[47] Bitterwolf, III/9.

[48] Niess-Mache, IV/15.

[49] Metz, VIII/23-24.

CHAPTER 7

THE POSITION OF THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

394. As already indicated in Chapter 2, by letter of 27 March 1986 the Government of the Federal Republic of Germany transmitted a statement of its position in regard to the alleged violation of Convention No. 111, to which was appended a legal opinion by Professor Karl Doehring, Professor of Public Law and International Law at the University of Heidelberg and Director at the Max-Planck Institute for Foreign Public Law and International Law.

395. The text of the Government's statement was as follows:

(Translation)

The Government of the Federal Republic of Germany has already, in its letter of 31 January 1986, made certain observations on the manner in which this inquiry is proceeding. The Chairman of the Commission of Inquiry replied in a letter of 28 February 1986 and dispelled some of the doubts entertained by the Government of the Federal Republic. Without going into detail, it should be emphasised again that, in the opinion of the Federal Government, to give the World Federation of Trade Unions a role similar to that of a complainant would be incompatible with the ILO Constitution and also cannot be based on any standing practice. On this point and on other questions of procedure which have already been raised, the Federal Government reserves the right to make further observations. The Government of the Federal Republic of Germany would like now to submit some comments on the questions of law that have been raised and, where necessary, on the statements and submissions made by the other side, and thus to respond to the request made in the letter of 27 November 1985 from the Chairman of the Commission of Inquiry. At the same time, it wishes once more to express its firm conviction that the obligations to safeguard faithfulness to the Constitution in the public service are fully consistent with the letter and spirit of Convention No. 111 concerning discrimination in respect of employment and occupation.

The Federal Government cannot forbear to point to the political dimension of the representation made by the World Federation of Trade Unons on 13 June 1984 and of other documents submitted in the

inquiry; in particular because it does not seem that all those showing an interest in the inquiry are concerned with a matter of law.

It must be emphasised first of all that the Federal Republic of Germany is, both historically and geographically, in a special position. For one thing, it has already had to learn by painful experience how much faster and more easily a totalitarian regime contemptuous of human beings and their fundamental rights establishes itself if it can rely on part of the body of officials. It was by no means only the leading elements in the administration and the judicial system that played a decisive part but also, specifically, teachers and "petty officials" in all fields. The Federal Republic of Germany learned from this that a body of officials of inherently democratic convictions constitutes one of the most effective guarantees of a free democracy which respects and promotes human rights in all fields and thus contributes to peace and freedom world-wide. Furthermore, after the end of the Second World War, it proved possible to set up a free and democratic State only in part of Germany. From its inception, therefore, the Federal Republic of Germany was compelled to defend its free democratic state order against forces that want to set up a corresponding totalitarian dictatorship also in the free part of Germany. Since it became clear to those forces that the democratic State knew how to defend itself, they have been seeking help from outside in order to breach that defence and thus attain their goal.

The political line of attack is evident from the mere fact that neither in the cases on which the Governing Body Committee based its report nor in other cases which the Commission of Inquiry has taken into account in its investigation have the domestic remedies been exhausted. The Federal Government has already pointed this out on several occasions. Although it is claimed over and over again that the conduct of the Executive and the decisions of the courts are contrary to the Constitution, the Federal Constitutional Court is avoided. This, the highest court in the Federal Republic of Germany, has the task of making a comprehensive examination on the merit of every alleged violation of rights to freedom and making a final binding decision thereon.

