties are recorded as separate statistics:

- (a) Intentional homicide offences;
- (b) Use of violence and abandonment;
- (c) Coercion and misuse of public office.

125. This change should enable a considerable improvement to be made in the recording of relevant criminal offences by police employees and thus lead to more transparency in accordance with the rule of law.

(d) In-service training

126. The issue of the prohibition of torture is dealt with in seminars in preparation for and debriefing following foreign assignments, among other things, or in the training of multipliers in the field of intercultural skills as part of the topics of “Human rights” and “International law”. The in-service training courses teach police officers the necessary conviction and attitude in order to do justice to the role and responsibility of the police in a free, democratic state under the rule of law.

3. Judiciary

(a) Protection against attacks by fellow inmates

127. There have been isolated cases in German prisons in which prisoners have attacked fellow inmates. One incident in November 2006 in particular, in which a prisoner was murdered by fellow inmates, gave rise to a debate on safety in prison. The prison system falls within the jurisdiction of the Länder, which have since then taken further steps to

counter such risks. By way of example, details will be provided here of the especially active role North Rhine-Westphalia (NRW) plays in implementing measures to prevent violence among prisoners.

128. North Rhine-Westphalia is currently investing some 500 million euros in building measures to create a large number of new prison spaces and additional factory buildings. These measures will ease the pressure on prisons and provide prisoners with additional training and work opportunities.

129. The number of staff in the prison system has been considerably increased, with priority being given to youth prisons. A total of more than 500 additional jobs have been created.

130. The youth prisons employ qualified educationalists. These are specifically entrusted with the following tasks:

- (a) Organising and supporting leisure-time groups;
- (b) Offering learning and remedial groups to support school measures;
- (c) Intensive individual educational support for young prisoners with behavioural problems;
- (d) Finding sensible leisure-time activities for young inmates after their period of detention as part of follow-up measures;
- (e) Organising educationally oriented, broader-based leisure-time activities, especially at weekends.

131. The range of courses available to members of staff in youth prisons has been further expanded, in particular regarding the issue of the prevention of violence.

132. The following measures have been proved particularly effective in preventing violence among inmates:

- (a) The abolition of communal accommodation;
- (b) Documentation of the compatibility test before each inmate is placed in communal accommodation;
- (c) More spot checks in multiple-occupancy cells, especially at weekends;
- (d) Providing the supervisory body with information concerning all cases in which violence was used, regardless of the severity of the violence.

133. In order to implement the principle of single-occupancy (section 25 (1) of the NRW Youth Prison Act, which entered into force on 1 January 2008) only young inmates will now be housed in youth prisons.

134. The NRW Youth Prison Act contains key elements to help prevent violence in youth prisons:

- (a) Expansion of leisure-time and sports activities at weekends and during non-working time;
- (b) Extension of visiting opportunities;
- (c) Expansion of residential group prisons, taking account of the special educational needs of young inmates.

135. Guiding principles on violence prevention were drawn up on the basis of a study commissioned in early 2006 and conducted by the North Rhine-Westphalia Criminological Service. Their implementation is regularly addressed in order to ensure that those employed

in the prison service are still aware of this specific issue and to further increase that awareness.

136. The recommendations of the Committee on the Prevention of Violence in the Prison System in North Rhine-Westphalia, which was also set up, were evaluated and implemented where possible.

137. The post of an independent ombudsman has been established to provide a contact person for all those who have spent any amount of time in prison. The reports the ombudsman puts forward contain valuable insights on the organisation of prisons, also with a view to preventive measures to avoid violence among inmates.

(b) Investigation proceedings against police officers

138. In most Länder the larger public prosecution offices at any rate have special departments which investigate office-holders or even specifically police officers on suspicion of a criminal offence in public office. In addition, it is regularly ensured at organisational level that the investigations are carried out by police officers from other stations than the accused officer.

