UNITED NATIONS

CCP

International covenant on civil and political rights

Distr.
GENERAL

CCPR/C/84/Add.5
22 February 1996

ENGLISH ONLY

HUMAN RIGHTS COMMITTEE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Fourth periodic reports of States parties due in 1993

Addendum

GERMANY 1/

[12 September 1995]

1/ For the second periodic report submitted by the Government of the Federal Republic of Germany, see CCPR/C/28/Add.6 and Corr.1; for its consideration by the Committee, see CCPR/C/SR.663 to SR.667 and Official Records of the General Assembly, Forty-first session, Supplement No. 40, (A/41/40), paras. 261-314. For the third periodic report submitted by the Federal Republic of Germany, see CCPR/C/52/Add.3; for its consideration by the Committee, see CCPR/C/SR.963 to SR.965 and Official Records of the General Assembly, Forty-fifth session, Supplement NO. 40, (A/45/40), paras. 321-354.

CONTENTS

		Paragraphs	Page
I.	INTRODUCTION	1 - 11	3
II.	DEVELOPMENTS CONCERNING THE INDIVIDUAL RIGHTS GUARANTEED BY THE COVENANT	12 - 246	5
	Article 1	12 - 13	5
	Article 2	14 - 31	6
	Article 3	32 - 33	9
	Article 4	34	10
	Article 5	35	10
	Article 6	36 - 39	10
	Article 7	40 - 43	11
	Article 8	44 - 47	12
	Article 9	48 - 56	13
	Article 10	57 - 58	15
	Article 12	59 - 62	16
	Article 13	63 - 64	17
	Article 14	65 - 82	17
	Article 15	83 - 87	21
	Article 16	88 - 93	23
	Article 17	94 - 104	25
	Article 18	105 - 107	27
	Article 19	108 - 129	28
	Article 20	130 - 133	32
	Article 21	134 - 144	34
	Article 22	145 - 151	37
	Article 23	152 - 159	38
	Article 24	160 - 161	40
	Article 25	162 - 177	41
	Article 26	178 - 235	45
	Article 27	236 - 246	58

I. INTRODUCTION

1. The German Government is submitting its fourth periodic report under article 40 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant") to the Human Rights Committee. The general information on the legal and constitutional system and on the protection of human rights in the Federal Republic of Germany, which formed the introductory part of previous reports, will, in future, in accordance with more recent practice, be submitted separately as a basic report.

2. Since the third report (CCPR/C/52/Add.3) was submitted on 1 September 1988 the political situation has changed fundamentally, especially in Germany which, during the period under review, regained its national unity by peaceful means.

3. The division of Germany, which lasted more than 40 years, was one of the worst consequences of the East-West conflict, which had dominated international relations since the end of the Second World War. In 1949 two German States emerged on German soil: the Federal Republic of Germany, whose Constitution incorporated the Western moral concepts of a free, democratic, parliamentary system of government geared to the protection of human rights, and, in the area of the former Soviet-occupied zone, the German Democratic Republic (GDR), which established a Marxist-Leninist dictatorship led by the Socialist Unity Party (SED). The people were denied fundamental rights and liberties, which became palpably manifest when the uprising of people and workers was put down in 1953, and when the Wall cutting right through the centre of Germany and Berlin was erected in 1961.

4. When representatives of the Federal Republic of Germany presented the third periodic report to the Human Right Committee in March 1990 there were already signs that Germany would be united. In the summer of 1989 there had been a mass exodus of people from the GDR to the Federal Republic's missions in East Berlin, Budapest, Prague and Warsaw. In 1989 alone, 343,854 East Germans completed the procedures for admission to the Federal Republic. As from October 1989 in particular, hundreds of thousands of people gathered on repeated occasions in East Germany's towns and cities to demand democracy ("We are the people!") and German unity ("We are one people!"). Shortly after the celebrations to mark the GDR's fortieth anniversary in October 1989, Erich Honecker, the long-standing SED chief and Chairman of the GDR Council of State, resigned, and on 9 November of that year the Berlin Wall and other border-crossing points were opened. On 18 March 1990 the first free parliamentary elections for the Volkskammer (the East German Parliament) were held. Those parties who in the election campaign called for early German unity won over 85 per cent of the votes.

5. German unity had been enshrined in the Basic Law of the Federal Republic of Germany since 1949 as the Federal Republic's most important political objective. The policy of every one of its governments was geared to that goal. The foundations for the achievement of this goal had been laid by Konrad Adenauer, the Federal Republic's first Chancellor, by integrating the Federal Republic of Germany into the Western community based on common moral values as a reliable partner serving the cause of international peace. The Federal Government led by Chancellor Helmut Kohl responded to the wishes of

the people in the former GDR by actively pursuing German unity and by ensuring, in particular, that the unification process took place within a broader European framework.

6. After the Volkskammer elections the Government of the Federal Republic of Germany entered into negotiations with the freely elected Government of the GDR with the aim of finalizing the details for the unification of the two States. The Basic Law of the Federal Republic of Germany as it then stood presented two possible ways of doing this. Under article 146 a new constitution for the whole of Germany could have been adopted by a free decision of the German people. Article 23 offered the alternative for the Basic Law to be put into force "in other parts of Germany on their accession". Preference was given to accession under article 23 of the Basic Law. This solution could be realized in the least amount of time and, in addition, had the advantage that the guarantees of freedom contained in the Basic Law, which at the same time ensure the fulfilment of the obligations under the Covenant, could have their validity extended to cover the whole of Germany without delay.

7. A decisive step on the way to German unity was the monetary, economic and social union, which entered into force on 1 July 1990. The Volkskammer in East Berlin declared on 23 August 1990 the accession of the GDR to the area of application of the Federal Republic of Germany's Basic Law as from 3 October 1990 in the expectation that consultations on the Unification Treaty would be completed by that time. This broad-ranging Unification Treaty of 31 August 1990 stipulated the modalities by which unification of the two States was to take place. The international seal of approval on the unification process was applied by the Treaty of 12 September 1990 concluded between the two German States and France, the Soviet Union, the United Kingdom and the United States on the Final Settlement with respect to Germany, known as the "Two plus Four Treaty". Under article 3 of the Unification Treaty all provisions of the Basic Law of the Federal Republic of Germany of relevance to the implementation of the Covenant came into force on 3 October 1990 "in the Länder of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia and in that part of Land Berlin where it has not been valid to date". These Länder, which had been abolished in 1952 when the territory of the GDR was divided into administrative districts, were re-established with effect from 3 October 1990 by the Länder Establishment Act of the GDR of 22 July 1990.

8. Through German unity and the process of restoring German unity the Germans in the former GDR have acquired extensive rights and liberties. They live according to the same constitutional and legal order as their West German compatriots.

9. None the less, it cannot be ignored that the GDR's legacy was a massive, continuing burden on the people. The long years of SED totalitarian rule left deep marks in all spheres of public as well as private life. Many of the wounds will only heal slowly, and the task of overcoming the terrible consequences of the watchdog state, political oppression, economic mismanagement and ecological exploitation will require the combined efforts of

the German people for a long time to come. This undertaking has been made more difficult by the fact that the markets of the former GDR economy in the other former communist bloc countries no longer exist.

10. The German Government has made these problems the focal point of its policy. Considerable progress has been made in replacing the socialist system and its abortive command economy with a democratic, social State based on the rule of law and operating a market economy, in spite of the serious obstacles to investment stemming from the GDR's past (environmental damage, contaminated sites, housing shortage, infrastructure deficiencies, etc.). It has been possible to resolve social problems mainly by directly extending the time-tested social net of the Federal Republic to the new Länder.

11. This fourth periodic report is not only submitted in order to fulfil the obligations of international law under article 40 of the Covenant but is, as already indicated in the third report of the Federal Republic of Germany (CCPR/C/52/Add.3, para. 25), considered by the German Government to be an expression of its commitment to the protection of human rights "as the basis of every community, of peace and of justice in the world" (Art.1 (2) of the Basic Law). It is for this reason that Germany also recognizes the principle of having its record on human rights controlled by international institutions. This is shown not only by the fact that Germany is a State party to the European Convention on Human Rights and is therefore subject to control by the organs in Strasbourg established under the Convention. It is also shown by the fact that during the period covered by the report the national requirements for the ratification of the Optional Protocol to the Covenant have been fulfilled. Ratification was effected on 25 August 1993 and the Optional Protocol thus came into force in Germany on 25 November 1993. This means that the Committee may in future examine communications by individuals claiming that German authorities violated rights which are guaranteed under the Covenant.

II. DEVELOPMENTS CONCERNING THE INDIVIDUAL RIGHTS GUARANTEED BY THE COVENANT

Article 1

12. In earlier reports by the Federal Republic of Germany, particularly and most recently in the third periodic report (CCPR/C/52/Add.3, paras. 47-52), the right of peoples to self-determination and the related problems of implementing article 1 of the Covenant were accorded particular importance. The division imposed on the German people and the immeasurable human hardship and problems encountered by them during over 40 years of division justified this decision. The political situation, dominated by the "cold war" and the global East-West confrontation, had long prevented the German people from freely determining their own political status.

13. A people's right to self-determination extends beyond the right to decide freely on its political status. An integral aspect of "internal self-determination" is that a people is in a position to freely pursue its own economic, social and cultural development. The free democratic basic order established by the Basic Law of the Federal Republic of Germany serves this

aim. The right of the individual to exercise political influence on this development is embodied above all in the civil rights guaranteed by article 25 of the Covenant. Reference is made to the remarks on this article.

Article 2

14. Information was provided in the initial and second periodic reports (CCPR/C/1/Add.18, p. 7 and CCPR/C/28/Add. 6, paras. 17-20) concerning article 2 of the Covenant. The German Government refers to this information.

Validity of the Covenant for the whole of Germany

15. No changes arose as a result of German unification with regard to the validity in Germany of the Covenant as an instrument of international law since the Covenant had entered into force on 23 March 1976 for both the Federal Republic of Germany and the GDR. The Covenant therefore already applied to the whole of Germany since both German States had ratified it. The degree to which the Covenant had been implemented in the two States was, however, extremely different. This can be seen particularly clearly from the example of the right guaranteed by the Covenant to everyone to be "free to leave any country, including his own" (Art. 12 (2)). This right had been implemented without any problem in the Federal Republic of Germany (territory as at 2 October 1990) having open borders within an increasingly united Europe. In the GDR, however, the authorities had prevented its people from exercising this right by using border defences and border protection measures, the like of which were not to be found anywhere else in Central Europe.

16. Legal unity, which was established by the Unification Treaty, constitutes a major precondition for the implementation of the Covenant in Germany as a whole to be harmonized at a level which has long existed in western Germany. In the protection of the rights guaranteed by the Covenant, the emphasis lies as always on the parallel guarantees as contained in domestic law. Basic and human rights are afforded specific protection in domestic law in that the Basic Law makes them binding as directly applicable law on the legislature, the executive and the judiciary. Effective court controls ensure that this commitment is honoured. When all other legal remedies have been exhausted any person who believes that his or her basic rights have been violated by public authority can file a complaint of unconstitutionality with the Federal Constitutional Court. Occasionally the courts will directly apply the provisions of the Covenant but in practice this is of minor importance because of the much stronger enforcement mechanisms provided by national basic rights.

Reorganization of the judicial system in the new Länder

17. The particular national system of protecting basic rights, the application of which was extended to the new Länder under the Unification Treaty, was not, however, sufficient to raise the level of implementation of the Covenant in the former GDR to the Western standard. In order for this to be achieved, the administration of justice in the new Länder had to be brought into line with that in the old Länder. The Covenant, too, as article 2 (3) shows, attaches a great deal of importance to the provision of legal protection in domestic law against violation of human rights. Thus

unification presented the serious problem of having to reorganize the administration of justice in the new Länder, a problem which could not be solved with one stroke of the legislator's pen.

18. Conditions therefore in the GDR were not favourable. The very access to the legal professions of judge or public prosecutor had been politically controlled. According to Marxist teachings, law was an instrument of class struggle. Both according to law and in practice, judges were subject to pressure or even direct instructions by political leaders. Administration of justice was structured in a way completely different from the West German system; for many disputes it did not provide any legal remedy. No jurisdiction of a constitutional court was available, for example; legal protection under public law against measures taken by the authorities was not introduced before 1988 and then only to a very limited extent. Many aspects of what is referred to as non-contentious litigation - cases involving the land register, registry matters, matters concerning wills and inheritance, cases of guardianship and trusteeship - were dealt with by other authorities.

19. In the third periodic report (CCPR/C/52/Add.3, para. 22) the figures for the old Länder of the Federal Republic of Germany were given as around 17,000 judges and over 3,500 public prosecutors. Since the population of the new Länder was around a quarter of that in the old Länder at the time of unification, the GDR should really have had 4,000 judges in office. In fact, according to the GDR Statistical Office's 1989 Yearbook there were only around 1,500. On the other hand there were around 1,200 public prosecutors which, using the same terms of reference, was proportionately a great deal more than in western Germany. There is a particularly marked discrepancy in the number of practising lawyers. Whilst in the third periodic report the figure given for western Germany was "over 40,000 lawyers" the number of practising lawyers in the GDR in 1989 was around 600, roughly 6 per cent of the pro capita ratio of lawyers in the old Länder. As at 1 January 1993, roughly 67,000 lawyers were practising in Germany, approximately 4,000 of them in the new Länder.

20. The organizational structure of the judiciary in the GDR was vastly different from that in western Germany. Whilst in West Germany there are five independent branches of jurisdiction - ordinary jurisdiction (the local courts, the regional courts, the higher regional courts and the Federal Court of Justice) and administrative, finance, labour and social jurisdiction - in the GDR there was only one unified judicial authority to deal with all matters involving the administration of justice. This was divided into district courts, local courts and the Supreme Court (which was dissolved on accession).

21. Since the aim was to ensure that the wheels of justice kept turning, it proved impossible to immediately introduce the court structure of the old Länder in the new Länder. The Unification Treaty therefore transferred West German procedural law to a large extent, but provided for a transitional period during which the district and local courts would retain responsibility for ordinary jurisdiction in the new Länder. They would also deal with matters of administrative, finance, labour and social jurisdiction until independent jurisdiction would be established.

22. Under the Unification Treaty, the courts and public prosecutor's offices provided for in the (West German) Judicature Act were to be established as soon as the personnel and material conditions were fulfilled having regard to the requirements of a regular administration of justice. Similar prerequisites applied for administrative, finance, labour and social courts which were to be created by the new Länder as soon as possible. The new Länder have meanwhile completed this task.

23. Many of the initial difficulties have since been overcome, thanks partly to transfer payments from West to East, which were used in establishing the administration of justice, but mainly to the efforts of judges, public prosecutors, judicial officers and others in the judicial service of the old Länder at the federal and Land levels who were sent to the new Länder to help establish the administration of justice there. Thus it was possible to combat to some extent the staff shortage which had resulted both from the restructuring of the courts and from the fact that, of the judges and public prosecutors of the former GDR, only about half of them were kept on in their former capacity and that further training was, and still is, necessary for these people. Further details on persons being kept on as judges and public prosecutors can be found in the section of this report which refers to article 25 of the Covenant.

24. According to 1 January 1995 figures, the number of judges in the new Länder now stands at 3,314 and the number of public prosecutors at 1,094. Of these, 603 of the judges and 365 of the public prosecutors were formerly in the service of the GDR. Thirty-three judges and 10 public prosecutors from former East Berlin have been taken on by the judicial service in Land Berlin.

25. Despite the successes achieved in establishing an administration of justice compatible with the rule of law, there is still a shortage of judges and especially of judicial officers, bailiffs and clerks in the new Länder. In addition to the everyday work to be done, roughly 70,000 rehabilitation petitions are still pending, submitted by victims of criminal proceedings in the GDR which contravened the rule of law. Another difficult task will be criminal proceedings against those who were responsible for injustices under the former regime. The Federal Republic of Germany will continue to take legislative and other measures to solve these problems.

Organizing the police force in the new Länder

26. Furthermore, special importance attaches to efforts to create in the new Länder an efficient police force based on democratic principles and able to protect people's rights. The new Länder are receiving considerable support from the old Länder in this process.

27. However, in personnel terms, the development in the new Länder of an efficient police force oriented along democratic lines is proving to be a considerably more difficult and lengthy process than the provision of technical resources.

28. Considerable efforts are being made both by the partner Länder, that is to say by western Länder which each support an eastern Land, and by the Federation to fill top positions in the new police organization on either a temporary or a permanent basis with experienced officials from the western Länder.

29. Where members of the former GDR People's Police have been kept on in their positions they were first subjected to extensive screening to determine their suitability for retraining for service in a democratically organized police force. This time-consuming process of individual screening for every single future police officer has almost been completed.

30. The organizational structures of the police services have now largely been established. Almost all members of the former People's Police have been awarded public servant status.

31. The density of the police force, that is to say the ratio of the number of citizens to the number of police officers, in the new Länder does not significantly differ from that in the rest of the Federal Republic. However, the number of officers available for police operations in the new Länder is still too low because a high percentage of staff are undergoing retraining and further training measures. Further support is therefore required from the police forces of the Federal Border Police and by police units from the Western Länder, especially in large-scale operations, and this is regularly provided upon demand.