This behaviour is no accident. Thus, Angenfort, a member of the Presidium and of the Secretariat of the Executive Committee of the German Communist Party (DKP) - to the political spectrum of which party all the individual cases included in the inquiry so far can be ascribed - was asked in an interview why members of the DKP did not appeal to the Federal Constitutional Court in relevant cases (interview published in Unsere Zeit of 25 January 1986 and partly broadcast in the Third Programme of the North German Radio on 22 January). He replied: "First I must just say that the Prime Ministers' decision of 1972 on job bans (Berufsverbote) is a political decision. And we think that a political decision should be opposed through a political movement. And that is excellent ..." Later on, he said: "If in the judgement, the possible judgement of the Federal Constitutional Court, even one formulation crept in which in some way

or other sought to justify job bans, that in itself would be to the detriment of all democrats. And because we see a chance to get rid of the job bans altogether - and they must be swept away because they are unconstitutional - our path does not lie to the Federal Constitutional Court, whose dubiousness with regard to the Basic Law has already been demonstrated in relation to the Greens; our way is to appeal to the public, through the movement against job bans, even more strongly than before and to trust in its support. We are sure that that is the right way."

With its representation, the World Federation of Trade Unions wished to support the political struggle thus formulated and thus to come to the aid of those who have made it their aim to destroy the free democratic basic order in the Federal Republic. The Federal Republic is to be compelled to rescind precisely those provisions and measures which can most effectively protect freedom and democracy also in the future. A secure place in the state machinery of the Federal Republic of Germany is thus to be won for the members of the German Communist Party as the ideological representatives of a completely different state and social order. This aim is to be achieved even at the cost of once again opening access to public posts in the Federal Republic of Germany to right-wing extremists as well.

The International Labour Organisation and its organs are too important for the dissemination of human rights in the world of work to allow themselves to be misused as a weapon in the struggle against freedom, democracy and human rights and thus against the Organisation's own purposes. Its Conventions have not been concluded in order that freedom in the world of work and the operation of free trade unions should be curtailed or eliminated with their help. The Federal Republic of Germany does not understand why it should be prevented from drawing the necessary conclusions from its history and accordingly securing its free democratic basic order.

The Federal Government has already set out its view of the legal position on several occasions in the preceding examination of the representation, in particular in its letter of 18 December 1984 and in the statement made by its representative before the Governing Body of the International Labour Office on 3 June 1985. With express reference to those statements and to all previous statements of the Government's position made before bodies of the International Labour Organisation on the questions at issue, the position of the Federal Republic of Germany is once more set out comprehensively below. The following points will essentially be the focus of attention:

- Can Convention No. 111 be applied at all to the relationship of officials, characterised by special rights and duties? (Section I).

- Can any comprehensive evaluation of the practice of a State be made by international bodies before domestic remedies have been exhausted? (Section II).

- The measures adopted in the Federal Republic of Germany to maintain a public service faithful to the Constitution serve the defence of freedom and human rights. The area of protection of Convention No. 111 is not affected thereby (Section III).

- The Federal Republic of Germany knows no discrimination in the public service on the basis of political opinion. Freedom of opinion is guaranteed by the national Constitution (Section IV).

- The special duties of officials are requirements based on a particular job. Article 1, paragraph 2, of Convention No. 111 rules out any violation of the Convention (Section V).

- A violation of Convention No. 111 by the Federal Republic of Germany is also ruled out by Article 4 (Section VI).

In discussing these questions, the Federal Government will also refer directly or indirectly, on individual points, to the report of the Committee set up to examine the representation made by the World Federation of Trade Unions on 13 June 1984 (hereinafter referred to as the "Governing Body Committee"), although its conclusions and recommendations are of no direct relevance to the present proceedings.

I. Application of Convention No. 111 to officials

In examining whether the measures taken in the Federal Republic of Germany to maintain a public service faithful to the Constitution are compatible with Convention No. 111, the first question is whether that Convention also applies to the relationship of officials characterised by special rights and duties. In answering this question, the Federal Government has hitherto been guided by the conviction that the special demands made on those employed in the public service, and in particular on officials, should be regarded as requirements of a particular job within the meaning of Article 1, paragraph 2, of Convention No. 111. However, since that interpretation, which served the International Labour Organisation's interest in a broad scope for its Conventions, was not shared by the Governing Body Committee, and since at the sitting of the Governing Body on 3 June 1985 the Workers' side raised the question whether Convention No. 111 as at present worded permits the appropriate regulation of the situation of members of the public service having regard to the special requirements of the status of officials, this question of principle must be answered. The question has general significance for the International Labour Organisation and all its member States. For there are special forms of relationships for officials or state servants in most States of the world.