139. Special reference is here made to what has become standard practice in Hamburg. The police there have a special Internal Investigations Department which comprises more than 50 officers entrusted with investigating police matters and with corruption proceedings. The same rule applies to public prosecutors and police officers alike, namely that they are rotated after spending a certain amount of time in this function.

(c) In-service training

140. The in-service training of those employed in the prison service is the responsibility of the Länder. Here, too, North Rhine-Westphalia is a forerunner. Its current training programme already includes the key issues of protection against violence and de-escalation. The number of training hours spent on these issues during the one-year basic and specialist training were increased once more as from 1 July 2009. The Judicial Academy offers advanced training courses on dealing with prisoners with psychological problems and on de-escalation.

141. The prison officers training colleges of the other Länder also hold specialist conferences for the general prison service dealing with current issues and on handling difficult individuals (e.g., the mentally ill) as well as anti-aggression training courses.

III. Statement regarding the concluding observations

142. The Federal Government previously submitted a statement regarding the recommendations made by the Committee under paragraph 5 (a), (b), (e) and (f) in its first response to the Committee against Torture (CAT/C/CR/32/7/RESP/1), which was to be submitted within one year. Only those conclusions and recommendations to which a response has not yet been given will therefore be addressed in the following. Reference is here also made to the supplementary response by the Federal Republic of Germany to the Letter by the Rapporteur for follow-up on the conclusions and recommendations of the Committee against Torture (CAT/C/DEU/CO/3/Add.1).

A. Concluding observation contained in paragraph 4 (a)

143. The Committee expresses its concerns at the length of time taken to resolve criminal proceedings arising from allegations of ill-treatment of persons in custody of law

enforcement authorities, including in particular serious cases where death has resulted, such as that of Amir Ageed, who died in May 1999.

144. Statistics on the ill-treatment of persons taken into custody by the law enforcement authorities are currently not collated separately. The relevant statistics from the administration of justice, which are published by the Federal Statistical Office, do not differentiate between perpetrators or places of commission of an offence. Although it will be possible as from the reporting year 2009 to find out details about criminal offences by police officers, it will still not be possible to separately record criminal offences by judicial employees. Accordingly, no statements can be made regarding the length of proceedings in such cases. There are, however, no practical indications to suggest that proceedings regularly take too long, so that it can be assumed that they generally take as long as public prosecutorial investigations and judicial criminal proceedings.

145. The disciplinary proceedings in the Ageeb case were instituted immediately after the possible violation of official duties emerged and were stayed for the duration of the criminal proceedings. After receiving and examining the written grounds for the judgement, the disciplinary proceedings were promptly brought to a conclusion. The documents pertaining to the disciplinary proceedings have in the meantime been destroyed on the basis of statutory provisions.

B. Concluding observation contained in paragraph 4 (b)

146. The Committee expresses its concerns at some allegations that criminal charges have been brought, for punitive or dissuasive purposes, by law enforcement authorities against persons who have brought charges of ill-treatment against law enforcement authorities.

147. It is correct that in connection with criminal charges against police officers charges are also often brought by these police officers against the person filing charges against them. However, this is not done for punitive or dissuasive reasons. A distinction must be drawn between the notification of the facts of the case to the public prosecution office and, over and above that, criminal charges brought by police officers or their superiors.

148. Pursuant to section 163 of the Code of Criminal Procedure, the police authorities and police officers are obligated to investigate criminal offences and, at the same time, to inform the public prosecution office of their findings; the public prosecution office then takes the decision regarding the further course of the proceedings and is responsible for the legal assessment of the facts of the case. This is a result of the principle of mandatory prosecution under section 152 (2) of the Code of Criminal Procedure, which forces the public prosecution office to take action in regard to all punishable criminal offences unless the law provides otherwise. In principle police officers are therefore obligated to investigate incidents in which resistance is given to their own measures or they are attacked and to inform the public prosecution office of their findings, as the behaviour in question may possibly, among other things, fulfil the definition of resistance to law enforcement officers pursuant to section 113 of the Criminal Code. If the police authorities or officers do not report the matter to the public prosecution office, they may risk punishment for obstruction of criminal prosecution in public office.