Article 3

32. Under article 3 (2) of the Basic Law, which since 3 October 1990 also applies to the territory of the former GDR, men and women have equal rights. Experience has shown that formal guarantees are not sufficient to ensure equality in practice. The German Bundestag, with the consent of the Bundesrat, therefore added the following sentence to article 3 (2) of the Basic Law: "The state shall seek to ensure equal treatment of men and women and to remove existing disadvantages." This clause became effective on 15 November 15 1994. Furthermore, article 31 (1) of the Unification Treaty expressly states that "it shall be the task of the all-German legislator to develop further the legislation on equal rights for men and women." Equality before the law does not, as already outlined in the second periodic report of the Federal Republic of Germany, eliminate discrimination against women in education, at work and in various areas of public life. Not least in order to meet its obligation under article 31 (1) of the Unification Treaty, the Federal Government introduced a second equal treatment bill in April 1993 which has meanwhile been enacted by Parliament and became effective on 1 September 1994. Its main objectives are to advance the interests of women in the federal administration, especially with a view to enabling them to reconcile their jobs with family responsibilities, and to give staff councils a bigger say in these matters. Women's situation on the labour market is also improved through a modification of the EC adaptation law ensuring that the ban on discrimination is more effectively applied. Moreover, other laws protect public service and private sector employees from sexual harassment at work.

Another important step towards equal treatment is the Composition of Councils Act, which is part and parcel of the Second Equal Treatment Act. The purpose of this law is to increase the proportion of women in federal governing or representative bodies.

33. The efforts made in the Federal Republic of Germany (territory as at 2 October 1990) to expand and develop the equality of the sexes were presented in the introductory report submitted by the Federal Republic of Germany under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/5/Add.59) along with a supplementary report. The next periodic report under article 18 of the Convention will provide information on current developments in this area and is due to be submitted in 1995.

Article 4

34. The legal situation with regard to article 4 as described in the initial and second periodic reports (CCPR/C/1/Add.18, pp. 7-8; CCPR/C/28/Add.6, para. 35) has applied to the whole of Germany since 3 October 1990.

Article 5

35. The details relating to article 5 presented in the initial and second periodic reports (CCPR/C/1/Add.18, p. 8; CCPR/C/28/Add.6, paras. 36-37) have applied to the whole of Germany since 3 October 1990.

Article 6

36. In the Federal Republic of Germany capital punishment was abolished in 1949 by article 102 of the Basic Law. With the accession of the GDR to the Federal Republic of Germany on 3 October 1990 this regulation also came into force in the territory of the former GDR. Capital punishment had, however, already been abolished in the GDR in 1987.

37. It is a matter of particular concern to the Federal Republic of Germany to work towards the worldwide abolition of capital punishment. As already stated in the third periodic report (CCPR/C/52/Add.3, para. 56), the Federal Republic of Germany submitted to the Third Committee of the United Nations General Assembly in 1980 a draft of a second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty and in doing so launched an initiative to achieve this end. The Second Optional Protocol was adopted by the United Nations General Assembly during the period covered by the present report and was opened for signature on 15 December 1989. It entered into force for Germany on 18 December 1992.

38. The Agreement to amend the Supplementary Agreement to the North Atlantic Treaty Organization (NATO) Status of Forces Agreement, which was signed on 18 March 1993, also makes a contribution to the suppression of the death penalty. The NATO Status of Forces Agreement prohibits military authorities to carry out a death penalty in a State in the territory of which forces of such authorities are stationed if that State has abolished such penalty. Furthermore, under the Supplementary Agreement, as amended, which applies

particularly to the stationing of forces in the Federal Republic of Germany, no criminal prosecution which might result in a death sentence shall be undertaken in Germany after the Agreement enters into force.

39. Furthermore, the German Government endorses the remarks made by the Committee in its general comments with regard to article 6 that the meaning of the "right to life" extends beyond the problem of the death penalty and the protection of life by penal provisions (such as those relating to murder and manslaughter). The free democratic order established in the Federal Republic of Germany by the Basic Law places human dignity and the inviolability and inalienability of human rights at the heart of law and politics in the State. It is self-evident, therefore, that "the right to life" concerns many areas of political and social life. It plays a role not only in the fight against infant mortality - the example cited by the Committee - but also in many other areas, e.g. foreign policy, environmental policy, health policy, crime policy and State efforts towards accident prevention.

Article 7

National situation

40. With the extension of the Basic Law to the whole of Germany, article 104 (1), second sentence, banning any and all ill-treatment of detained persons without exception now applies also in the territory of the former GDR. Thus, one of the vital prerequisites has been achieved for the page to be turned on a dark chapter of history in which prisoners, particularly political prisoners, were subjected to inhuman conditions in GDR prisons, especially in the early years of the SED regime. Numerous other legal regulations relating to the treatment of prisoners and aimed at preventing any kind of ill-treatment also entered into force in the territory of the former GDR on 3 October 1990, e.g. the Prison Administration Act. The retraining of prison officers who have been kept on in their jobs is meant to ensure that West German law will be applied in the correct spirit.

International activities

41. During the period covered by the report, the German Government also undertook efforts internationally to strengthen international preventive measures against torture and inhuman treatment, by ratifying both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The first-named Convention entered into force for the whole of Germany on 31 October 1990, the second had already come into force for the then Federal Republic on 1 June 1990 and on the basis of the Unification Treaty was extended to the former GDR on 3 October 1990. During its first visit to Germany (in December 1991), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which was established under the European Convention, not only visited prisons in the old Länder (Berlin-Tegel, Berlin-Moabit, Straubing in Bavaria) but also the former GDR Waldheim prison located in Saxony. Its comments and suggestions for improvements were contained in a comprehensive report.

42. Incidentally, the German Government submitted its initial report under article 19 of the Convention against Torture in March 1992 (CAT/C/12/Add.1). The German Government refers to that report, which was examined by the Committee against Torture in November 1992.

Terrorist offenders

43. In earlier periodic reports particular attention has always been paid to the accusation that terrorist offenders imprisoned in Germany after having been convicted by the courts were exposed to inhuman conditions of imprisonment (CCPR/C/28/Add.6, paras. 53-57; CCPR/C/52/Add.3, paras. 41-46). The German Government does not believe that there is any need at present to deal with this point in any further depth. The cases in question are all isolated cases - around 25 in all. Those concerned have had the opportunity at all times to have the validity of their complaints clarified in court and internationally, on the basis of the European Convention on Human Rights. They have not done so and instead have taken their concerns to international relief organizations such as Amnesty International which in its annual reports, and thus also during the period covered by this report, several times criticized the allegedly inhuman conditions under which terrorist prisoners are being held in Germany. The German Government has been in contact with Amnesty International about this matter, drawing on the statements obtained from the Länder concerned. In response to criticism that the alleged facts did not correspond to the truth, Amnesty International explained that they passed on information from the persons concerned and expressed their concern about the observance of human rights, without being in a position, as they said, to vouch for the accuracy of the information they had received. Even P. Kooijmans, the Special Rapporteur appointed by the United Nations Commission on Human Rights to investigate such accusations, who came to Bonn to obtain information on the conditions of the prisoners concerned, found no grounds for criticism; he reported on this matter (see E/CN.4/1990/17 of 18 December 1989, paras. 14-15).

Article 8

44. The national guarantees for ensuring that the prohibitions contained in article 8 are observed and the additional international instruments adopted by the Federal Republic of Germany for that purpose have already been dealt with extensively in the initial report (CCPR/C/1/Add.8, pp. 9-10) and supplementary details added in the second periodic report (CCPR/C/28/Add.6, paras. 58-59). The regulations detailed in these reports have applied to the whole of Germany since 3 October 1990.

45. During the period covered by this report a large number of prisoners serving sentences in German prisons have claimed that the payment they receive for work they perform as prisoners is inadequate and that they are being exploited like slaves.

46. In this context the following should be noted: payment for prisoners' work is calculated in accordance with the Prison Administration Act (section 200 (1)) as 5 per cent of the average payment received by all those covered by the salaried employees' pension insurance and the wage earners' pension insurance in the year preceding the last calendar year. By means of

this arrangement, the payment prisoners receive for their work rises in line with the payment received by all those insured by the national pension insurance schemes. Thus, the daily wage paid to prisoners rose from DM 6.86 in 1986 to DM 7.78 in 1990, an increase of 13.4 per cent in five years. This increase is greater than the increase in the cost of living over the same period, which was only 7.1 per cent. Quite apart from this, a political discussion is taking place at present on the raising of pay levels.

47. Under article 8 (3) (c) (i) of the Covenant, "forced or compulsory labour" within the meaning of paragraph 3 does not include work normally required of persons who are under detention in consequence of a lawful order of a court. Moreover, the Convention does not stipulate that any payment whatsoever be made for such work.

Article 9

National legal situation

48. The national laws which are the framework within which the requirements of article 9 are fulfilled and which applied in the territory of the Federal Republic of Germany as it was on 2 October 1990 have been reported on in detail and several times over, in the initial (CCPR/C/1/Add.18, pp. 10-12), second periodic (CCPR/C/28/Add.6, paras. 60-65) and third periodic reports (CCPR/C/52/Add.3, paras. 69-74). Most of the laws and regulations referred to in these reports are part of federal law. Under article 8 of the Unification Treaty of 3 October 1990, these regulations have now entered into force in the territory of the former GDR. Thus, the legal requirements have been met to establish West German custodial practice, which satisfies article 9 of the Covenant, in the territory of the former GDR as well.

Wrongful judgements in the former GDR

49. Developments have taken place which are of particular importance with respect to the right to compensation for unlawful arrest or detention established by article 9 (5) of the Covenant. Article 17 of the Unification Treaty provided as follows:

> "The Contracting Parties reaffirm their intention to create without delay a legal foundation permitting the rehabilitation of all persons who have been victims of a politically motivated punitive measure or any court decision contrary to the rule of law or constitutional principles. The rehabilitation of these victims of the iniquitous SED regime shall be accompanied by appropriate arrangements for compensation."

50. The First Act on the Resolution of SED Injustices, article 1 of which contains the Penal Rehabilitation Act, came into force on 4 November 1992. Under this law, a ruling given under criminal law by a State court at any time between 8 May 1945 and 2 October 1990 in the territory of the former GDR is, on application, to be "declared contrary to the rule of law and quashed (rehabilitation)", in so far as it is incompatible with fundamental principles of a free order under the rule of law, above all on the grounds that the ruling served the purposes of political persecution or because the legal consequences of the ruling were greatly disproportionate to the offence in

question (section 1 (1) of the Rehabilitation Act). In order to make the process of establishing proof easier the act contains a catalogue of regulations of the former GDR law. It may generally be assumed that a judgement based on any of these regulations served the purpose of political persecution (e.g. "Treasonous communication of information", "Human trafficking hostile to the State", "Subversive agitation", "Unlawful crossing of borders", "Incitement to boycott"). All rulings given by the Waldheim branch of the Chemnitz regional court in 1950 are regarded as "incompatible with the fundamental principles of a free order under the rule of law" (section 1 (2) of the Rehabilitation Act). This recalls a particularly sombre chapter in the history of the administration of criminal law in the former GDR. In these proceedings special courts used summary proceedings to pass draconian sentences, including the death penalty. Judges and public prosecutors in these proceedings had been selected in advance as being particularly loyal to the party line. Many of the accused were seriously ill due to the time spent in custody beforehand. As a rule they were not assisted by legal counsel. The proceedings were carried out under the control and instructions of party officials who were to ensure that the more than 3,000 cases - as determined by the SED - were concluded in the shortest time possible, that the sentences passed were in line with those prescribed and that the court staff strictly obeyed their instructions.

51. The Penal Rehabilitation Act grants, among other things, financial compensation of DM 550 per month of imprisonment for victims who stayed in the GDR until the Wall was opened on 8 November 1989 and DM 300 per month of imprisonment for those who had moved to West Germany before that date. In this way, beneficiaries of the Act are granted more or less equal status as regards compensation for imprisonment with those who suffered persecution under the Nazi regime. The number of cases of compensation is estimated at 80,000. The costs of the Act are estimated at over DM 1.5 billion. It should be noted in this respect that article 9 (5) of the Covenant does not mention the amount of compensation to be granted: this is left to the discretion of the States themselves.

52. Both parliament and government realized that no one can fully make amends for the injustices perpetrated by the SED regime. Many of the victims were killed or sustained emotional or serious physical damage. Hence all that can be done, apart from rehabilitation, is to give these people adequate material satisfaction as an obligation of the whole community to the extent the State’s financial resources allow. The amount of compensation is, therefore, in no way a measure of the injustice suffered.

53. The Penal Rehabilitation Act has been supplemented by the Second Act on the Resolution of SED Injustices, which became effective on 1 July 1994. It makes provision for the administrative and occupational rehabilitation of those concerned. The stigma of personal discrimination is to be removed from anyone who in the former GDR or its antecedent, the Soviet-occupied zone of Germany, was exposed to grossly unlawful administrative measures or was a victim of political persecution which affected their occupation or training. They are also entitled to claim social benefits by way of compensation. The law expressly states that in particular cases where people were forced to leave their homelands are totally irreconcilable with the fundamental principles of a democratic State. It therefore requires that any property

confiscated in the context of such action must be returned to its rightful owners in accordance with the provisions of the Real Property Act. The envisaged compensatory payments within the scope of occupational rehabilitation include especially the elimination of disadvantages to this category of persons within the statutory old-age pension system.

Duration of imprisonment on remand

54. Data concerning the duration of imprisonment on remand in the Federal Republic of Germany were given in the third periodic report (CCPR/C/52/Add.3, para. 70) relating to 1986. Updated figures can only be given for 1989 since statistics relating to subsequent years are not yet available.

55. Statistics for 1989 show that there were 26,773 prisoners under remand. The duration of such imprisonment was as follows:

Up to one month	9 889 cases
One to three months	6 507 cases
Three to six months	5 277 cases
Six months to one year	3 653 cases
Over one year	1 447 cases

56. These data are very similar to the statistics for 1986. In other respects there have been no general indications either that, in deciding on the continuation of remand, the right of the person concerned to trial within a reasonable time (art. 9 (3), first sentence of the Covenant) was disregarded.

Article 10

57. The German Government is committed to improving the protection of prisoners' human rights around the world. The member States of the Council of Europe are currently working on a supplementary protocol to the European Convention on Human Rights providing for special rights for prisoners. Under this protocol the right of an arrested person to inform his family, his lawyer and, if the person concerned is a foreigner, his diplomatic mission of his arrest and his whereabouts should be extended to become a guaranteed right under the Convention so that in future it will be virtually impossible to have cases of people "disappearing" without anybody knowing where they are.

58. Furthermore, the German Government believes that a particularly effective measure is the inspection by international commissions of places where prisoners are held, as is already the practice in Europe under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. It is envisaged that the European Convention will also be made available to those European states which are not yet members of the Council of Europe. A protocol to this effect was opened for signature on 4 November 1993. The German Government considers it necessary to create other

equally effective mechanisms of worldwide application; to this end it favours the preparation of an optional protocol to this effect, to be added to the Convention against Torture.

Article 12

Freedom of travel within Germany

59. One of the most noticeable changes brought about by German unification is the re-establishment of freedom of travel within Germany. The former GDR had placed diabolical obstacles (barbed wire, mines, self-triggering shrapnel-firing devices) along the intra-German border and the Wall in and around Berlin to stop people from leaving. Moreover, border guards had been ordered to prevent would-be escapers from crossing the border at any cost and to shoot them if necessary. Freedom to travel was thus very restricted: GDR citizens were refused permission to leave for West Germany or any other Western country, unless they were awarded travel privileges by the SED, had reached retirement age, or had urgent family business to attend to.

60. Those wanting to enter the GDR also faced many bureaucratic obstacles and even some chicanery. There was, for example, one temporary regulation allowing only physically handicapped travellers to enter "GDR territory" by car, whilst all others had to enter by train. Since then the basic right to freedom of movement in accordance with article 11 of the Basic Law has been re-established throughout Germany.

Freedom of movement for asylum-seekers

61. During asylum proceedings, asylum-seekers enjoy a temporary right of residence limited to the district for which the aliens' registration office involved is responsible (section 55 (1), first sentence; section 56 of the Asylum Proceedings Act of 26 June 1992 - Federal Law Gazette I p. 1126). Generally, asylum-seekers are obliged to stay in the reception centre responsible for them for the duration of the asylum proceedings but for no longer than three months (section 47 of the Asylum Proceedings Act). The aliens' registration office can impose additional conditions on the provisional residence permit pending asylum proceedings, and in those cases in which the asylum-seeker is not or is no longer obliged to live in a reception centre they can place further limits on the provisional residence permit (section 60 of the Asylum Proceedings Act). The aliens' registration office may also allow asylum-seekers to temporarily leave their normal area of residence under certain conditions (section 58 of the Asylum Proceedings Act). Asylum-seekers do not have the right to reside in any particular place or Land (Section 55 (1) second sentence of the Asylum Proceedings Act).