In this connection, the question needs to be raised whether employment relationships can fall within the area of protection of the Convention if they are not characterised by a typical employer-employee

connection, which is the case for officials in the Federal Republic of Germany. Thus it is typical of an official's employment relationship in the Federal Republic of Germany that it relates to a function of state sovereignty. The distinction drawn by the Committee set up to examine the representation (see GB.229/5/11, para. 32(d)) between officials engaged in the administration of the State and officials in technical positions may correspond to the legal situation in certain other States Members of the ILO. It does not, however, correspond to the situation in the Federal Republic of Germany. Another question which might be of background relevance here is whether it can be left to a State's discretion whether or not to assign sovereign functions to employment relationships. In this context, however, that question can be left aside, for Convention No. 111 does not regulate the powers of States Members of the ILO to decide, in detail, on the form which their legal relationships with such employees is to take. It is of no relevance for this purpose whether activities comparable to those carried on by officials in the Federal Republic are, or can be, regulated, in the same member State or in other member States, also within the framework of an ordinary employment relationship in the public service. Whether, in an individual case, an employment relationship (with or without a sovereign function) or the relationship of an official (with a sovereign function) is chosen will be decided by each authority in accordance with the laws of the State concerned, whose conformity with Convention No. 111 is not at issue.

These considerations might suggest the answer that the relationships of officials in the sense described above ought not to be judged in terms of Convention No. 111.

However, should the Commission of Inquiry consider Convention No. 111 to apply also to relationships of officials, it would be necessary, in accordance with the Federal Government's original view, to give special consideration to the special nature of the status of officials at least in interpreting Article 1, paragraph 2, of Convention No. 111 (on this point, see also Section V).

II. Failure to exhaust legal remedies

In view of the independence and high authority of international bodies, the question arises whether any comprehensive evaluation can be made by those bodies of the practice of a State before domestic remedies have been exhausted. This question becomes particularly important where the subject of inquiry is not the statutory provisions as such but their practical application. Thus, in one of the three cases on which the Governing Body Committee based its report, the official concerned has in the meantime been cleared at second and last instance. In the other two cases, too, the persons concerned - as in the other individual cases of which details have been communicated by the Commission of Inquiry to the Federal Government - have not exhausted all domestic remedies and have not appealed to the Federal Constitutional Court, which would above all have been competent to

decide on their claim that the measures and judicial decisions taken were unconstitutional.

Individual cases may be deemed conclusive evidence of particular circumstances only when the proceedings have been concluded by a decision at last instance. Only then do they become a noteworthy component of the overall picture which the Committee must make for itself. An exception could be valid only if the exhaustion of domestic remedies could not be expected, for example, because the existing case law of the Federal Constitutional Court - the only relevant factor here - had already settled the matter. Since there has been only one relevant decision so far, in 1975 (see Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 39, pp. 334 et seq.), and it leaves open a series of questions on which the decision in individual cases may depend, cases in which exceptionally the exhaustion of domestic legal remedies could not be expected are hardly likely to arise. That would apply also if further decisions concerning DKP activists had been given by committees under section 93 of the Federal Constitutional Court Act. Although such committees are not "the Federal Constitutional Court", their decisions exhaust the domestic remedies because those concerned cannot appeal from them, for example, to the competent division of the Federal Constitutional Court. However, such decisions are mostly limited to a few brief indications and do not contribute any particular new legal considerations; otherwise it would not be possible for a decision to be taken under section 93a of the Federal Constitutional Court Act and the competent division would have to take the decision.

Since the DKP activists whose cases are presented here by WFTU have deliberately refrained from exhausting domestic remedies, and in particular have not appealed to the Federal Constitutional Court, their cases cannot be used.