149. A distinction must, however, be drawn to whether, in certain cases, the police officers in question have themselves become the injured party or their superiors explicitly file criminal charges on account of criminal offences against the police officer on duty which go beyond the definition of resistance to law enforcement officers. The following are possible options: punishability, among others, for intentional or negligent bodily injury pursuant to sections 223, 229 of the Criminal Code, as well as insult pursuant to section 185 of the Criminal Code. These are known as criminal offences prosecuted only on application

(Antragsdelikte). An insult is only prosecuted if the injured party files an application for criminal prosecution (section 194 of the Criminal Code). Pursuant to section 230 (1) of the Criminal Code, intentional or negligent bodily injury may also only be prosecuted upon complaint from the injured party, unless the law enforcement authority considers ex officio that this is necessary because of the special public interest in criminal prosecution. Pursuant to section 194 (3) and section 230 (3) of the Criminal Code, the complaint in the case of both insult and bodily injury may also be filed by the superior if the criminal offence was committed against a public official while discharging his or her duties. Based on an application for criminal prosecution the public prosecution office is therefore obligated to evaluate the facts of the case from the point of view of bodily injury or insult to the detriment of the police officer too and, insofar as it does not follow up the allegations and thus terminates the proceedings, to notify him or her of the reasons therefore, against which he or she may file a complaint. Sometimes, however, beyond merely giving notification of a punishable matter, police officers do not file an additional application for criminal prosecution for bodily injury or insult if this does not appear appropriate to them given that such incidents are an everyday occurrence and, being the injured party, they are thus not interested in criminal prosecution. On the other hand, it is their decision and their right — as is the case with every injured party of a criminal offence — to subsequently initiate a criminal complaint if they are themselves confronted with charges of ill-treatment or complaints and therefore wish to see the criminal offence committed against them prosecuted.

150. The background to criminal charges brought by police officers or their superiors in connection with resistance against law enforcement officers is therefore not to punish or dissuade persons who allege they were ill-treated by the officers. The police authorities and police officers are in any case obligated to inform the public prosecution office of the underlying facts of the case. The criminal complaint in the form of an application for criminal prosecution merely expresses the fact that the police officer concerned wishes to see criminal offences committed against him, for instance bodily injury or insults, prosecuted in the same way as any other injured party of a criminal offence would.

C. Concluding observation contained in paragraph 4 (c)

151. The Committee expresses its concerns at the fact that for numerous areas covered by the Convention, the State party was unable to supply statistics, or appropriately disaggregate those in its possession. During the current dialogue, this occurred with respect to, for example, public prosecutions, alleged cases of collusive allegations of ill-treatment, cases of counter-charges being brought by law enforcement authorities, and details as to offenders, victims and the factual elements of ill-treatment charges.

152. The police crime statistics published by the Federal Criminal Police Office at federal level include criminal offences dealt with by the police, including attempts threatened with punishment. They do not contain regulatory offences, offences against the security of the state or traffic offences. Parameters applied are “cases”, “suspects” and — in the case of certain criminal offences — “victims”. However, the police crime statistics do not currently differentiate between groups of perpetrators (e.g. police officers or teachers in the case of bodily injury in public office pursuant to section 340 of the Criminal Code).

153. However, the statistics recorded will shortly be extended on account of the implementation of the so-called new police crime statistics by submission of individual data sets (instead of the previously aggregated Land tables). The extent of the information will essentially not change, but will only be expanded to include what will then be a six-digit criminal offences code rather than the current four-digit code. It will be implemented as of 1 January 2009 at the latest.

154. The second step will then be to provide comprehensive additional catalogues in the new police crime statistics, including the specifics which are of interest here (bodily injury in public office, possibly also in combination with place of commission “police authority”).