62. For asylum-seekers who arrive in the country by plane either without a valid passport or from a country of origin which is on the list of States considered to be safe, asylum proceedings must be completed before entry into the country. They are obliged to stay on the airport premises for the duration of the asylum proceedings, maximum 19 days, in so far as accommodation is available there (section 18a of the Asylum Proceedings Act). The asylum-seeker is guaranteed permission to leave the country at any time.

Article 13

63. An alien lawfully residing in the territory of the Federal Republic may only have his or her stay terminated if the move is justified under the terms of the Aliens Act. Objection may be raised against the measure to terminate residence, and the matter will be decided upon by higher administrative authorities. Further, the decision is subject to review by an administrative court.

64. Aliens who, having made an application for asylum in the Federal Republic, have had that application refused and are to have their residence terminated do not have the right to raise an objection against these measures but such measures are nevertheless subject to review by an administrative court.

Article 14

Relieving the strain on the judicature

65. The creation and extension of a judiciary based on the rule of law in the territory of the former GDR is an important task on the road to internal unity. As has been mentioned, much has already been achieved with the help of the western German Länder in particular and of the judicial staff delegated by them to perform this task. Yet there is still a shortage of staff in the judicature in the new Länder.

66. In view of this situation the "Act amending the rules of finance courts and other acts" (Federal Law Gazette 1992 I, p. 2109) came into force on 1 January 1993 and the "Act relieving the strain on the judicature" (Federal Law Gazette 1993 I, p. 50) on 1 March 1993. These laws are intended to tighten up and simplify proceedings of civil, criminal, social, administrative and financial courts, thus freeing sufficient human resources and providing judicial staff for the new Länder.

Rulings

67. During the period covered by this report a number of rulings were given which set standards for the national application of law. This applies in particular to judgements rendered by the Federal Constitutional Court. In this context the following cases should be mentioned:

68. Right to a hearing in accordance with the law. Under article 103 (1) of the Basic Law, everyone is entitled to a hearing in accordance with the law. If this right is violated the person affected, having exhausted all other legal remedies, may lodge a complaint of unconstitutionality with the Federal Constitutional Court. This instrument is particularly appropriate when enforcing the right to a fair trial under article 14 (1), first sentence, of the Covenant.

69. A constant problem in court practice is that of "surprise decisions", in other words when the court bases its decision on a point of law which the parties involved in the trial had not reckoned with. In one case the Federal Constitutional Court, referring to an earlier ruling it had made, had the

opportunity to state that it was a violation of article 103 (1) of the Basic Law for a court, without giving prior notice, to base its decision on a point of law "which even a conscientious and well-informed party to the trial need not have reckoned with, even in view of the wide variety of reasonable legal viewpoints". In this particular case the Federal Constitutional Court ruled that there had indeed been a violation of article 103 (1) and overturned the decision under appeal with its ruling of 19 May 1992 - 1 BvR 986/91 (Fed. Const. Court Decision 86, 133).

70. Rejection of delayed pleadings. It is possible that the right to a fair trial under article 14 (1) of the Covenant is at odds with the right to trial "within a reasonable time" as set out in article 6 (1), first sentence, of the European Convention on Human Rights. This conflict may be solved if the judge exercises the right accorded by law to reject delayed pleadings by any party. Thus, section 296 (1) of the Code of Civil Procedure states that any pleadings for the prosecution or defence put forward after the deadline set for such pleadings "may only be allowed if, in the objective opinion of the court, their admission will not delay the legal action or if the party can sufficiently justify the delay".

71. In the case concerned, the local court had been convinced in the hearing of the evidence on 2 November 1990 that the defendant, a flat tenant, had indeed, as she claimed, agreed a fixed rent for life with the since deceased landlady. With the consent of both parties the court was to make its decision on 1 February 1991. Both parties had the opportunity to submit a written statement by 2 January 1991, an opportunity which the lawyer representing the plaintiff used. In a statement dated 20 December 1990, which was received on 27 December 1990, a further witness was named who was able to testify that even the former landlady had wanted to raise the rent and that a fixed rent arrangement was out of the question. It was not, according to the lawyer's statement, before mid-November 1990 that he had learned from a telephone conversation that this witness existed. The local court disregarded this submission and rejected it as having arrived too late.

72. The first chamber of the First Senate of the Federal Constitutional Court, however, declared in their ruling of 22 August 1991 - 1 BvR 365/91 - that the complaint of unconstitutionality alleging a violation of the right to a hearing was "obviously justified" (Neue Juristische Wochenschrift, 1992, p. 680). It pointed out that, pursuant to past rulings of the Federal Constitutional Court, the rejection of delayed pleadings infringes on article 103 (1) of the Basic Law if the delay was beyond the control of the party concerned. The disputed ruling, said the chamber, had not taken this aspect into consideration.

73. Granting of legal aid. In its decision of 30 October 1991 - 1 BvR 1386/91 - (Neue Juristische Wochenschrift, 1992, p 889) the second chamber of the First Senate of the Federal Constitutional Court quashed a court decision in which an application for legal aid had been refused because there was insufficient likelihood of success in the case. Referring to its past rulings the Federal Constitutional Court emphasized that, although it was not unconstitutional to make the granting of legal aid conditional on the intended

legal prosecution having sufficient prospects of success, in the case in question the adjudicative court had, it maintained, exaggerated the requirements. The Federal Constitutional Court explained:

> "Examination of the chances of success must not, however, serve to transfer the actual prosecution or defence of the case to the summary procedure on legal aid, thus allowing it to take the place of the main proceedings. The legal aid proceedings are not intended to actually provide the legal protection guaranteed by the Basic Law but rather to make it accessible .... The specialized courts overstep their authority - which is to interpret the operative legal facts and assess the prospects of success - if they use standards of interpretation which make prosecution or defence of a case disproportionately difficult for a party without private funds, as compared with a party with private funds."

74. Presumption of innocence. During the period covered by this report, the Federal Constitutional Court again had an opportunity to underline the significance of presumed innocence in court orders relating to costs. The case in question was a decision by a criminal court which ordered the accused to bear the necessary costs of his defence himself when the criminal proceedings were dismissed on account of an impediment to the action and decided the State did not have to bear any of the costs. In the decision under appeal it was claimed that, had it not been for the impediment to the action, the accused would have been convicted. Looking at the file on the case, the Court felt the accused's guilt was "indisputable".

75. The second chamber of the Second Senate stated in its decision of 16 December 1991 - 2 BvR 1590/89 - (Neue Juristische Wochenschrift, 1992, p. 1611) that the complaint of unconstitutionality made against the decision was "obviously justified" and quashed the decision under appeal on the grounds of a violation of the principle of presumption of innocence.

76. Legal proceedings within a reasonable time. Article 14 (3) (c) of the Covenant only accords accused persons involved in criminal proceedings the right to be tried without undue delay. Article 6 (1) of the European Convention on Human Rights, however, contains the obligation for all proceedings covered by the guarantee to be concluded "within a reasonable time". This regulation has considerable significance in practice; nearly 50 per cent of all cases dealt with by the Strasbourg bodies established under the Convention are based on the charge that the proceedings are excessively lengthy. Germany has itself had a number of cases during the period covered by this report involving such charges. Now that the criteria for the application of article 6 (1) of the European Convention on Human Rights ("within a reasonable time") have long been an established part of the rulings of the bodies of the Convention, any Commission reports affirming a violation of the principle of expeditious proceedings are usually no longer submitted to the Court for its decision but decided by the Committee of Ministers of the Council of Europe. As a rule, the Committee of Ministers accepts the judgement of the Commission and determines the amount of compensation to be paid to the petitioner.

77. During the period covered by this report the Federal Constitutional Court decided that domestic law also requires that proceedings be concluded within a reasonable period of time. This right must also be respected in proceedings concerning administrative penalties under the Regulatory Offences Act - in proceedings, therefore, which are not deemed to be criminal proceedings within the meaning of Article 14 (3) of the Covenant. In its decision of 19 March 1992 - 2 BvR 1/91 - (Neue Juristische Wochenschrift, 1992, p. 2472), the second chamber of the Second Senate was particularly critical of the fact that in the case in question the amount of the fine imposed did not sufficiently take account of the excessive length of the proceedings (eight years and ten months). Thus, it overturned the decision under appeal not in respect of the guilty verdict but in respect of the amount of the fine imposed and referred the case back to the local court.

Maintaining the Federal Constitutional Court's ability to function

78. As already emphasized, the Federal Constitutional Court has a particularly important role to play in the practical realization of human rights in Germany since all persons who believe that their basic rights as laid down in the Basic Law have been violated can, after all other legal remedies have been exhausted, appeal to the Court, using the extraordinary remedy of a complaint of unconstitutionality. The Federal Constitutional Court, which is held in high esteem by the population, is therefore regarded as the defender of the Constitution and the protector of their basic rights. This is demonstrated not least by the large number of constitutional complaints which are filed. Until 1975 the number of such complaints remained virtually unchanged. Between 1966 and 1975 the Federal Constitutional Court received a yearly average of 1,520 complaints on constitutional issues. Since that time, however, the number of such complaints has risen sharply, doubling in 10 years. In 1991 the figure reached 4,000, an increase of 15 per cent compared with the preceding year. It is to be expected that the amount of business to be dealt with will increase even further when larger numbers of complaints on constitutional issues will arrive from the new Länder. This has not yet occurred since the Basic Law only entered into force in those Länder on 3 October 1990 and all other legal remedies must be exhausted before a complaint of unconstitutionality may be lodged.

79. The strain being put on the Federal Constitutional Court has resulted in problems concerning the length of time taken to examine constitutionality in cases which, although not entirely without any prospect of success and therefore admitted, do not carry any major implications for legal policy. Sometimes such proceedings are postponed because another case is more urgent, due to its particular importance for legal policy. Those affected by such postponements have appealed to the European Commission of Human Rights, alleging a violation of the principle of expeditious treatment (art. 6 (1) of the European Convention on Human Rights: "within a reasonable time").

80. The German Government has brought its influence to bear on legislative measures, in order to maintain the Federal Constitutional Court's ability to function in the light of the growing strain being put on it. Various measures which were taken in the past (e.g. the introduction of a fine for cases of abuse) have not, or have not fully, come up to expectations. On the suggestion of the German Government, the German Bundestag adopted an amendment

of the Act concerning the Federal Constitutional Court (Federal Law Gazette 1993 I, p. 1442) whereby in future constitutional complaints will be accepted for adjudication only if one of two prerequisites is fulfilled - either "in so far as it is of fundamental constitutional importance" or if it is appropriate to enforce those rights which may be asserted by a complaint of unconstitutionality. The latter may also be the case if "the complainant would be placed at a particularly serious disadvantage if a decision on the merits were to be refused".

The concept of education in juvenile criminal law

81. With respect to article 14 (4) of the Covenant reference is made to the entry into force on 1 December 1990 for the whole of Germany of a modernized juvenile criminal law based on the results of empirical research. This accords even more importance to the concept of reform within the meaning of article 14 (4) of the Covenant than was accorded in the earlier law of the Federal Republic of Germany. It takes into account the special nature of juvenile delinquency requiring not only detention but also socio-educational measures to enhance their ability to play a normal role in society as well as steps to ensure their material support. The changes in the Juvenile Courts Act mentioned above ensure that sufficient legal options are available for those measures.

82. The new law expands the options available to public prosecutors to avoid bringing charges and take instead less drastic measures, such as discontinuance of proceedings if the offender redresses the wrong done to the victim. Where formal charges are unavoidable and the offender is convicted, there are more possibilities for the judge now to exert a reforming influence on young offenders. A number of reformatory measures are available to judges (disciplinary measures for juvenile delinquents and the imposition of conditions). It is for example possible for them to impose the condition that the damage be made good or that the offender undergo "social training", i.e., group discussions or a group course involving action or experience which young offenders must attend for a maximum of six months to reflect on their behaviour, draw the desired conclusions or gain improved social interaction skills. If young offenders are given custodial sentences of less than two years but show promise of betterment such sentences have to be suspended in favour of probation in order to spare young people the distress of a deprivation of liberty. Because of the potential distress, very much stronger preconditions have been attached to the imprisonment of young people awaiting trial. This is something which may only be ordered where absolutely necessary and only if there is no available alternative - for example an approved reformatory. If a warrant of arrest of a juvenile is executed, he must be given a defence counsel. These new regulations have been established in recognition of the fact that offences committed by juveniles are fairly often the result of the juveniles' development or have their main cause in underprivileged social conditions.

Article 15

83. In the Federal Government's view prosecution of the SED regime's injustices is an essential part of the process of reconciliation and national unity in Germany. The guilty have to be brought to account, but only on the

basis of democratic legal proceedings to which all citizens are entitled and without any retroactive application of criminal law. This ban on retroactive application is binding on Germany not only under international law in accordance with article 15 of the Covenant (and also art. 7 of the European Convention on Human Rights). It is also guaranteed under domestic law by article 103 (2) of the Basic Law. In accordance with the provisions of that article, an act may be punished only if it constituted a criminal offence under the law before the act was committed. This right is virtually amounting to a fundamental right, against whose violation a complaint of unconstitutionality may be brought when all other legal remedies have been exhausted. All this applies equally to the territory of the former GDR for which the Basic Law entered into force on 3 October 1990. Therefore, judging whether an offence committed before 3 October 1990 is punishable or not must in principle be based on former GDR law. An exception to this rule - namely application of the law of the Federal Republic of Germany in its territory of 2 October 1990 - can only be made if the more lenient of the laws is applied to the accused. This concords with article 15 (1), third sentence, of the Covenant.

84. The rulings of Germany's supreme criminal court, the Federal Court of Justice, in cases concerning fatal shootings at the intra-German border and the Berlin Wall have to be seen in this context. It had to find on the appeal filed by two defendants against a judgement by the Berlin regional court on 5 February 1992. The juvenile chamber of the regional court had sentenced one of the accused to one year and six months in juvenile custody for manslaughter and the other to one year and nine months' imprisonment. The court had found them guilty of having, as GDR border guards, shot a person, on 1 December 1984, who was trying to escape from East to West across the Wall between the Pankow district in East Berlin and the Wedding district in West Berlin. The escapee died later of his wounds.

85. The Federal Court of Justice affirmed the conviction of the two persons involved in the fatal shooting and refused to accept the argument that the order to shoot, which applied to the two accused both because of the GDR border laws and because of the positions they held, was sufficient justification for their action since it quite obviously contravened basic principles of justice and humanity and violated conceptions of justice which are common to all people and are derived from the values of human worth and dignity. The Court also justified its ruling by stating that, as a State party to the Covenant, the GDR had acted in violation of its obligations under article 12 (3) of the Covenant in preferring to accept a person's death rather than allow that person to escape across the Wall. The Federal Court of Justice argued that the GDR border regime had violated article 12 of the Covenant because those living in the GDR were denied the human right to freely leave the country, not only in exceptional cases but as a general rule. Until 1 January 1989 the regulations of GDR law provided no lawful means for any person who did not either enjoy special political privileges, had reached the age of retirement or had urgent family business to attend to leave for the other part of Germany or any other Western country. Until 1 January 1989 there was no need to give a reason for the refusal of an application to leave the country and until that date there was no possibility of appealing against such decisions.

86. This regulation, the Federal Court of Justice continued, had violated article 12 (3) of the Covenant, the principle that restrictions on the freedom to leave a country must remain an exception and also the principle that an appeal of any kind must be available if permission to leave the country is refused. The Federal Court of Justice did not overlook the fact that other countries have also restricted the freedom to leave the country. It ruled that this was irrelevant; the GDR border regime had been particularly harsh in view of the fact that "Germans in the GDR had a particular motive for wishing to cross the border to West Berlin and West Germany. They and the people on the other side of the border formed one nation and were bound together by numerous family and other personal ties". Interpreting section 27 of the GDR border law on the basis of articles 6 and 12 of the Covenant, it can be inferred from the GDR law in force at the time of the offence that it was unlawful to shoot at the escapee under the given circumstances and the accused were therefore guilty of manslaughter - a punishable offence even under former GDR law. Even at that time GDR law, correctly interpreted, would not have offered any legal justification. The accused had culpably failed to appreciate this, the Court said, adding that the killing of an unarmed escapee was a dreadful act which was not reasonably justifiable. Therefore, the fact that this was a violation of the elementary ban on killing should have been patently obvious even to an indoctrinated person, especially when the vast majority of people in the GDR did not support the use of firearms at the border, as is well known.

87. In its judgement of 26 July 1994 the Federal Court of Justice ruled that those in positions of authority in the former GDR who were responsible for the orders to shoot should, like those who executed the orders, be punished not merely as participants in, but as perpetrators of the killings along the Wall.

Article 16

88. In the initial report it was pointed out that the right granted in article 16 of the Covenant is fully guaranteed, in particular by article 1 (1), first sentence, of the Basic Law because it is inherent in the inviolability of human dignity that all persons be recognized as bearing rights and obligations (CCPR/C/1/Add.18, p. 21). This now also applies, since 3 October 1990, in the territory of the former GDR.