This is also recognised in cases where it is no longer possible to exhaust the legal remedies because the person concerned has allowed the time-limit to elapse (see the consistent view of the ILO Committee on Freedom of Association, Official Bulletin, Vol. LX, 1977, Case No. 866, paragraph 78, with further references).

The DKP has obviously given instructions to its Party activists, which they have followed, not to appeal to the Federal Constitutional Court against decisions unfavourable to them. Jupp Angenfort, a member of the Presidium and of the Secretariat of the Party Executive Committee, who, incidentally, was also a member of the Secretariat of the Party Executive Committee in the Communist Party of Germany (KPD), which was later prohibited by the Federal Constitutional Court (see Pfeiffer/Strickert, KPD-Prozess, Dokumentarwerk, Vol. 3, p. 261), justified this in the television interview of 22 January 1986 which has already been mentioned. Presumably the DKP is afraid that, if one of its adherents were to appeal to the Federal Constitutional Court, the Court might rule that the DKP was a successor organisation to the prohibited KPD and therefore prohibited ipso jure.

At all events, a failure to exhaust domestic remedies consisting in non-utilisation of a sequence of available legal procedures should also be taken into consideration in the examination of the facts in proceedings in which it is claimed that an ILO Convention and consequently international law have been violated (see Committee on Freedom of Association, 168th Report, Case No. 866, paragraph 78 (OB, Vol. LX, 1977, Series B, No. 3, p. 15, with further references)).

Furthermore, the Federal Government holds it to be a misuse of international bodies supervising standards if recourse is deliberately made to them directly for political reasons, by-passing the highest domestic jurisdictions.

A corresponding procedure is also followed in other international bodies. Thus the European Commission of Human Rights, in a comparable case, rejected a complaint as irreceivable on account of non-exhaustion of domestic remedies (Decision of 16 December 1982, Complaint No. 9251/81, Neue Juristische Wochenschrift (NJW), 1984, 549/550, 551; Europäische Grundrechte-Zeitschrift (EuGRZ), 1983, 411). The Human Rights Committee of UNESCO, too, at its meeting of 17 May 1983, deferred action on two complaints pending the exhaustion of domestic remedies.

Even supposing the exhaustion of domestic remedies, there would still be appropriate cases for inquiry into whether practice in the Federal Republic of Germany was compatible with Convention No. 111. On this point reference need only be made to proceedings pending before the European Court of Human Rights in which that condition has been met. The representative of Dr. Kosiek stated before the European Court of Human Rights at Strasbourg in the oral proceedings on 22 October 1985 that he had also applied in the matter to the International Labour Organisation and claimed a violation of Convention No. 111. If that assertion should be correct, this case has obviously not been included in the inquiry.

Further, Dr. Huber, attorney-at-law, the permanent legal representative of the Executive Committee of the National Democratic Party of Germany (NPD), informed the Federal Minister of Defence in a letter of 31 July 1984 that in future every case of "discrimination" would be immediately submitted to the International Labour Organisation and that all previous cases would also be reported. Appropriate inclusion of these types of cases would clearly be helpful to an inquiry into the overall context of the domestic application of Convention No. 111.

III. Area of protection of Convention No. 111

In the Federal Government's opinion, the measures taken in the Federal Republic of Germany to maintain a public service faithful to the Constitution do not affect the area of protection of Convention No. 111. For the concern of the Federal Republic of Germany, like

that of the International Labour Organisation, is to defend and spread human rights in the world of work, not to restrict or to eliminate them.

The Constitution of the Federal Republic of Germany is therefore designed to guarantee a free and democratic Germany for all time. It is based on the principle of a "democracy capable of defending itself", i.e. on the idea that no one may misuse the rights to freedom guaranteed by the Constitution for the very purpose of destroying this free democratic state order (see Federal Constitutional Court, decision of 22 May 1975 (2 BvL), 13/73, BVerfGE 39, 334/368 et seq.). The measures laid down by the Basic Law to secure freedom include the duty imposed on officials, with constitutional force, by article 33, paragraph 5, of the Basic Law to bear witness by their entire conduct to their support for the free democratic basic order within the meaning of the Basic Law and to act to uphold it (section 52(2) of the Federal Civil Service Act and section 35(1), third sentence, of the Civil Service (General Principles) Act). Legislation, administration and court decisions in the Federal Republic of Germany are bound by this constitutional precept. Any departure from the protective measures for the maintenance of a public service faithful to the Constitution is therefore out of the question.