D. Recommendations contained in paragraph 5 (c) and (g)

1. Recommendation contained in paragraph 5 (c)

155. The Committee recommends that the State party take such measures as are appropriately within its power with respect to the authorities of the Länder to ensure the adoption and general application of measures which have proven efficacious at the federal level in improving compliance with the Convention, such as the federal rules on forcible return by air.

156. The Federal Government provided the Länder with the Committee’s Recommendation 5c and asked them to comment. The Federal Government received responses from all the Länder. The Länder notified the Federal Government that they had received the “Rules on the Forced Removal of Foreign Nationals by Air”. The Länder generally and exclusively effect the forcible return of foreign nationals in cooperation with the Federal Police, so that the application of and compliance with the aforementioned Regulations is guaranteed. They have thus not enacted their own disciplinary provisions.

157. The applicability and the content of the aforementioned Regulations are regularly discussed in the “Working Group on Forced Removal”, a committee of the Länder which the Federation is also involved in and which is subordinate to the Standing Conference of the Interior Ministers of the Länder.

2. Recommendation contained in paragraph 5 (g)

158. The Committee recommends that the State party offer, as a routine practice, medical examinations both before all forced removals by air and, in the event that they fail, thereafter.

159. In the Federal Government’s opinion, the current regulation contained in the internal instructions of the Federal Police on the forced removal of foreign nationals by air largely complies with the Committee’s wishes. According to the regulation, the Federation expects the Land authority to carry out a renewed medical examination before handing over a person to be forcibly removed to the Federal Police in order to establish that the individual in question is fit to travel by air whenever there are actual indications to suggest that the person concerned has health problems or there are risks which could influence the success of the forced removal by air.

160. No need is currently seen to carry out a medical examination without differentiation prior to each forced removal by air in the case of unaccompanied forced removals, which constitute the overwhelming majority of cases.

161. Reference is made to the fact that deportation can fail for various reasons. For example, the authorities in the country of origin may refuse to let their own national enter the country. For that reason carrying out medical examinations after each failed attempt to forcibly remove a foreign national is not deemed necessary.

162. The current practice of carrying out a medical examination if the person to be forcibly removed shows signs of injury, of being in pain, or claims to be injured or in pain or there are other indications which necessitate medical treatment therefore seems appropriate, since ultimately a doctor is involved in all cases in which there are signs of possible health problems.

E. Recommendation contained in paragraph 5 (d)

163. The Committee recommends that the State party comprehensively group together its criminal provisions relating to torture and other cruel, inhuman or degrading treatment or punishment.

164. The Federal Government is aware of the fact that such a summary could increase the visibility of the special significance of the prohibition of torture and could have advantages in regard to the statistical recording of violations. However, the structure of German criminal law has developed over the course of many decades. Summarising the criminal provisions relating to torture and other cruel, inhuman or degrading treatment or punishment would considerably interfere with this structure, affecting numerous definitions of crimes in different areas, including those outside the scope of the Criminal Code. Moreover, the goal of the German legislature was to create a largely independent body of regulations of international criminal law which reflects the development of international humanitarian law and international criminal law. The Federal Government currently sees no scope for a comprehensive reform, but will take account of the Committee's recommendations in the context of future deliberations.

F. Recommendation contained in paragraph 5 (h)

165. The Committee recommends that the State party consider making more active use of the Convention's extradition mechanisms with respect to German nationals who are alleged to have engaged, or to be complicit, in acts of torture abroad or in which German nationals are alleged to be victims.

166. The Committee's concluding observations have been provided to the German judicial authorities. The competent law enforcement authorities were also informed of the fact that in such cases they need to make active use of extradition mechanisms. Apart from the case of E. M. outlined in chapter II, section C, 4 (b) above, the Federal Government is, however, not aware of any cases in which the recommendation would have been of relevance.

G. Recommendation contained in paragraph 5 (i)

167. The Committee recommends that the State party make all efforts to ratify the Optional Protocol to the Convention.

168. The Federal Government has complied with this recommendation, as detailed in chapter II, section A 1 above.