89. Article 16 does, however, leave room for a number of different interpretations. In respect of this, reference is made to the annotation submitted by the Secretary-General on the draft international covenants on human rights which states "... the expression ’as a person before the law’ was meant to ensure recognition of the legal status of every individual and of his capacity to exercise rights and to enter into contractual obligations" (document A/2929 of 1 July 1955, p. 130, para. 97).

90. Without necessarily wishing to accept this interpretation, which extends the article’s scope to cover the capacity to enter into legal transactions, the German Government points out that during the period covered by the report, on 1 January 1992, the new act of 12 September 1990 reforming guardianship and curatorship for persons of full age entered into force for all Germany. The significance of this act, known as the "care" act, is as follows.

91. Under the old German law, as was in force in the Federal Republic of Germany in its territory of 2 October 1990, any person suffering from mental illness could be placed under legal guardianship by proceedings carried out by the responsible local court on the application either of the spouse, of a relative or even the public prosecutor. Such decisions were made on the basis of prior observation and expert advice by a doctor in respect of the person concerned. The respective person could be placed under legal guardianship if he or she was unable to attend to his or her own affairs "as a result of mental illness or mental deficiency". If a ruling was made in favour of guardianship on the basis of mental illness, the person concerned was consequently declared incapable of entering into legal transactions and accorded a status equal to that of a child under the age of seven. The person was no longer able to make any binding statement - according to the law any statement was null and void. Just as the parents of a child under seven act as the child's legal representatives so did the court-appointed guardian act on behalf of the person who had been placed under guardianship due to mental illness. The guardian could, for example, sell the person's belongings or place the person in a psychiatric hospital, which, however, required a judicial order.

92. Although the legal instrument of guardianship was intended by the law to perform a welfare function and to serve the interests of the sick person, the situation of the persons affected was the subject of growing criticism. In particular, doubts were expressed as to whether the consequences of a person being placed under guardianship still stood in proportion to the protective aim which was being pursued. Under the former law, these consequences followed without the individual situation being taken into consideration.

93. Guardianship was abolished on 1 January 1992. A person of full age who is totally or partially unable to attend to his or her affairs due to a mental illness or a physical or mental disability is now, under the new law, assigned a "carer" by the guardianship court, either upon his or her own application or ex officio (sect. 1896, Civil Code, revised version). The appointment of a "carer" does not automatically limit the capacity to contract of the person concerned. Rather, the guardianship court must give special instructions that the person under care must obtain the prior consent of the "carer" before making a declaration of intent concerning any matters for which the "carer" is responsible, in so far as such a measure is deemed necessary in individual cases to avoid considerable danger to the person or to the property of the person placed under care (known as the consent proviso). In such cases the person under care is said to have "limited contractual capacity" and has a legal status equivalent to that of a minor over the age of seven. Similar to children over seven, the person who is subject to the consent proviso can therefore, under section 110 of the Civil Code, fulfil his or her contractual obligations, using the means accorded him either for this purpose or for free disposal, even without the express consent of the "carer". Moreover, the person under care may, depending on his or her capacity to understand, be placed under care but without any limitation on contractual capacity. Only in cases where there is no possibility of the person under care freely developing informed opinions can he or she be declared incapable of entering into legal transactions. A person suffering from psychic illness who has been placed under care therefore has much more freedom than a person who was placed under legal guardianship under the old law.

Article 17

Federal Data Protection Act, 1990

94. Privacy is protected by the data protection laws. Detailed information on the Federal Data Protection Act, 1977, was already provided by the second periodic report (CCPR/C/28/Add.6, paras. 128 - 132). Since this act came into force, ideas as to what is necessary in the area of data protection have changed and thus there was no option but to formulate new laws on data protection. For this reason the old data protection act was replaced in 1990 by a new Federal Data Protection Act. This development was prompted mainly by the ruling of the Federal Constitutional Court on the census, which was also mentioned in the second periodic report (CCPR/C/28/Add. 6, para. 131).

95. The Act of 1977 only intended to minimize the particular threat to privacy posed by organized data files and therefore only encompassed the technical aspects of data processing. The Act of 1990, on the other hand, set itself the more ambitious aim of "protecting individuals from attacks on their personal privacy as a result of the use of their personal data". The new act entered into force after 3 October 1990 and has therefore been applicable to the new Länder right from the beginning.

96. The 1990 Act implements in practice what the Federal Constitutional Court had already formulated in an abstract way in its ruling on the census, namely that everyone has the basic right, guaranteed by the Constitution, to "have control over the disclosure and use of his or her personal data", the right known as "informational self-determination". This means, as the Federal Constitutional Court stipulated, that the individual does not have the right to absolute, unlimited control of "his" data but must accept certain legal restrictions in the interest of the overriding common good. Any processing of personal data without the prior consent of the person concerned is subject to a law. This law must also clearly regulate the conditions for any restriction on the basic right and the extent of such a restriction in order to conform to the principle of unambiguity of the law. It must also observe the principle of commensurability - only the minimum of data needed should be collected. The data must in any case be used solely for the purpose for which they were collected. Legislature must attach additional precautions which provide effective protection of the rights of the individual in the organization of the handling of personal data and the procedures used in the course of this - data security measures and data protection control authorities, for example.

97. The Federal Data Protection Act is limited to the provision of general regulations. These apply to any processing of personal data for public agencies, regardless of whether the data are processed in automated data files or general files. In addition, there are numerous sector-specific data protection regulations taking precedence over the general data protection laws (e.g. regulation on social security data, data on employees, statistical data, registration data, tax data).

98. One particular sector-specific regulation concerns documents belonging to the State security service of the former GDR (the "Stasi"). The Stasi Files Act of 20 December 1991 (Federal Law Gazette I, p. 2272) was necessary because

the State security service had left behind files of 180 km in length documenting its observation and spying activities. Here it is a question of the protection of data of the victims of the SED regime. These data were collected secretly in a way which violated the victims' human rights a million times over. What also had to be taken into account was the victims' interest in rehabilitation, which can in many cases only be achieved with the aid of these documents. A further important aim of the Stasi Files Act is "to ensure and promote the historical, political and judicial analysis of the activities of the state security service". What is of importance in this respect is the interest of both public and non-public agencies in obtaining information from the Stasi files for purposes outlined more precisely in the Act. The Act allows, for example, information to be released in order to determine whether members of the government, members of parliament, civil servants, notaries or lawyers or people with leading positions in trade and industry had worked for the state security service either on a full-time basis or unofficially. This could determine whether the person concerned may be allowed to remain in any of the above functions or not.

The fight against organized crime

99. In Germany, too, organized crime has become an issue confronting both State and society. It concerns in the main offences which offer high criminal gains and for which the risk of detection is reduced either because there are no immediate victims or because the victims are not prepared to report the offence to the police. The Act of 15 July 1992 on combating illegal drug trafficking and other forms of organized crime which entered into force on 22 September 1992 (Federal Law Gazette I p. 1302) therefore provided a wide variety of measures to help fight this type of crime. An interference with privacy may in special cases be unavoidable. Here the question of whether and at which point such an interference with privacy is necessary can only be answered after careful examination of all circumstances of the individual case.

100. On 20 May and 21 September 1994 the German Bundestag passed the Crime Prevention Act which entered into force on 1 December 1994 after being approved by the Bundesrat. It plays a crucial part in containing and punishing crimes of violence and in prosecuting the ruthless agitation of political extremists, whose propaganda is one of the main sources of violence. The law also focuses on combating organized crime and the speeding up of criminal proceedings, and ensures greater consideration for the interests of the victims of such crimes during criminal proceedings. In particular, the penalties for simple bodily harm have been increased substantially. Thus, greater consideration is given to the constitutional status of the right to bodily integrity and legal protection against physical attack greatly improved. Furthermore, the rules pertaining to State's evidence have been extended to offenders linked to organized crime. The penal rules against traffickers in illegal immigrants have likewise been tightened up.

101. Furthermore, measures which considerably affect individual rights and liberties may only be ordered by a judge, although in case of imminent danger they may also be ordered by the public prosecutor or the police. Where investigatory activities entail serious encroachments upon a person's privacy any information thus obtained may only be used in the criminal proceedings

relative to the case in question. In other criminal proceedings it may only be presented as evidence if the issue in those other proceedings is also a serious criminal offence, for the clarification of which the information could likewise have been obtained.

102. The persons concerned must be informed afterwards of the measures taken "as soon as such information can be made without jeopardizing the purpose of the investigation, public security, a person's life or well-being or the further secret use of an official who had been working on the case" (sect. 101 of the Code of Criminal Procedure). As long as these provisos are observed, "arbitrary" or "illegal" attacks on private life are out of the question. The German Government is therefore convinced that the law of 15 July 1992 is compatible with the requirements of article 17 of the Covenant.

Protection of honour

103. Article 17 of the Covenant, on the one hand, accords the right to protection against unlawful attacks on honour and reputation. Article 19 (1) of the Covenant, on the other hand, guarantees everyone the right to hold opinions "without interference". These two rights may come into conflict with each other. The section dealing with article 19 will go into more detail on this question.

Guarantee of privacy of post

104. Written correspondence is protected against arbitrary or illegal intrusion under domestic law, not least by the institution of the privacy of post which under article 10 of the Basic Law is "inviolable" and may only be restricted pursuant to a law. When the Basic Law came into force in the territory of the former GDR it was ensured that the control of letters and the State-organized theft of post in order to obtain goods and hard currency, as was practised for years by GDR authorities, will not occur in future.

Article 18

105. The guarantees of freedom of faith and conscience (CCPR/C/1/Add. 18, pp. 24-25), enshrined in German law, for example in article 4 of the Basic Law ("Freedom of faith and conscience as well as freedom of creed, religious or ideological, are inviolable") have applied in the territory of the former GDR since 3 October 1990. In addition, real, tangible changes have occurred in the course of German unification. The churches of the former GDR were not free in the same way as the churches in the western part of Germany. They were subject to close observation and spying by the State security service of the GDR. Many clergymen were persecuted for political reasons and active church members discriminated against in a number of ways. The peaceful revolution of 9 November 1989 put an end to all this.

106. Moreover, the constitutional guarantee provided in article 4 of the Basic Law goes much further than article 18 of the Covenant. In its paragraph 3 it also guarantees a basic right to conscientious objection ("Nobody may be forced against their conscience into military service involving armed combat. Details shall be the subject of a federal law.").

107. However, no one may derive from article 18 of the Covenant or article 4 of the Basic Law the right not to obey the law on grounds of conscience. In particular, an individual who, for reasons of conscience, does not feel in a position to fulfil civic or other public obligations cannot be released from such obligations, nor can that person be authorized to withhold taxes required for the maintenance of the armed forces and, again for reasons of conscience, pay them instead for other public purposes, such as environmental protection. The Legal Affairs Committee of the German Bundestag which discussed this issue emphasized that decisions of conscience are only respected within the framework of article 4 (3) of the Basic Law. In addition, issues decided by a majority were not the responsibility of the individual. It was therefore not a matter for the individual conscience, the less so if legal consequences such as refusal to pay taxes were involved.

Article 19

Restoration of the freedom of information

108. The right to seek information regardless of frontiers, established in article 19 (2) of the Covenant and also recognized by the former GDR, represents one of the points where the reality in the GDR deviated particularly blatantly from the obligations the GDR assumed as a State party to the Covenant. Apart from a few unimportant exceptions, the import of newspapers and magazines from West Germany and other Western countries into the former GDR was strictly prohibited. For decades the checks on travellers and vehicle searches which were carried out without fail at border-crossing points under the GDR border protection regime were used to prevent people importing or introducing copies of Western newspapers and magazines into GDR territory, by seizure of such publications.

109. The SED regime did, however, tolerate reception of television programmes from the West. The degree of actual freedom of information provided in this way depended on the region in which people lived: a unique information gap existed between GDR citizens who could pick up Western television broadcasts and those - for example in the Dresden region - who could not do so for technical reasons and therefore remained dependent on Eastern television, radio and newspapers to meet their information needs.

110. As in the case of denial of the freedom of travel, fundamental change of this situation did not require introduction of the Basic Law or of special support measures. Actual freedom of press and of information materialized the instant Western newspapers and magazines appeared on the East German market after the opening up of the borders. This led de facto to the restoration of press freedom in the former GDR. The technical preconditions enabling the reception of television programmes "across the borders" in all parts of the former GDR have also been created in the meantime.

Extent of the freedom of information

111. In practice, ensuring that the right to freedom of information can be exercised not infrequently gives rise to certain problems. The following decisions made by the Federal Constitutional Court during the period covered by this report are mentioned in this connection:

112. Decision of the third chamber of the First Senate of 15 October 1991 - 1 BvR 976/89 - Neue Juristische Wochenschrift, 1992 p. 493. The case involved a civil law dispute between a tenant and his landlord concerning the installation of an additional aerial to receive television programmes on a special television channel. The civil courts had dismissed the case on the grounds that the channel in question was not a normal channel. Furthermore, the tenancy agreement neither expressly nor tacitly granted the right to install such an additional aerial. The complaint of unconstitutionality led to the quashing of the regional court's ruling.

113. In its reasoning on the basis of the Federal Constitutional Court rulings, the third chamber emphasized that the basic right to freedom of information - the right to obtain information from generally accessible sources - was one of the most important prerequisites for a free democracy. A television channel did not lose the quality of being a generally accessible source of information just because it could be received in a particular place only with more than the average input. Weak signals also fell under the protection of the freedom of information. The tenant did of course require the landlord's consent to install an additional aerial if a contractual agreement had not been reached. However, the landlord could not refuse consent if by so doing he contravened the principles of good faith. What was demanded by good faith in this context was clearly determined by the basic right to freedom of information. The regional court had not examined whether the landlord refused consent for pertinent reasons. It consequently did not take into account the impact of the basic right to freedom of information within the framework of the tenancy agreement regulations pertaining to the principle of good faith; the contested decision was founded on this infringement of the constitution.

114. Decision of the Federal Constitutional Court of 11 November 1992 - 1 BvR 1595, 1606/92 - Neue Juristische Wochenschrift, 1992 p. 3288. At the beginning of the trial in the criminal proceedings against the former Chairman of the GDR Council of State, Erich Honecker, and other defendants, the presiding judge of the competent division for criminal matters at the Berlin regional court decreed that the television crews could only film outside the courtroom and that television recordings were not permitted in the courtroom even before or after the trial. The complaint of unconstitutionality lodged against this decree by the television corporations concerned, who applied for a temporary injunction to allow television recordings in the courtroom for about five minutes before the trial began, was granted by the Federal Constitutional Court with reference to the free access to information which is an integral part of the freedom of the press. In this connection the consideration was of particular importance that refusal to issue a temporary injunction would mean documentation of the appearance of the defendant Erich Honecker at the start of the criminal proceedings - to which the complainants rightly attached historical significance - would not have been guaranteed.

Rulings on the limits to freedom of expression

115. The degree of freedom actually accorded by the guarantee of freedom of speech in the Basic Law was examined by the Federal Constitutional Court several times during the period covered by this report. The following

decisions of the Federal Constitutional Court are of particular interest, especially since they not only affect the individual case in question but also directly influence legal practice, which has to deal with the often difficult issue of the limits to the freedom of expression.

116. Decision of the First Senate of 26 June 1990 - 1 BvR 1165/89 - in Fed. Const. Court decision 82,272. This case involved an author and journalist who publicly described the now deceased State Premier of a Land as a "democrat under duress" and explained this expression in a newspaper interview as follows: "In my view this expression means those people who were converted to democracy only under duress or for opportunist reasons and who operate this form of government formally at most. For me, Mr. X is the personification of this type." The person attacked thereupon obtained a temporary injunction forbidding the complainant amongst other things to advance and spread the above assertion. He maintained that he had always supported parliamentary democracy and viewed it as the best form of government. Assuming anything to the contrary would be regarded as an interference with his personal privacy and a violation of his human dignity.

117. In the main proceedings, too, the person attacked and the heirs who joined the proceedings after his death won the case in the main. An essential factor in the decision was that the higher regional court considered the complainant’s remarks to be abusive criticism which was not as such covered by the basic right to freedom of expression.

118. The Federal Constitutional Court ruled that the complaint of unconstitutionality against the decision was justified, quashed the contested ruling and referred the case back to the higher regional court.

119. The Federal Constitutional Court recalled its ruling whereby, in contributions made to a debate pertaining to an essentially public issue - unlike remarks which simply serve to pursue private interests - presumption speaks for freedom of expression. Especially in public debate, and in political differences of opinion in particular, criticism expressed "in exaggerated and polemical form" must also be tolerated because otherwise there was a danger of the opinion-forming process being immobilized and emasculated. Interpreting the laws limiting freedom of expression in such a way as to make excessive demands on the admissibility of public criticism in political debates was consequently not consistent with the Basic Law. Classifying the remarks made by the complainant in this case as "abusive criticism" was not compatible with these principles: "An opinion does not become abuse solely because of its disparaging effect on third persons. Exaggerated and even insulting criticism in itself does not make a remark abuse. Rather, a disparaging remark becomes abuse only when it is no longer the dispute in itself which is at the centre of the matter, but the defamation of the person."