Moreover, none of the socially relevant groups in the Federal Republic of Germany deviates from this basic position. The Social Democratic Party of Germany (SPD) group in the Lower House of the Federal Parliament (Bundestag) emphasised only recently, in a motion dated 29 January 1986, that a person employed in the public service may not by his actions combat the basic principles of the Constitution. Also the German Confederation of Trade Unions (DGB), in its letter of 27 January 1986, does not question this principle. The resolutions of 1972, 1976 and 1980 transmitted by the German Railway Workers' Union with its letter of 30 January 1986 contain corresponding statements.

The Federal Government is not of the opinion that the interpretation of Conventions should be subject solely to national judgement by the member States, thus depriving them of their value. However, it can only serve the purposes of the International Labour Organisation if an intensive and well-prepared dialogue leads to an interpretation of a Convention that is acceptable to all.

The Commission of Inquiry might bear in mind in this connection that the Federal Republic of Germany, inter alia, on account of its particular historical past, must protect itself from a situation in which individual servants of the State who have sworn to be faithful to its Constitution can call a dictatorship into existence by citing Convention No. 111 in an inadmissible manner. No one who champions totalitarian systems can have a place in the service of the State. The protection of freedom cannot be entrusted to its opponents. Indeed, this corresponds to the United Nations International Covenant on Civil and Political Rights. The Covenant provides in Article 5:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Consequently, the Federal Republic of Germany regards itself as fully in conformity with the protective ideas of Convention No. 111 if it does not employ in the state service officials who advocate a totalitarian system. Only a person who wishes to combat and destroy:

- respect for the human rights embodied in the Basic Law;
- the sovereignty of the people;
- the separation of powers;
- the accountability of the Government and administration in accordance with law;
- the independence of the courts;
- the plurality of political parties and equality of opportunity for all political parties with the right to form and exercise opposition in conformity with the Constitution;

(for these components of the free democratic basic order, see BVerfGE 2, 12; 5, 140) can be affected at all by measures to maintain a public service faithful to the Constitution. In the Federal Government's opinion, a democratic State cannot be forbidden to demand of its officials that they support these most elementary principles of every democratic body politic. In this fundamental and comprehensive guarantee of the freedom and human rights of all citizens there can be no attack on those very rights. This position cannot conflict with the principles of the International Labour Organisation.

A Convention of the International Labour Organisation, which is a guarantor of human rights in the world of work, cannot be used to the advantage of persons who hold human rights in contempt. That would turn the International Labour Organisation's efforts into their opposite.

It is precisely the aforementioned indispensable elements of a free democratic order proper to a State based on law and social welfare that the Federal Republic of Germany, in common with the International Labour Organisation, is striving to protect. In this connection it also refers to the statement of the position of the Confederation of German Employers' Associations of 31 January 1986, which is based on similar considerations.

Hence the legal and constitutional position in the Federal Republic of Germany is fully in accord with Convention No. 111 concerning discrimination in respect of employment and occupation, so that there is no call for a change in domestic practice, even if that were possible. The Federal Republic of Germany has already made this point on several occasions.

IV. No discrimination within the meaning of Article 1, paragraph 1, of Convention No. 111

The Federal Republic of Germany knows no discrimination which leads to unequal treatment in employment or occupation on the basis of political opinion and even less any so-called job bans (Berufsverbote). It is a free democracy in which no one is discriminated against on the basis of his political opinion or membership of a particular political party, also not in the public service.