120. Decision of the third chamber of the Second Senate of 10 July 1992 - 2 BvR 1802/91 - Neue Juristische Wochenschrift, 1992 p. 2750. The complainant, a professional soldier, appealed against a Federal Administrative Court ruling downgrading him from major to captain as a result of breach of duty. He had signed a press release relating to another court proceeding which stated that the signatories agreed with the substance of the

statement "all soldiers are potential murderers"; the still valid strategy of nuclear deterrence in particular put them in a moral dilemma because, should it fail, it would cause indiscriminate mass deaths. The Federal Administrative Court took the "murderers quote" to imply that the complainant's comrades in the Federal Armed Forces were intended to be morally condemned and reviled.

121. The third chamber of the Second Senate of the Federal Constitutional Court considered the complaint of unconstitutionality to be clearly justified, quashed the contested judgement and referred the case back to the Federal Administrative Court.

122. The Federal Administrative Court had, it argued, interpreted specific elements of the remarks in a way which was, upon sufficient consideration of the context, incomprehensible, aggravating and thus exaggerated. This was not, however, compatible with the function performed by the basic right to fair constitutional proceedings, namely to guarantee freedom. Furthermore, such a procedure violated the basic right to freedom of expression.

123. The downgrading was consequently reversed. The Federal Administrative Court recognized that the soldier was acting under pressure of conscience, but reproached him for using emotional expressions ("murderers") which could have been avoided in the circumstances, and which had led to considerable misunderstanding and misinterpretation. The Court therefore imposed a disciplinary fine of DM 500.

124. Decision of the third chamber of the First Senate of 25 August 1994 - 1 BvR 1423/92. The third chamber dealt with a similar matter in its decision of 25 August 1994 (1 BvR 1423/92).

125. The complainant had put a sticker on his car which read "Soldiers are murderers" and had a facsimile signature of "Kurt Tucholsky" (the author, who died in 1935) underneath. The Federal Constitutional Court overturned the complainant's conviction for incitement and libel and referred the matter back to the local court on the ground that the criminal courts had based their judgement on interpretations of the sticker's content which, after due consideration, were not tenable.

126. In a press release issued on 23 September 1994 the Federal Constitutional Court explained that the decision did not in any way imply a general permission to describe members of the Federal Armed Forces as murderers. The Federal Government responded to the judgement by emphasizing that the sole purpose of the Federal Armed Forces was to help maintain peace.

127. Decision of the First Senate of 13 April 1994 - 1 BvR 23/94. The complainant, a political party, maintained that the conditions imposed by the local authority on a meeting at which speeches seemed likely to be made denying that the Jews had been persecuted during the "Third Reich" were inadmissible. The Federal Constitutional Court found that the denial of Jewish persecution was not covered by the basic right of free speech, that it had been shown to be an untrue assertion. Such assertions, as the Court's decisions have consistently indicated, could not be defended as the free expression of opinions. But even if in view of the context such comments were

to be considered opinions the restriction on freedom of expression could not be objected to on constitutional grounds. Article 5 (2) of the Basic Law allowed such restrictions in certain circumstances, notably where it was necessary to protect personal honour. In weighing up the relative importance of freedom of expression and protection of personal honour it was necessary to consider the gravity of the insult which a denial of their persecution during the Third Reich would mean for the Jewish population in view of their suffering at the hands of Germany. On the other hand, the opinion expressed was not particularly worthy of protection since it was based on a proven untruth. The expression of opinions the content of which had been proved untrue always came second to protection of personal honour, as the Constitutional Court's decisions in this respect had consistently indicated.

Restrictions on the exercise of the right to freedom of expression

128. Since the exercise of the right to freedom of expression carries with it special duties and responsibilities, it may be subject to certain restrictions as are provided by law (art. 19 (3) of the Covenant). With regard to the rights of others, measures were taken to combat right-wing extremism and xenophobia. For instance, the spread of skinhead music and "fanzines" (independent, unregulated publications aimed at the youth) which advocate violence was banned. Knowledge acquired in this respect has been passed by the authorities to the competent public prosecutor's office, so that they are able to consider whether criminal investigation proceedings should be initiated. The Federal Ministry for Women and Youth and the Länder youth authorities can decide on the basis of the information obtained whether application should be made for indexing procedures to be carried out by the Federal Review Board for Publications Harmful to Young Persons. On the basis of numerous indexing applications, also by the Federal Ministry for Women and Youth, between October 1992 and 30 June 1993 the Federal Review Board included 21 records, 10 compact discs, 12 music cassettes and 16 brochures/fanzines in the list of publications harmful to young people. The index of all media glorifying the Nazis and war indexed by the Federal Review Board totals 177 objects.

129. The Federal Ministry of Justice has also undertaken extensive examination of the lyrics of songs of so-called "skinhead bands" and informed the competent criminal prosecution authorities in the federal Länder of the results so that they can take the necessary measures. Several trials have meanwhile resulted in convictions.

Article 20

130. The national legislation serving the implementation of article 20, details of which have already been provided in the initial report (CCPR/C/1/Add. 18, p. 17), also applies as of 3 October 1990 to the territory of the former GDR on the basis of the Unification Treaty. The same applies to the penal provision against incitement of the people in Section 130 of the Penal Code, which read previously as follows:

"Section 130

"Incitement of the people

"Whoever, in a way that may disturb the peace, attacks the human dignity of others by

1. inciting hatred against sections of the population,

2. inciting violence or arbitrary measures against them, or

3. insulting them, maliciously exposing them to scorn or contempt or slandering them,

will be sentenced to between three months' and five years' imprisonment."

131. This statutory definition previously had little practical significance; between 1980 and 1990 in the Federal Republic of Germany (1990 figures refer to the territory as at 2 October) an average of less than 100 individuals per year were convicted under section 130 of the Penal Code.

132. In 1991 and 1992 some new forms of incitement developed. The Federal Government regards it as a priority duty to act decisively against right-wing extremist and xenophobic agitation.

133. To this end a more stringent definition of incitement has been incorporated in the Crime Prevention Act and made easier to apply. In particular the denial of mass murder in the concentration camps ("denial of the Holocaust") is now unequivocally defined as incitement and is thus a punishable offence. The new provision reads as follows:

"Section 130

"Incitement of the people

"(1) Whoever in a manner liable to disturb the peace

1. incites hatred against sections of the population or the use of force or arbitrary measures against them, or

2. attacks the dignity of others by insulting sections of the population, maliciously exposing them to scorn or contempt or slandering them,

will be sentenced to between three months' and five years' imprisonment.

"(2) A sentence of up to three years' imprisonment or a fine will be imposed on anyone who

1. (a) disseminates writings or publications (Section 11 (3)) which incite hatred against sections of the population or against a national, racial, religious or ethnic group, calls for the use of force or arbitrary action against them or attacks the

human dignity of others by insulting sections of the population, maliciously exposing them to scorn or contempt or slandering them, or

(b) publicly exhibits, displays or presents such writings or publications or makes them otherwise accessible,

(c) offers or sells such writings or publications or makes them accessible to persons under the age of eighteen, or

(d) produces, procures, delivers, stores, offers, announces, promotes or seeks to import or export such writings or publications or copies thereof in order to use them for the purposes stated in (a) to (c) above or to enable others to make such use of them, or

2. broadcasts programmes whose material fits the description contained in subparagraph 1 above.

"(3) A sentence of up to five years' imprisonment will be imposed on anyone who, in a manner liable to disturb the peace, publicly or in an assembly approves, denies or minimizes an act of the kind described in Section 220 (a) (1) perpetrated under National Socialist rule.

"(4) Paragraph 2 also applies to writings and publications (Section 11 (3)) whose contents are of the kind described in paragraph 3 above.

"(5) Section 86 (3) applies mutatis mutandis in the cases referred to in paragraph 2 above, also in conjunction with paragraph 4, and in the cases referred to in paragraph 3."

Article 21

Freedom of assembly throughout Germany

134. German unification demonstrated the particular importance of the right to freedom of assembly established in article 21. In fact, the peaceful revolution of 9 November 1989 was brought about by mass demonstrations in different towns and cities in the former GDR, particularly in Leipzig. These mass demonstrations were a revolutionary act because the right to freedom of assembly was not in reality recognized in the GDR, despite the commitments made under international law by the GDR as a State party to the Covenant. Public demonstrations opposing or even merely criticizing the SED regime were not permitted and, if they were carried out without authorization, were put down as "counter-revolutionary" by the police and criminal justice with draconian measures. With the peaceful revolution, the actual prerequisites were created for the effective exercise of the freedom of assembly and of demonstration in East Germany. These freedoms are now lawfully founded on the basic right to freedom of assembly in article 8 of the Basic Law, which under the Unification Treaty of 3 October 1990 also applies to the territory of the former GDR.

Combating non-peaceful demonstrations

135. In a free community it is not a question of whether or not people may demonstrate. Instead, problems are caused when freedom of assembly is abused and assemblies take a violent course.

136. During the period covered by this report, the German legislature attempted to encourage the peaceful character of assemblies by means of stricter legal regulations: for example, through the act of 9 June 1989 (Federal Law Gazette I p. 1059) which in its article 3 extended the law of assembly to include, amongst other things, a penal provision (section 27 (2)). This provision threatens anyone with punishment (up to one year imprisonment or a fine) who carries with him during public assemblies, demonstrations or other outdoor public events or on the way to such events so-called "protective weapons" - which are understood to mean above all protective shields, gas masks (for protection against teargas) or self-made protective devices (e.g. cut-up car tyres) - designed to offer protection against police operations. Furthermore, the penal provision also covers "masking" - namely taking part in such events in an outfit which, according to the circumstances, is designed to prevent identification.

137. Since 1985 both these elements had been punishable as administrative offences by fines, but this threat of a fine being imposed had proved ineffective - not least because of the principle of discretionary prosecution applicable in the case of prosecution of administrative offences. The reasons given for the bill were that violence observed during demonstrations was increasingly directed against persons, above all against police officers. Increasingly brutal action was apparent here, often with the recognizable aim of inflicting bodily harm on police officers. For example, in 1986 more than 800 police officers were injured in violent demonstrations. Experience showed that the propensity to violence of an assembly of people was considerably heightened by the appearance of masked demonstrators and by the carrying of protective weapons. In view of this trend, and with regard to their specifically violence-promoting effect, the unlawful nature of passive arming and masking could no longer be viewed as a mere regulatory offence; instead it was justified to impose a criminal punishment on such offences. Furthermore, the threat of punishment was a suitable way to deter recidivists.

138. In the parliamentary debates it was emphasized that fortifying the ban on masking and on passive arming by means of the threat of punishment helped "re-cultivate" demonstrations and guaranteed the exercise of the right to peaceful assembly. To participate in a demonstration as a masked person, says the report of the German Bundestag’s Legal Affairs Committee, is, moreover, unworthy of a mature, responsible citizen and is therefore inhuman.

139. The amendment of the law proved effective in practice, particularly in the run-up to mass rallies when it may be necessary to stop people who are travelling in from elsewhere, e.g. in buses, to take part in a demonstration in order to check for signs of "protective weapons" (and other weapons) being brought with them and to seize such objects if they are found. This applies not only to politically motivated demonstrations but also to big events such as soccer matches where, as experience shows, violence breaks out again and again.

Sit-ins

140. The third periodic report already gave full particulars of the development of court rulings concerning the punishability of sit-in demonstrations (CCPR/C/52/Add.3, pp. 32 ff., paras. 128 ff.).

141. In the period following that report, problems arose from the fact that criminal courts not infrequently viewed sit-ins as criminal offences, although in accordance with the Federal Constitutional Court ruling they should not have been regarded as such. Thus, in its decision of 23 March 1992 - 1 BvR 687/88 - (Neue Juristische Wochenschrift, 1992, p. 2688), the third chamber of the First Senate of the Federal Constitutional Court emphasized that the "reprehensibility" of an action which is required for the action to be punishable as a coercion made it necessary to assess the punishability of a sit-in demonstration by comprehensively weighing and considering all the circumstances pertaining to the individual case. The following circumstances were always to be considered: the operations of the blockaded institution expected at the start of the sit-in, the duration and intensity of the action, prior announcement thereof, alternative routes via other access roads and the relation of the persons involved to the issue of the protest. Furthermore, under certain circumstances, the number of demonstrators or the urgency of the blocked transports or other official trips could also be of relevance. In the case under review the third chamber of the First Senate of the Federal Constitutional Court quashed the contested judgement because the special circumstances of the case had not been examined, as required.

142. The First Senate of the Federal Constitutional Court ruled on 10 January 1995 that the broad interpretation by the criminal courts of the definition of violence in section 240 of the Penal Code is not compatible with the "principle of precision" embodied in article 103 (2) of the Basic Law. The Federal Constitutional Court has overturned the judgements of the regional and higher regional courts against four complainants and referred the case back to the higher regional court.

143. The Federal Constitutional Court also found that the constitutional principle of precision imposes limits on any interpretation of the facts going beyond the defined element of an offence by the courts. The judgements of the criminal courts largely removed the limits on the definition of violence in that they took away the function of that definition as intended by parliament, which was to determine which among the necessary, unavoidable or everyday constraints on the free will of third parties were punishable. It considered that it is no longer possible to predict with sufficient certainty which physical conduct which psychologically prevented others from asserting their will should be prohibited and which not. The task of limiting the definition of violence in section 240 (1) of the Penal Code, which was now necessary, was primarily the responsibility of the criminal courts, not of the Federal Constitutional Court. The illegality of sit-ins under other rules and regulations was not affected by this decision, the Court said.

144. Parliament will have to consider whether criminal law will have to be modified or supplemented in the light of that decision.

Article 22

Freedom of association and parties

145. Among the various aspects of the right to freedom of association guaranteed in article 22 of the Covenant, the right to form political parties, to join them and to participate in the work of political parties is of particular importance. In fact, only where the effective exercise of this right is guaranteed are the actual prerequisites created for people to exercise effectively also the right to take part directly in the conduct of public affairs (art. 25 (1) (a) of the Covenant). Although, as a State party to the Covenant, the former GDR had also committed itself to comply with article 22, under the SED regime there could be no question of a right to form political parties. The "bourgeois" parties licensed in 1945 by the Soviet occupying Power did continue to exist - but they were integrated as "bloc parties" into the SED system of rule. They were dependent on this system, had a statutory claim to a specific number of members in the People's Chamber and, as a result of the arrangements taken, had no chance of winning elections and taking over political responsibility from the SED regime. The continued existence of this regime was practically consolidated. The so-called "bourgeois" parties simply served to give the regime an air of democratic legitimacy and reputation.

146. On 3 October 1990 the regulations contained in the Basic Law and the Law on Political Parties also came into effect in the territory of the former GDR. Under article 21 (1) of the Basic Law, political parties help form the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. Parties which, by reason of their aims or the conduct of their adherents, seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany may be prohibited. However, the question whether a political party is unconstitutional is, according to article 21 (2) of the Basic Law, for the Federal Constitutional Court to decide.

Bans on extremist associations

147. The purpose of freedom of association is to ensure pluralism of opinions, tolerance and open-mindedness in a democratic society. However, human rights and fundamental freedoms may not be abused to the extent of permitting any group to seek their destruction (art. 30 of the Universal Declaration of Human Rights; art. 5 (1) of the Covenant). Thus, freedom of association may be restricted pursuant to article 22 (2) of the Covenant if the fundamental values of a democratic society are threatened by any group.

148. At present there are 82 right-wing extremist organizations and other associations in the Federal Republic of Germany (1991: 76) which are under observation by the Federal Office for the Protection of the Constitution on account of right-wing extremist activities. Together, they have some 36,600 members, discounting multiple memberships (1991: 39,800). This figure does not include the Republikaner (REP), a party which has about 20,000 members. Since mid-December 1992, the REP has been under observation throughout the Federal Republic of Germany by the Office for the Protection of the Constitution.

149. The Federal Ministry of the Interior has the authority to ban associations whose aims or activities contravene criminal law or who are directed against the constitutional order or the notion of international understanding (art. 9 (2) of the Basic Law in conjunction with sect. 3 of the Associations Act). Such bans count as restrictions of the freedom of association permitted under article 22 (2) of the Covenant. Invoking this authority, the Ministry banned three right-wing extremist associations at the end of 1992: the Nationalistische Front (NF) on 27 November 1992, the Deutsche Alternative (DA) on 10 December 1992, and the Nationale Offensive (NO) on 22 December 1992. On 16 September 1993 the Federal Minister of the Interior requested the Federal Constitutional Court on behalf of the Federal Government to declare the right-wing extremist Freiheitliche Deutsche Arbeiterpartei (FAP) unconstitutional pursuant to article 21 of the Basic Law so that the party could be banned. After the Federal Constitutional Court had ruled that the FAP was not a party within the meaning of the Basic Law, the Federal Ministry of the Interior banned it on 24 February 1995 as an association of the kind described in article 9 (2) of the Basic Law in conjunction with section 3 (1) of the Associations Act. Again acting on behalf of the Federal Government, the Federal Ministry of the Interior sought a ruling from the Federal Constitutional Court pursuant to article 18 of the Basic Law to the effect that two right-wing radicals had forfeited their basic rights on account of their inflammatory propaganda. Bans on associations and other applications under article 21 and article 18 of the Basic Law are under consideration.