1. The right to free expression of opinion is guaranteed by our Constitution; the Constitution, specifically article 3, paragraph 3 - like Convention No. 111 - prohibits any prejudice or preference on account of the political attitude of the person concerned. These provisions of the national Constitution are not violated by the protective measures adopted by the Federal Republic of Germany in order to maintain a public service faithful to the Constitution, as the independent Federal Constitutional Court has expressly determined in its basic decision of 22 May 1975 (BVerfGE 39, 334/360 et seq., 367 et seq.).

Instead it is demanded of applicants for employment in the public service, and of officials, that they should recognise the central basic values of the constitutional order in force which secure freedom. For it is the task of all state authority, and thus also of members of the public service, to protect the individual's scope for freedom and his living space. The protection of freedom and human rights cannot be entrusted to their opponents. This agreement in principle with the basic order which the official serves, and not the expression of political opinion or membership of a party, is the connecting link with the duty of faithfulness to the Constitution.

In this connection, it cannot be emphasised strongly enough that the Federal Republic of Germany knows from its own painful experience what it is talking about. Nothing is more dangerous for a free democracy than a public service that distances itself inwardly from that democracy and seeks to destroy it.

On this ground alone it is incomprehensible that the Governing Body Committee should have arrived at a different conclusion with regard to the provisions of Article 1, paragraph 1, of Convention No. 111 which correspond to article 3, paragraph 3, of the Basic Law.

2. Measures to maintain a public service faithful to the Constitution in the Federal Republic of Germany are not connected with the political views of the person concerned. In assessing this statement, freedom of political opinion should not be confused with faithfulness to the Constitution within the meaning of the Basic Law.

In the Federal Republic of Germany every official may hold, profess and seek to give effect to political views which conflict with the policy of the Government. Every official may work actively for a change in the existing political and social circumstances and even advocate a change in the Constitution itself. The limit of the permissible is reached only when goals are pursued which are aimed at destroying human and basic rights and the basic structure of the State which guarantees them. Here any change is prohibited by the Constitution itself, in article 79, paragraph 3, in order to afford secure protection for the basic substance of democracy. If, despite the strict constitutional prohibition, efforts are made to bring about changes in this area, it is no longer a matter of political opinion but a matter of securing a free Constitution. Efforts to bring about such changes no longer have anything to do with "expressing or demonstrating opposition to the established political principles", but serve to destroy the free order and human rights themselves and thus freedom of opinion as well.

3. In this connection the Federal Government refers to the limit which the Committee of Experts itself has set to the field of application of Convention No. 111. The Committee has stated that "even if certain doctrines are aimed at fundamental changes in the institutions of the State, this does not constitute a reason for considering their propagation beyond the protection of the Convention in the absence of the use of advocacy of violent or unconstitutional methods to bring about that result" (see Report III (Part 4A), International Labour Conference, 69th Session, 1983, pp. 204-205 and 218-219). That, however, is the case here. Since any change in the basic principles and values laid down as unalterable by the Constitution (article 79, paragraph 3, of the Basic Law) is absolutely ruled out, anyone who wishes to abolish those guarantees of freedom is using or advocating unconstitutional methods, for there are no legal methods for that purpose.

4. In this connection it is often contended - for example by the Germany Confederation of Trade Unions in its statement of 27 January 1986 - that the behaviour of a political party hostile to the Constitution and that of its individual members need not be identical. The Federal Government cannot accept this view: this line of thought suggests that a party member may inwardly distance himself from his party's goals. Even in the case of a simple inactive party membership this assumption seems somewhat unrealistic. In the present context, however, this aspect can be disregarded, since in any case mere membership of a party hostile to the Constitution cannot in itself justify dismissal from a relationship of official. In Bavaria there is even a ruling to that effect by the Bavarian State Government dated 19 June 1979.

However, anyone who participates actively in party affairs, exercises functions within the party and takes part in elections as a candidate of his party thereby makes it plain that he wants to fight for its aims and programme and to further their realisation. Any other interpretation would be contrary to common sense, for it would argue that officers and candidates of a party pursued aims and ideas other than those of the party in whose name they acted. Anyone who commits himself to and for a party hostile to the Constitution therefore also pursues its aims hostile to the Constitution.