150. To the extent that an association's activities and organization are confined to a particular Land, bans fall within the purview of the supreme authorities of that Land. On 18 December 1992 Lower Saxony imposed a ban on the Deutscher Kameradschaftsbund Wilhelmshaven (DKB). On 7 June 1993 the Bavarian Ministry of the Interior banned an association known as the Nationaler Block (NB), and on 8 July 1993 the Interior Ministry of Baden-Württemberg took the same action with regard to the Heimattreue Vereinigung Deutschlands (HDV). All three of them pursued right-wing extremist aims. In addition, the Hamburg Senate - Internal Affairs Department - banned the Nationale Liste (NL), a right-wing extremist association, on 24 February 1995. Other possible bans are under consideration.

Trade unions

151. Article 22 (3) of the Covenant expressly mentions the right to form and join trade unions, which is also accorded within the framework of the freedom of association. This right is also the subject of a special guarantee under article 8 of the International Covenant on Economic, Social and Cultural Rights on the implementation of which the German Government has to submit a separate report in accordance with its articles 16 and 17.

Article 23

152. The guarantees concerning the protection of the family, the right to marry and to equality of rights as to marriage, during marriage and at its dissolution contained in article 23 have been enshrined in more comprehensive and specific form in the special guarantees made in article 4 (2) and

articles 12, 13 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women. As already stated in connection with article 3 in this report, the Federal Republic of Germany will soon submit its second periodic report in accordance with article 18 of the Convention.

153. During the period covered by this report, problems have arisen in connection with article 23 (4) of the Covenant. Under section 1671 (1) of the German Civil Code, the family court has to decide ex officio in case of divorce "which parent is to have the care and custody of the mutual child".

154. The criteria to be applied when making this decision are laid down in the law (sect. 1671 (2) and (3) of the German Civil Code) as follows:

> "(2) The court shall make the settlement most suitable for the child's well-being; in this process consideration must be given to the child's ties, particularly those to his or her parents and siblings.
>
> "(3) The court should deviate from an identical proposition put by the parents only when this is necessary for the child's best interests. If a child aged fourteen or more makes a proposal deviating therefrom, the court shall make its decision in accordance with paragraph 2."

155. A regulation formerly contained in paragraph 4, under which in the case of divorce parental custody always had to be granted to one parent alone, was annulled by the decision of the Federal Constitutional Court of 3 November 1982. Since then, it has been possible to allow both parents to retain joint care and custody after divorce if they are willing and able to continue to bear joint responsibility for their child after the dissolution of their marriage. However, majority opinion holds that an identical application must be submitted by both parents. In practice, this type of agreement between divorced parents remains the exception, especially since most divorcing spouses are no longer on amicable terms. The result of this is that in by far the most cases courts award parental custody to just one parent, usually the mother, whilst the other parent, usually the father, is limited to rights of access in accordance with section 1634 of the German Civil Code.

156. This situation is being increasingly criticized. There is a widespread feeling that in future joint parental custody should continue even after divorce, unless the parents file an application to the contrary. Whether and to what extent the law on the legal consequences of divorce can be revised on account of these ideas is at present an issue under discussion, to which the German Government also referred in its reservation made on 6 March 1990 to the Convention on the Rights of the Child. The reservation reads as follows:

> "The Government of the Federal Republic of Germany declares that it welcomes this Convention on the Rights of the Child as a milestone in the development of international law and that it will take the opportunity afforded by the ratification of the Convention to initiate reforms in its domestic legislation that are in keeping with the spirit of the Convention and that it considers appropriate, in line with article 3 (2) of the Convention, to ensure the well-being of the child. The planned measures include, in particular, a revision of the law on parental custody in respect of children whose parents have not married, are

permanently living apart while still married, or are divorced. The principal aim will be to improve the conditions for the exercise of parental custody by both parents in such cases as well."

157. Associations formed by parents who are not awarded parental custody to fight for the protection of their interests have, in their criticism of domestic practice, asserted that with the custody decisions made by German family courts the Federal Republic of Germany is violating international law and particularly the obligation incumbent upon it under article 23 (4) of the Covenant to take steps to ensure equality of rights and responsibilities of both spouses in the case of dissolution of marriage.

158. The German Government does not share this concern. Rather, it is of the opinion that the above-quoted provision of the Covenant cannot be taken to mean that the parental custody regulation which applies during marriage must automatically continue to apply after divorce in accordance with paragraph 4 in order to realize the equality of rights for divorced spouses. In fact, according to paragraph 4, second sentence, as a State party to the Covenant Germany is, first and foremost, obliged, in the case of dissolution of marriage, "[to make] provision ... for the necessary protection of any children". However, what is required by "necessary protection" of the children - be it continuing joint parental custody regardless of the parents' wishes, be it transferring joint parental custody to divorced parents who both make an application to this effect, or be it another solution - is not defined in the Covenant and therefore left to the discretion of the States parties to the Covenant. The German Government therefore upholds the opinion represented in the initial report (CCPR/C/1/Add.18, p. 15) that the requirements of article 23 (4) of the Covenant are complied with if the family court, following section 1671 of the German Civil Code, decides ex officio in accordance with the child's well-being who should be awarded custody of the children in cases where the parental marriage - as the former basis of joint parental custody - no longer exists.

159. This does not alter the fact that intensive work is continuing in Germany on the revision of the legislation concerning parents and child. According to the coalition agreement for the thirteenth legislative period (1994 to 1998), this reform focuses on the legal protection of the well-being of the child, especially with regard to joint care, uniform rights of access, improved maintenance regulations, and the termination of statutory ex officio guardianship. The bill to this effect is in preparation, and another aimed at eliminating statutory ex officio guardianship is already before parliament.

Article 24

160. The particular importance of article 24 lies in the fact that a binding international guarantee is given of the child's right to protection in general form. The protective measures to be taken by the States parties to the Covenant are not - apart from marginal specifications in paragraphs 2 and 3 - defined in detail, so that the manner in which article 24 is applied is largely left to the discretion of the States parties to the Covenant. To alter this unsatisfactory situation the international community has elaborated since 1979 a comprehensive instrument, the Convention on the Rights of the Child. Not only the Federal Republic of Germany, but also the former GDR

participated in preparing the draft of the Convention and deposited its instrument of ratification of that Convention on 2 October 1990 - one day before the completion of German unity. Such deposit was, in the opinion of the German Government, without effect because at the time the Convention would have entered into force for this State by virtue of its act of ratification, in accordance with article 49 (2) of the Convention (1 November 1990), the German Democratic Republic no longer existed as a subject of international law.

161. Instead, the Convention on the Rights of the Child entered into force on 5 April 1992 for Germany as a whole, after the German instrument of ratification had been deposited on 6 March 1992 with the Secretary-General of the United Nations. Therefore, the Federal Republic of Germany is also obliged, in accordance with article 44 (1) (a) of the Convention, to submit within two years of its entry into force the initial report on the implementation of the rights recognized in the Convention. The German Government does not deem it appropriate to anticipate its initial report in accordance with article 44 (1) of the Convention on the Rights of the Child in this report and also wishes to avoid reporting twice on the same subject.

Article 25

Right to free elections

162. One of the achievements of German unification is that the right of each citizen guaranteed in article 25 (b) of the Covenant "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors" has now been put into effect throughout Germany. Periodic elections to the People's Chamber and to the local governments were of course held in the former GDR. But these were mere sham elections, which guaranteed neither secret ballots, nor free expression of the will of the electorate, nor correct, unfalsified vote counts. In particular, GDR elections did not provide an opportunity to vote the government out. There was no choice between the parties listed on the ballot paper, because the candidates nominated by all parties were summarized in a list which could only be approved in its entirety or rejected - for instance by spoiling the ballot paper. The distribution of seats in parliament was already fixed before the election and the only question was whether the percentage of affirmative votes (99 per cent) aimed for by the Government was attained - if necessary this was also ensured by fraud in connection with the election.

163. The peaceful revolution of 9 November 1989 provided the political conditions for free elections to the People's Chamber in the former GDR on 18 March 1990 in accordance with the requirements of article 25 (b) of the Covenant. As of 3 October 1990, the constitutional guarantees by which the Basic Law ensures that elections carried out in Germany meet the requirements of the Covenant also apply to the territory of the former GDR. In this context, particular mention should be made of article 20 (principle of democracy, sovereignty of the people), article 28 (requirements of elections in the Länder) and article 38 (elections to the German Bundestag); compliance with these constitutional provisions is subject to control by the Federal Constitutional Court. There is no longer any fraud in connection with

elections, as occurred in the former GDR to produce results acceptable to the SED regime. Criminal proceedings have already been instituted against individuals who participated in such election rigging, and some cases have already been conducted.

Voting rights of foreigners

164. During the period covered by this report two Länder introduced voting rights for foreign nationals in local elections, provided they had resided lawfully in Germany for a number of years. However, the Second Senate of the Federal Constitutional Court handed down two rulings on 31 October 1990 which annulled these Land law provisions as being incompatible with the Basic Law. In support of its judgements, the Federal Constitutional Court particularly emphasized that even though article 28 (1), second sentence, of the Basic Law provides for the people being represented in counties and municipalities, Germans alone constitute "the people" and choose their representatives. These decisions of the Federal Constitutional Court are consistent with article 25 of the Covenant which reserves the exercise of the civil rights listed in the article, including the right to vote, to citizens.

165. In the meantime local voting rights have been incorporated in the Basic Law in respect of nationals of member States of the European Union. They are based on the Maastricht Treaty on European Union, which the Federal Republic of Germany has now ratified. That treaty gives every citizen of the Union residing in a member State of which he is not a national the right to vote and to stand as a candidate at municipal elections in the member State in which he resides. Therefore, by the act of 21 December 1992 (Federal Law Gazette I, p. 2086) the following sentence was inserted after article 28 (1), third sentence, of the Basic Law:

> "In county and municipal elections persons who are nationals of member States of the European Community, too, may vote and shall be eligible for election in accordance with European Community law."

The detailed arrangements for exercising this right to vote and to stand for election and hence the adaptation of Germany's electoral legislation are contained in European Council directive No. 94/80/EC of 19 December 1994 (OJ (EC) No. L 368, p. 38). Member States are required to convert this directive into national law before 1 January 1996. In the Federal Republic of Germany citizens of the Union will probably be able to participate in local elections for the first time in Berlin on 22 October 1995. This special local electoral law differs essentially from the introduction of a general right to vote in local elections for foreigners. For one thing the right to vote in local elections in other member countries in which they reside has been accorded to Europeans by dint of the newly created status of citizenship of the Union. For another, the participation of citizens of the Union in local elections in the member States is provided for under Community law, not national law.

166. For those foreign nationals who are not citizens of the Union the only way to attain this right is to acquire German nationality. Current law makes naturalization dependent on renunciation of the former nationality, as far as this is possible and reasonable. Since the Government attaches considerable

importance to making naturalization easier for foreigners who have resided in Germany for many years, a number of measures to this effect have been introduced in recent years.

167. Every citizen of the Union residing in a member State of which he is not a national is entitled under the Maastricht Treaty to vote and to stand as a candidate not only at municipal elections but at elections to the European Parliament in the member State in which he resides. Following the incorporation in German electoral law of the EC directive of 6 December 1993 (OJ (EC) No. L 329, p. 34), citizens of the Union residing in Germany were able to exercise this right for the first time at the election for the European Parliament held on 12 June 1994.

Right of access to public service

168. The former GDR abolished the traditional German institution of the life-time appointment of public servants and judges whose status, service and loyalty are governed by public law and who can only be dismissed from office by a court ruling, which shapes public service law under the Basic Law. Those employed in public administration in the GDR were classified as employees and their employment could be terminated by notice given by the employing authority. Although special rules applied for judges (selection of judges for a specific term of office), no appointment for life was provided for. Re-election was not guaranteed, and termination of employment during the term of office was possible.

169. The Unification Treaty permitted only temporary continuation of the employment of former GDR public service employees. It determined, apart from the rules for judges and public prosecutors which are to be defined more closely, that routine termination of such employment is also permissible within a two-year period after accession taking effect, if:

(a) The employee lacks the qualifications or aptitude;

(b) The employee is no longer needed;

(c) The former public authority is dissolved without replacement or continued or alternative employment is no longer possible owing to the fact that the employing authority has been merged with or incorporated in another or extensively restructured.

170. Furthermore, the Unification Treaty allowed, even after the expiry of the two-year period, for dismissal without notice in the event that the employee:

(a) Violated the principles of humanity or of the rule of law, in particular the human rights guaranteed under the Covenant or the principles laid down in the Universal Declaration of Human Rights of 10 December 1948;

(b) Was employed by the GDR Ministry of State Security or the GDR Department for National Security and his or her continued employment is deemed untenable.

171. This led to the screening of the staff of the former GDR administration, with the aim of deciding in each individual case whether employment should be terminated, continued in the public service or civil service status awarded. Questionnaires are also used to this end; employees must provide truthful details about former employment and functions and about any work they may have carried out for the GDR State security service, etc.

172. There are no specific criteria in the Unification Treaty concerning employment of staff. Such decisions are to be taken by the Länder at their own discretion within the scope of their power to appoint and dismiss staff; they are not always uniform. Of course, the principles laid down in article 33 (2) of the Basic Law - whereby applicants to the public service shall be employed only according to their aptitude, qualifications and professional ability - also apply in the new Länder. Within the meaning of this constitutional provision, aptitude, unlike qualifications and professional ability, refers to the applicant's personal aptitude for any public office. Personal aptitude may be found wanting if the applicant does not guarantee the required loyalty to the Constitution or is otherwise ineligible for carrying out public duties. As a rule it can be said that former membership of the SED alone cannot be viewed as sufficient reason to terminate employment.

173. Screening the public service begun by the new Länder has not yet been terminated. Further details on the total number of GDR public employees whose employment in the public service was terminated or who were kept on cannot be provided as yet. To date no ruling has been made as to whether the regulations on the screening of those who were employed in the former GDR's public service conform to the Constitution.

174. Initially the judges and public prosecutors of the former GDR in principle continued to carry out their functions. It was intended that they should be screened. This process was entrusted to committees for the selection of judges and committees for the appointment of public prosecutors, which acted on the basis of the 1990 provisions of the GDR Acts governing the judiciary and public prosecutors, which were retained in modified form under the Unification Treaty. Each committee consisted of 10 members: six being appointed by the representations of the people in the new Länder and four being judges or public prosecutors serving in the former GDR.

175. The screening process was used to determine whether the applicant was eligible for employment in a State under the rule of law, and above all to what extent the judge or public prosecutor had played a part in wrongful rulings or demonstrated his support for the totalitarian system. Mere membership of the SED - almost all GDR judges and public prosecutors were members - did not matter in this process.

176. The judges who were kept on in their jobs have to serve a probationary period. They will be appointed judges for life at the latest five years after their designation provided that no further reservations are voiced with regard to their aptitude. Upon appointment for life the judges may also exercise functions outside the new Länder (e.g. in the federal service or in the service of the old Länder). The same applies to public prosecutors.

177. The German Government believes that the provisions of the Unification Treaty and the practical screening of GDR public employees beyond all doubt respect article 25 (c) of the Covenant. The guarantee provided for under the Covenant is by no means geared to the special problems which arose as a consequence of German unification. It is not a matter of punishing members of the public service "because of their political opinion", but a question of reorganizing the public service, which for decades was the mainstay of the iniquitous SED system, in a manner which fully meets the expectations the citizens place in the public service's rule of law ethos and loyalty to the Constitution.

Article 26

Equality of children born outside marriage

178. Following German unification, problems arose in connection with article 26 of the Covenant above all because the legislation on illegitimate children in the Federal Republic of Germany as at 2 October 1990 differed from that in the former GDR. Article 26 of the Covenant committed both German States as Parties to the Covenant to prohibiting any discrimination and guaranteeing to all persons equal and effective protection against discrimination on any ground such as birth or other status in particular.

179. This does not mean that the States parties to the Covenant are obliged under international law to refrain from adopting any regulation in their domestic law which distinguishes between legitimate children and children born outside marriage. In fact, article 26 does not prohibit any distinction, but rather any "discrimination". Accordingly, the German Government assumes that "the purpose of the article was to prohibit discrimination, in the sense of unfavourable and odious distinctions which lacked any objective or reasonable basis" (Capotorti in A/C.3/SR.1099, para. 10). The primary concern of the protection of the child is also to be cited in support of this interpretation (art. 23 (4), second sentence, and art. 24 (1) of the Covenant) which allows the introduction or maintenance of such distinctions between legitimate children and children born outside marriage which serve the well-being of the children in question.

180. For this reason the West German law on illegitimacy, which had been reformed in 1969, retained a great number of differentiating regulations. The 1969 legislators were convinced that this was in the interests of and served the well-being of the illegitimate child. However, opinions of what really serves the interests and well-being of the child are subject to social change. This becomes quite obvious from the fact that there are hundreds of thousands of unmarried parents with children cohabiting in western Germany, something that would have been inconceivable back in the 1960s.

181. As a result West German law on illegitimacy is increasingly considered with criticism in domestic debates.

182. Of course, it is agreed that some distinctions are reasonable. For example, there is general consensus that, for practical reasons, paternity does not have to be recognized or established in the case of a child born in wedlock but that the mother's husband is assumed to be the father. Since

paternity of an unmarried mother's child cannot be established in this way a different procedure is inevitable. The fact that, in the case of a child born outside marriage, paternity binding on everyone is established only when a specific man has freely acknowledged paternity or has been determined to be the father by decision of court (sect. 1600a of the Civil Code) does not therefore appear to pose any problems.

183. The following distinction is more difficult: if a child is born outside marriage and if the mother is of full age when the child is born, the youth welfare office automatically becomes the guardian of the illegitimate child by law and must take care of the child in certain matters, especially the following: establishing paternity; enforcing maintenance claims; and seeing to the child's inheritance and compulsory portion rights.

184. This ex officio guardianship does of course serve the interests and well-being of the child. However, it must be asked whether these protective measures taken for the sake of the child do not also mean patronizing the mother more than is necessary.

185. The distinctions made in the West German law of succession are also under discussion. In principle the illegitimate child is naturally the legal heir to his or her father. However, should the father leave a surviving spouse or legitimate offspring, the illegitimate child, although a legal heir, will not become a co-owner of the estate. Instead, the child has only a mandatory claim against the widow or the half-siblings inheriting the estate for payment of a sum of money equivalent to his or her share of the inheritance (sect. 1934a of the Civil Code). This "claim of the illegitimate child to receive the equivalent of his or her statutory share" takes the place of the legal portion which is withheld from the illegitimate child in case the estate is to be divided with a surviving spouse or legitimate offspring of the deceased. This regulation was introduced in 1970 above all to protect the legitimate family of the deceased from the illegitimate co-heir acting as a "disruptive element" in the community of heirs and pushing towards rapid settlement of the estate, including the family home inhabited by the widow.

186. Following German unification these problems intensified because the GDR Family Code went further than the law in force in the Federal Republic of Germany as at 2 October 1990 in terms of the equal status of children born outside marriage: in the former GDR a mother of full age having an illegitimate child had full parental rights undiminished by the institution of ex officio guardianship by the youth welfare office. Moreover, all children, whether born in or outside marriage, had equal rights as legal heirs to their father. This was due to the fact that the GDR Family Code no longer distinguished between the legitimate or illegitimate status of a child. The higher percentage of children born outside marriage in the former GDR may have played a part in this: during the last few years before German unification about 32 per cent of the children in the GDR were born outside marriage, compared to around 10 per cent in West Germany.

187. The Unification Treaty took this into account by not putting the Civil Code provisions concerning ex officio guardianship into force in the territory of the former GDR. Instead, mothers of illegitimate children were not

prevented from exercising their full parental rights and ex officio guardianship did not become effective even if the child was born after 2 October 1990.

188. For children born outside marriage before 3 October 1990 the regulation concerning the right of inheritance applicable to legitimate children applies so that these children continue to enjoy the advantages provided under previous GDR law. This means, among other things, that the claim of the illegitimate children to receive the equivalent of their statutory share provided for under section 1934a of the Civil Code does not apply to these children, regardless of whether the testator's death occurred before or after the accession of the GDR to the Basic Law became effective.

189. The parallel application of such different regulations in the eastern and western parts of Germany in the sphere of legal issues which are subject to the legislative jurisdiction of the Federation can, however, only be a temporary solution. The German Government is consequently endeavouring to harmonize the legal provisions pertaining to the status and rights of the child within Germany.

190. This involves, irrespective of further reforms in this sphere, in particular the abolition of ex officio guardianship for Germany as a whole. It will be replaced by voluntary support because today, when many illegitimate children are born into unimpaired relationships, the interference in parental rights incidental to ex officio guardianship is largely unnecessary. A bill to this effect has already been submitted to Parliament.

Interpretation of article 26

191. During the period covered by this report the German Government noted with concern that, in its General Comment 18 (37) of 9 November 1989, the Committee is prepared to accept only those distinctions as being compatible with article 26 of the Covenant, whose aim is to achieve a purpose which is legitimate under the Covenant. The German Government summarized its reservations as follows:

> "1. The general comments on article 26 of the Covenant (non-discrimination) adopted by the Human Rights Committee on 9 November 1989 prompt the Government of the Federal Republic of Germany to submit the following observations in accordance with article 40, paragraph 5, of the Covenant.
>
> "2. In the Federal Republic of Germany, a guarantee largely corresponding to article 26 of the Covenant is contained in article 3 of the Basic Law (Constitution) of the Federal Republic of Germany which reads as follows:
>
> 'Article 3
>
> '(1) All people shall be equal before the law.
>
> '(2) ...

'(3) No one may be disadvantaged or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religion or political opinions.'

"This guarantee is a basic right enshrined in the Constitution. In the Federal Republic of Germany, redress may be sought for the violation of basic rights by means of a complaint of unconstitutionality. Such a complaint may be filed with the Federal Constitutional Court, after exhausting all other legal remedies, by any person who believes that one of his basic rights has been violated by public authority.

"3. According to the rulings of the Federal Constitutional Court, article 3 (1) of the Basic Law prohibits the legislators from arbitrarily treating essentially identical circumstances in a different manner and essentially different circumstances in an identical manner (BVerfGE 4, 144/155 and other cases). The legislators must decide in each specific instance which circumstances are to be regarded as essentially identical and which ones as so different that different treatment is justified (BVerfGE 6, 273/280; 9, 3/10 et seq.; 10, 59/73; 13, 225/228); in doing so the legislators enjoy a large measure of freedom (BVerfGE 17, 319/330; 74, 182/200). Since in reality circumstances are never wholly identical, certain differences must always be ignored. The legislators must, however, make an objective decision; it is a question of whether the differences in the circumstances concerned are so significant 'in terms of an approach based on a sense of justice' that ignoring them must be regarded as arbitrary (BVerfGE 21, 12/26 et seq.). Of late, the Federal Constitutional Court has expressed this idea even more concretely by stating that article 3 (1) of the Basic Law is violated above all whenever a group of persons is treated differently to another group although no differences of such a nature and such significance exist between the two groups as would justify the dissimilar treatment (BVerfGE 79, 106/121 et seq.; 71, 364/384).

"Inter alia, article 3 (3) of the Basic Law expresses in more concrete terms the precept of equal treatment to be observed by the legislators. As the Federal Constitutional Court has held, the words that no one may be disadvantaged or favoured 'because of his sex, his parentage ...' etc. imply that there must be no causal link between the criteria of differentiation listed (sex, parentage, etc.) and any disadvantage or preference (BVerfGE 2, 266/286; 5, 17/22); the criteria listed are thus not 'differences' that might on their own justify dissimilar treatment if, in the case of a statutory provision based on those criteria, there are otherwise no objective reasons justifying such differentiation.

"4. In the opinion of the Government of the Federal Republic of Germany, article 26 of the Covenant must be interpreted similarly to the parallel guarantee in article 3 (1) and (3) of the Basic Law. Accordingly, it is the responsibility of national legislators of the States parties to the Covenant to determine the

circumstances subject to identical statutory treatment. A violation of article 26 of the Covenant may be assumed only if no objective reason can be found for the identical or dissimilar treatment accorded by the national legislators, meaning that the statutory provision introduced clearly lacks objectivity. This also applies where a statutory provision makes a distinction according to a feature expressly named in the second sentence of article 26 (1) of the Covenant. For 'discrimination' within the meaning of that sentence can at most occur when no reasons that are objective in terms of a sense of justice can be found for a statutory provision that differentiates according to one of the features mentioned in the said sentence.

"5. The interpretation of article 26 of the Covenant on which the Committee bases its General Comments 18 (37) of 9 November 1989 partly takes account of the foregoing, but might be understood to mean that the article always requires formally identical treatment, that formally dissimilar treatment always constitutes discrimination and that dissimilar treatment is only compatible (by way of exception) with article 26 of the Covenant if the differentiation is reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. Such an interpretation would establish far narrower limits for national legislators than the Federal Constitutional Court's interpretation of the parallel guarantee contained in article 3 (1) and (3) of the Basic Law.

"6. In the opinion of the Government of the Federal Republic of Germany, different treatment for which reasonable and objective reasons can be adduced is compatible with article 26 of the Covenant not only when it pursues a purpose which is legitimate under the Covenant. In fact, the Covenant's guarantees cover only a narrow field of government activity, which means that for wide sectors of legislation, e.g. fiscal or social law, the Covenant does not envisage any purposes that may be pursued in this context. Moreover, the requirement that the purposes be legitimate under the Covenant isolates the interpretation of the Covenant from that of other human rights instruments. In this connection mention should be made, for example, of article 1 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination, pursuant to which distinctions, exclusions, restrictions or preferences between citizens and non-citizens are not regarded as racial discrimination or as any other form of discrimination. The Committee's reference to purposes which are legitimate under the Covenant might be understood to mean that article 26 of the Covenant is to be interpreted irrespective of article 1 (2) of [the Convention]. This, too, would not be acceptable to the Government of the Federal Republic of Germany, especially since the Committee itself bases the interpretation of article 26 of the Covenant on article 1 (1) of [the Convention]."

Combating xenophobic violence

192. Preliminary remarks. Affording people legal protection against discrimination, especially for reasons of their origin or race, is extremely important and is guaranteed by the Basic Law. The Federal Republic of Germany deems it essential to ensure that legislation offers the best possible protection against discrimination. All public authorities are obliged to ensure the application of the appropriate laws and to take effective measures to counter any form of discrimination.

193. Combating xenophobic attitudes and violence is a task for society as a whole. That government has a special responsibility in this respect goes without saying. On 2 December 1992 the Federal Government led by Chancellor Helmut Kohl instructed the head of the Federal Chancellery to coordinate, with the help of a committee of State secretaries, all measures and plans of the Federal Government aimed at preventing violence or bringing offenders to justice. Working groups were set up under the chairmanship of the competent federal ministries to look into the problems of violence among young people, the integration of foreigners, police aspects, criminal law as well as criminal and court procedure. The results of their work, entitled "Campaign against Violence and Hostility towards Foreigners", has appeared in two interim reports that have also been distributed in several languages via the Federal Republic's missions abroad.

194. The increase in violence in society, especially among young people, calls for a tremendous joint effort on the part of all sections of society. The schools and universities, religious communities, the various clubs and associations, and especially families, are called upon to help combat violence and extremism. In order to promote this campaign the Federal Chancellor invited representatives of all these groups and of the media, as well as other experts, to attend meetings with him on this subject. So far three such meetings have taken place and they have produced some open, and in some cases controversial, discussions on the origins of the phenomenon of "violence", on the possibilities of prevention and the necessity of prosecution. The various institutions and organizations represented have entered into cooperative agreements. Further discussions will be held in due course.

195. The background to this "Campaign against Violence and Hostility towards Foreigners" is that since mid-1991 a considerable quantitative and qualitative increase in xenophobic offences has been witnessed in the Federal Republic of Germany. Between 1 January and 31 December 1992, 2,272 acts of violence motivated by proven or suspected right-wing extremism were recorded by the Federal Office for the Protection of the Constitution. This is an increase of 53 per cent over the 1,483 violent offences committed in 1991. Since 1993 there has been a marked downward trend.

196. Whilst in the first half of 1992 offences were committed either by single perpetrators or by small groups, groups of perpetrators comprising up to 500 violent individuals took part in the riots in Rostock and in the incidents shortly afterwards in various other cities. These attacks were often no longer directed only at "foreigners" or their hostels and dwellings but also at the forces of law and order deployed against the rioters, i.e. police officers and firemen. Most of the xenophobically motivated offences were

committed spontaneously by local people. So far no central control by right-wing extremist organizations has been proved. There are indications, however, that skinheads and similar-minded right-wing extremist associations are increasingly developing interconnections. The security authorities, especially the offices for the protection of the Constitution, concentrate their efforts on these emerging interconnections. It has also been noted that right-wing extremists in the Federal Republic of Germany have increasingly been in contact with like-minded persons abroad.

197. At present 6,990,000 foreigners are living in the Federal Republic of Germany (as at 31 December 1994). They account for more than 8 per cent of the total population. In some parts of the country there are particularly large foreign communities which in some densely populated areas represent more than 20 per cent of the population, and in some urban districts the proportion is especially high. A large percentage of Germany's foreign community are of Turkish nationality (numbering 1,965,000). There are 1,560,000 nationals from other member States of the European Union. On 31 December 1994 the total number of refugees in the Federal Republic of Germany exceeded 1,750,000. They included about 136,800 people entitled to asylum and refugees recognized abroad, and about 130,000 relatives. There are also some 67,200 "quota" refugees and roughly 650,000 "de facto" refugees. In addition, more than 350,000 refugees and expellees from the former Yugoslavia are living in the Federal Republic.

198. The Federal Government's policy towards foreigners is aimed at integrating those lawfully residing in Germany, especially workers recruited abroad and their families, and at restricting further immigration from countries outside the European Union.

199. The purpose of the integration measures introduced by the Federal Government is to ensure that foreigners living permanently in Germany become economically, socially and legally integrated and thus enabled to play their part in the life of the community, as far as possible on an equal footing with other citizens. The success of the integration process also depends on the willingness of foreign families to recognize the fundamental values enshrined in Germany's Constitution (separation of State and Church, status of women, religious tolerance) and to abide by the laws (e.g. as regards compulsory schooling), and on the extent they are prepared to learn German.

200. In 1993, as part of the Government's general endeavour to facilitate the integration of foreigners, legislation was introduced making it easier for foreigners to become naturalized Germans enjoying all the civil rights guaranteed by the Constitution. The Federal Government also intends to carry out a comprehensive reform of nationality law.

201. The attitude of by far the overwhelming majority of Germans towards foreign residents is clear from opinion polls commissioned by the Federal Government. These showed that in 1992, in comparison with the previous year, the acceptance of foreigners had considerably increased. In more recent surveys 72 per cent of Germans in both the eastern and western Länder declared that they approved of the fact that so many foreigners lived in Germany. In

late autumn 1992 only 60 per cent of respondents had expressed this view. Today, 94 per cent of those surveyed also denounce violence against asylum-seekers.

202. A survey carried out in mid-January 1993 shows that extremists in Germany are ostracized socially. It also showed that the Germans' attitude to Jews is largely positive.

203. A widespread protest movement against right-wing extremist and xenophobic violence has emerged among the German population. On 8 November 1992, for instance, a mass demonstration under the slogan "human dignity is indivisible" took place in Berlin. More than 350,000 people took part. Since then similar campaigns, e.g. demonstrations, candle-light vigils and solidarity concerts, have taken place in many German towns and cities with participants expressing their condemnation of xenophobic ideas and activities. Private individuals and companies call for tolerance in newspaper advertisements. Broadcasting corporations make broadcasting time available on radio and television for spots in which celebrities speak out against xenophobia. Posters in public places, e.g. railway stations, call for resistance against racism and xenophobia. In schools, classes carry out project weeks on this issue. School classes or private individuals "sponsor" foreigners, e.g. foreign nationals living in homes for asylum-seekers. Employers' and employees' representatives make joint appeals against xenophobia. Isolated incidents of xenophobic comments in companies have been punished - even going as far as instant dismissal.

204. Police and judicial measures. The police and judicial authorities have taken up the challenge represented by right-wing extremism and xenophobic activities. Parliament is meeting its responsibility in this respect. All public authorities are doing their level best to combat right-wing extremism and xenophobia. If they lead to violence and offences, the public authorities cannot, therefore, be deemed guilty of violations of human rights. Indeed, the German authorities are spending considerable sums of money to facilitate the integration of foreigners living permanently in Germany.

205. Security agencies, public prosecutor's offices and courts of law are doing their utmost to prevent further violence. The forces of law and order are endeavouring to use all opportunities available to prevent further acts of violence and to pursue those responsible for such offences with all the means at their disposal under the law. Persons taking part in xenophobic violence will be made to feel the full severity of the law.

206. In the federal system of the Federal Republic of Germany it is the Länder which are largely responsible for the preventive protection of foreigners and for measures of criminal proceedings. The criminal investigation departments attempt to clear up crimes already committed whilst it is for the police forces to prevent crimes being committed. The federal and Land offices for the protection of the Constitution work independently of these to obtain information on right-wing extremism and xenophobically motivated violence and, if relevant, make it available to the prosecuting authorities.

207. To guarantee a uniform and joint procedure throughout the Federal Republic, the Länder ministers of the interior and of justice, on the initiative of the Federal Minister of the Interior and the Federal Minister of Justice, discussed this problem area in detail at a special meeting held in 1991 and agreed on a package of measures which are currently being put into effect or have already been implemented by the Federation and in the Länder. These involve increased police measures to protect the homes of foreigners and German resettlers, against whom xenophobic violence is particularly directed, an intensified exchange of information between the security services and an improved collection of information, amongst other things by employing the means available to the offices for the protection of the Constitution. In addition, to prevent further crimes in this sphere, the risk to perpetrators of such offences in terms of rigorous and rapid punishments will be consistently increased, thus raising the deterrent effect.

208. The public prosecution service, too, has responded with organizational measures to the challenge of offences against foreigners. In the Länder specialist public prosecutors are handling such cases. In some of the Länder special commissions of public prosecution service officials and police officers have been formed to coordinate the activities of the police and the judiciary. Cases involving right-wing extremists are dealt with swiftly so that offenders can be brought to justice without delay.

209. In 1993, 23,318 proceedings involving approximately 21,400 defendants were instituted as a result of crimes motivated by right-wing extremism or xenophobia. In the first six months of 1994 the number of investigatory proceedings fell by about 25 per cent compared with the same period in 1993. About 21,500 proceedings were concluded in 1993. Some 2,200 persons were convicted for related offences in 1993 and approximately 1,200 in the first half of 1994. Of these, roughly 900 were sentenced to detention in a remand home or to imprisonment in 1993 and 474 in the first half of 1994.

210. The number of investigatory proceedings for homicide and arson dropped by about two thirds in the first half of 1994 compared with the first half of 1993. There was also a considerable reduction (just under 50 per cent) in the number of proceedings instituted for incitement of the people or the representation of violence/incitement to racial hatred and of investigatory proceedings for offences against foreigners. There has also been a slight decline in the number of investigatory proceedings for the dissemination of propaganda and the use of emblems or symbols of unconstitutional organizations.

211. There are many indications that the decline of violence is due to the cumulation of political and police measures as well as penalties which have had a considerable deterrent effect. These include speedy and comprehensive investigation of xenophobic crimes of violence as well as the early charging and sentencing of offenders. These measures have made it clear to potential offenders that a State based on the rule of law takes firm steps to counteract such crimes.

212. Special mention should be made of the fact that intensive police investigations made it possible to establish the identity of all the suspects in right-wing extremist or xenophobically motivated crimes resulting in fatalities perpetrated in 1992.

213. A rising detection rate is also noted with respect to offences involving grievous bodily harm and arson attacks.

214. Alongside the judicial authorities, the police are of particular importance in combating xenophobic activities. Traditional police measures as such have proved inadequate. Therefore, both the Federation and the Länder, which under the federal system in the Federal Republic of Germany are responsible for the police forces, have implemented a wide range of measures to allow more effective combating of xenophobic offences. These include not only the investigation of offences but also preventive measures, as well as availability of adequate stand-by forces which can quickly be brought to the scene of violence. The Federation supports the Länder in their operations against right-wing extremists by making available units of the Federal Border Guard to combat xenophobic excesses. Moreover, the investigative and surveillance efforts of the Federal Criminal Police Office and of the Federal Office for the Protection of the Constitution have been considerably increased.

215. The police forces in the new Länder were sometimes reproached with not coming to the aid of the foreigners involved - or not coming to their aid in time - such as in the case of the incidents in Rostock and in Eberswalde. To examine these accusations the public prosecutor instituted a preliminary investigation of the police officers concerned. With respect to the incidents in Rostock, 36 proceedings are currently pending. The public prosecutor general has given orders to process these investigations with particular speed, so that the behaviour of the forces of law and order can be clarified as quickly as possible. Furthermore, as a result of events in Rostock-Lichtenhagen, the Landtag of Mecklenburg-Western Pomerania has set up a parliamentary committee of inquiry to investigate the incidents.

216. Legislative measures. The available legal instruments largely suffice for appropriate prosecution and punishment; however, recent experiences have revealed specific problems of a legal or material nature. They are to be solved by an anti-crime bill which the German Bundestag adopted on 20 May and 21 September 1994. The bill passed into law on 1 December 1994 and envisages the following measures:

(a) Supplement to section 86 (a) (2) of the Penal Code (using the emblems or symbols of unconstitutional organizations) to the effect that the use of such emblems which are so similar as to be confused with those listed in section 86 (a) (2) of the Penal Code is also a punishable offence. Under the law as it stands it is doubtful whether the use of slightly modified emblems of banned national socialist organizations is punishable. The amendment is intended in the first place to ensure a clear interpretation of these provisions in court decisions;

(b) Supplement to sections 86 and 86 (a) of the Penal Code to the effect that the manufacture and storage of propaganda material and emblems or symbols of unconstitutional - especially neo-Nazi organizations for dissemination and use abroad as well as their actual export are punishable offences;

(c) Wider use of summary proceedings in straightforward cases so that sentencing and punishment of the crime will follow quickly. Where the penalty could be a prison sentence in excess of six months the local court conducting the summary proceedings will assign defence counsel if the defendant has no legal representation;

(d) Amendment of section 112 (a) of the Code of Criminal Procedure with the aim of also being able to order a defendant to be detained on remand to avert the danger of repeated offences even if he or she had not, as was generally necessary in the past, been finally sentenced to imprisonment for a similar offence within the past five years. The revision takes into account knowledge primarily acquired within the context of combating right-wing extremist and xenophobic violence: offenders of a specific type cannot be prevented from committing further serious offences simply by the institution of a preliminary investigation against him or her under criminal law, so that even without previous conviction, sentencing to imprisonment on remand may be essential to avert the danger of recidivism;

(e) As is already the case with certain grave offences, it will also be made easier to remand in custody any person charged in a case of particularly serious arson or of particularly serious bodily harm;

(f) Increasing penalties for offences involving bodily harm; these measures may not be directly connected to violence motivated by right-wing extremism, but against this background clearly show the importance the Federal Government attaches to the inviolability of the person as the object of legal protection;

(g) Extension of criminal provisions concerning incitement of the people and incitement to racial hatred (sections 130, 131 of the Penal Code; see para. 133);

(h) A law on the establishment of a public prosecutors' information system which should lead to a clearly improved process of informing the prosecuting authorities; this regulation, too, is (only) indirectly connected to the recent xenophobic excesses;

(i) Amendments to the Associations Act to ensure that, inter alia, right-wing extremist organizations cannot evade a ban and its enforcement through conspiratorial conduct, through transferring the organization's assets to its members or by means of other manoeuvres.

217. In addition, it is intended to amend the law on restrictions on the privacy of letters, posts and telecommunications enacted pursuant to article 10 of the Basic Law to the effect that by extending the list of crimes included in article 1, section 2 (1), of the Act the conditions are established for controlling the post and telecommunications also of members of

associations whose purposes or activities are directed at committing extremist offences. Furthermore, the Federal Intelligence Service will be able to acquire information on international activities in the fields of terrorism, drug trafficking, money forgery, export of sensitive goods and money laundering which it can pass on to the competent German authorities.

218. Further government measures. In addition to judicial and police measures, those concerning information, instruction and education are of particular importance. The following are some examples.

219. The Federal Government made clear its stance on violence and xenophobia also by means of public relations work long before the rise in xenophobic offences.

220. In cooperation with the Federal Ministry of the Interior, the Press and Information Office of the Federal Government instituted a widespread campaign against xenophobia in autumn 1991 under the motto "Stop! No violence". In this context, two television spots were produced. Further elements of the campaign included an information brochure on the topic of foreigners in Germany, stickers and badges as well as a nationwide poster and advertising campaign for which the publishers made advertising space available free of charge. In the spring of 1993, the advertisement was elected "1992 Advertisement of the Year" by the readers of Bravo magazine for young people, and it was awarded the "CREATIV OTTO 1992" on 22 June 1993.

221. With almost DM 1.3 million from federal funding, advertisements and film spots to the value of DM 8 million were disseminated within the framework of this campaign.

222. In December 1991, under the headline "They too pay the solidarity tax", the Press and Information Office's periodical Political News from Bonn (circulation over 250,000) pointed to the contribution made by foreign residents in Germany to the nation's prosperity and to ensuring the continuity of social services in Germany. In the November 1992 edition, which bore the cover "Human dignity is inviolable", the Federal Government's stance on xenophobia, anti-Semitism and right-wing extremist violence was again explained and reaffirmed. The series of advertisements at the turn of the year 1992/93 published in the entire daily press and the supplement Deutschland-Journal (circulation over 5 million) in the 2 January 1993 issue of BILD-Zeitung contained the latest statements issued by the Federal Government on this subject. Prominence was given once again to campaigns and activities against violence, which were the central theme of the supplement.

223. In the series "Practical Tips" the Press and Information Office of the Federal Government in cooperation with Berolina-Film GmbH developed the feature "Foreigners in Germany" which was completed in 1992 and has been broadcast since the first half of 1993 by regional television stations and used within the framework of the German Film Centre and the regional film services for schools and other educational institutions.

224. The Federal Government's overall programme against violence is also a regular item on the agenda of specialist conferences for journalists and influential personalities (Multiplikatoren) (around 50 in the 1993 calendar

year). It is primarily a question of sensitizing the media and advising caution in cases where the media could become a platform for right-wing and left-wing extremist groups.

225. In cooperation with a publishing house the Press and Information Office has produced material on the role of violence and of extremist groups in politics and society, which is sent to teachers upon request. Finally, the 1993 publication Politics for Young People explained the issue of people's propensity to violence and the stance of the Federal Government.

226. The ministers and senators of the interior at federal and Land level on 13 November 1992 adopted an immediate action programme with the slogan "Fairness and understanding - respect for human dignity - combating xenophobia" thereby contributing to a nationwide information campaign. Posters, stickers and badges are intended to win the support particularly of young people for the idea "being fair to and understanding foreigners".

227. At the same time, the following measures are being taken by the Federal Ministry of the Interior to make especially young people - who constitute the majority of violent offenders - aware of the dangers of extremism and xenophobia and to encourage them to develop tolerance and support for democracy:

(a) The production of a brochure for pupils and teachers with a circulation of 1.8 million or 191,000 copies with the title "Stop! No violence - Working against extremism and xenophobia";

(b) Advertisements in particular magazines for young people;

(c) Seminars with Multiplikatoren from the press sector for young people, the media in general, in-service teacher training, youth and social work and administrations;

(d) The production of brochures within the framework of the series "Texts on Internal Security" from the Federal Ministry of the Interior.

228. The Federal Ministry of Labour and Social Affairs is currently promoting a total of seven projects throughout Germany which include concrete measures to eliminate xenophobia. Their particular purpose is the promotion and organization of meetings between Germans and foreigners, and the education and training of Multiplikatoren.

229. Within the framework of its endeavours to prevent violence the Federal Ministry for Women and Youth is supporting a variety of measures to counter violence, xenophobia and right-wing extremism.

230. The Federal Government's action programme against aggression and violence, preparation of which began in summer 1991 and which was commenced in 1992, is to run beyond 1993 and is provided with DM 20 million each year in 1992 and 1993. This is being used to provide the new Länder and Berlin with an organizational framework, specialist support and financial means in order to carry out in 30 selected regions projects designed to reduce and prevent violence in the fields of youth work and leisure activities with cultural

elements and components designed to help people learn by experience, street work, mobile youth work, community work, supervised dwelling, fan projects and other types of projects. First evaluations demonstrate that groups of people who formerly tended towards violence and who are included in such projects can be prevented from committing further acts of violence.

231. Besides the around 150 local youth work projects, supplementary information and further education possibilities are being developed for and made available to voluntary and full-time youth work specialists. They are intended to provide local youth workers dealing with the difficult problems and special risks connected with youth violence with additional educational knowledge and qualifying abilities.

232. The experience gained from the programme is to be used by the Länder to continue and expand work on their own. A systematic reappraisal of the knowledge gained in this programme should facilitate its applicability beyond the scope of the projects themselves.

233. With regard to "violence/internal security", the Press and Information Office of the Federal Government has prepared an educational series which should assist teachers and adults in the new Länder in dealing with this issue. It has published 15,000 copies of this folder.

234. In order to address young people directly, the Press and Information Office has promoted numerous seminars with youth groups by the Deutsche Gesellschaft e.V. on the subject of "violence" over the past few years and supported a mass rally in Frankfurt/Oder.

235. Moreover, reference is made to the remarks on article 5 in the eleventh and twelfth periodic reports of the Federal Republic of Germany under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/226/Add.7).

Article 27

236. In the Federal Republic of Germany as it existed on 2 October 1990, article 27 of the Covenant was of importance only to the Danish minority in the north of Schleswig-Holstein, a Land which borders on Denmark. Following German unification the Sorbian minority resident in Lusatia (Saxony and Brandenburg), a people of Slavonic origins, also became the object of the Federal Republic of Germany's reporting. The following details are reported on those two minorities:

237. The total number of members of the Danish minority is estimated at around 50,000 persons. Their claim to protection and support is expressly enshrined in article 5 of the constitution of Land Schleswig-Holstein. The 1955 "Bonn-Copenhagen Declaration" had already included regulations on the freedom of allegiance to Danish national traditions as well as the protection and fostering of the Danish language and culture.

238. In 1993, Schleswig-Holstein spent a total of DM 49 million promoting the Danish minority's school system. The Danish schools are private schools whose final examinations are officially recognized in Germany. Alongside the Danish

minority's school system, Schleswig-Holstein also promotes other spheres of the varied cultural life of this community, such as cultural and youth work and the adult education system.

239. In order to improve the possibilities of political representation for the Danish minority, their political parties have since 1955 been exempt from the application of a restrictive clause in elections to the Landtag (Land parliament). For many years the Danish minority's political organization, the Südschleswigscher Wählerverband (SSW), has been represented by one member in the Schleswig-Holstein Landtag.

240. As regards the - around 60,000 strong - Sorbian minority, guarantees were established in a protocol note to the Unification Treaty between the Federal Republic of Germany and the former GDR similar to those in the Bonn-Copenhagen Declaration regarding the Danish minority. The constitutions of the Länder Saxony and Brandenburg, adopted in 1992, contain detailed provisions on the Sorbian minority's claim to protection and support, including amongst others - as per the Saxony constitution - the provision that Land and local government planning consider the vital needs of the Sorbian people and that the nature of the area settled by the Sorbian minority be maintained as it is. Detailed reference is made in the CERD report.

241. A Foundation for the Sorbian People was set up in October 1991 in order that representatives of the Sorbian people may have a major say in the allocation of the funds provided by the Federation and by the two Länder Saxony and Brandenburg. The Foundation's work is supported by government funding, which in 1994 amounted to DM 36.5 million. Added to this is targeted financing of Sorbian educational and scientific institutions, such as Sorbian grammar schools or the Sorbian institute (Sorbisches Institut e.V.) which has set itself the task of researching and fostering the Sorbian language, history and culture. Notwithstanding the regulations contained in the rules of procedure, Sorbs are permitted in their home Sorbian communities to use the Sorbian language in court.

242. Problems arise time and again in connection with the protection of minorities, because groups which are not recognized minorities claim to be a privileged protected minority in the sense of article 27 of the Covenant. In this context the German Government attaches particular importance to the travaux préparatoires of the Covenant, and especially to the report of 1 July 1955, which states:

> "The provisions concerning the right of minorities, it was understood, should not be applied in such a manner as to encourage the creation of new minorities or to obstruct the process of assimilation. It was felt that such tendencies could be dangerous for the unity of the State. In view of clarification given on those points, it was thought unnecessary to specify in the article that 'such rights may not be interpreted as entitling any groups settled in the territory of a State, particularly under the terms of immigration laws, to form within that State separate communities which might impair its national unity or security'" (A/2929, p. 182, para. 186).

243. The application of article 27 must, consequently, as already emphasized during the elaboration of this article, be restricted to certain ethnic groups: "It was agreed that the article should cover only separate or distinct groups, well-defined and long-established on the territory of a State" (A/2929, p. 181, para. 184).

244. Restriction of the definition of the privileged minority within the meaning of article 27 to ethnic or linguistic groups who have a traditional area of settlement in particular regions is supported, furthermore, by the practical consideration that essential minority rights such as the right (although not expressly mentioned in art. 27) to have their own place-name signs, street names, schools and other cultural institutions and, on certain conditions, the right to use their own language when dealing with the authorities, can only be realized in the case of ethnic groups who live in a specific and traditional settlement area.

245. Moreover, sections of the population who are not minorities in the sense presented above are not prevented from exercising the rights listed in article 27. However, when dealing with the authorities and courts they must use the German language. Some groups are supported by considerable means, e.g. the Sinti and the Romany. The CERD reports cited in paragarph 235 contain more details on this.

246. For the Federal Republic of Germany the protection of minorities is a special concern. In the international sphere their efforts currently concentrate on cooperating in the elaboration of legally binding regulations on the protection of minorities within the sphere of the Council of Europe. Germany is represented on the Committee for the Protection of National Minorities set up for this purpose by the Committee of Ministers. On 5 November 1992 Germany also signed the new European Charter for Regional or Minority Languages and is currently preparing ratification thereof. The aim of this Charter is to guarantee and improve the status of regional and minority languages. Its scope of application on the one hand extends beyond the languages of minorities, but on the other hand it refers to only one aspect of the situation of minorities. On 11 May 1995 the Federal Republic of Germany signed the Council of Europe’s Framework Convention for the Protection of National Minorities.