As a further argument in this connection it is repeated over and over again that the DKP is a "legal party" and that the measures against its members in the public service should therefore be regarded as "illegal".

On this subject the Government of the Federal Republic of Germany would like to make the following clear:

Under article 21, paragraph 2, of the Basic Law, parties which by their objects or the conduct of their adherents seek to impair or abolish the free democratic basic order or to jeopardise the existence of the Federal Republic of Germany are unconstitutional. The constitutionality or otherwise of parties is decided by the Federal Constitutional Court. The court cannot, however, act of its own motion. Instead, under section 43(1), read in conjunction with section 13(2), of the Federal Constitutional Court Act, an application from the Federal Diet (Bundestag), the Federal Council (Bundesrat) or the Federal Government is needed in the case of parties active throughout the federal territory. No such application for a prohibition has so far been filed, so that the DKP, like other comparable parties hostile to the Constitution, can participate in the political life of the Federal Republic of Germany without let or hindrance. Under the legal order of the Federal Republic of Germany it is a matter for the political judgement of the authorities competent to apply for proceedings under article 21 of the Basic Law whether to make such an application or rather to counter a party hostile to the Constitution by political means. No reproach can be addressed to the Federal Government on the grounds that, precisely in the interests of a democratic political exchange of views, it has filed no application with the Federal Constitutional Court for extremist parties to be prohibited as unconstitutional: a prohibition of the German Communist Party would produce no change in the present situation as regards persons employed in the public service, since for the purposes of judging the conduct of those public servants it is of no decisive significance whether the DKP is prohibited or not.

As the Federal Constitutional Court stated in its basic decision of 22 May 1975 (BVerfGE 39, 334/358 et seq.), article 33, paragraph 5, of the Basic Law requires officials to uphold the constitutional order, whereas article 21, paragraph 2, of the Basic Law leaves the citizen free to reject that constitutional order and to combat it politically provided that he does so by generally permitted means

within a party which is not prohibited. For the special duties of officials are not laid down with the interests of political parties in view, nor in particular to impede their political activities, but with a view to safeguarding the constitutional State from dangers from among its officials (thus the Federal Constitutional Court, loc. cit.). In view of this clear decision by the Federal Constitutional Court, there can be no question of any ambiguity: an official is not acting constitutionally merely because his party - whose aims he actively supports - has not been formally declared unconstitutional and hence prohibited. On the contrary: the official's behaviour may be held to be unconstitutional even when his party has not been declared unconstitutional in proceedings for its prohibition.

In the light of all that precedes, the Government of the Federal Republic of Germany does not see any discrimination on the basis of political opinion within the meaning of Convention No. 111 in its measures to maintain a public service faithful to the Constitution. Therefore there is no question of any violation of that Convention.

V. Application of Article 1, paragraph 2, of Convention No. 111

Should the Federal Government's opinion that Convention No. 111 is not at all applicable to the subject of the inquiry not be accepted, a violation would be ruled out in any case on the basis of Article 1, paragraph 2. This paragraph provides that any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

1. The legal duty of officials to be faithful to the Constitution is such an inherent prerequisite for a post in the public service of the Federal Republic of Germany. As has already been emphasised several times, the historical and geographical situation of the Federal Republic of Germany makes it necessary, in defence of the free basic order and the democratic rights of all citizens, to ensure that every servant of the State defends those rights at all times and works actively for democracy. Otherwise he is unsuited for state service as an official. That is the only way in which the freedom of all can be protected against their enemies on the extreme right or left. This is why, as a subjective condition for appointment, the applicant must also furnish a guarantee of conduct faithful to the Constitution, and why every official is under a duty to act for the maintenance of democracy. Correspondingly, the State, as employer, must be able to count on the loyalty of its employees. It must be able to rely on them to identify themselves with its free, democratic order proper to a State based on law and social welfare (see Federal Constitutional Court, loc. cit., pp. 347/348) and to remain faithful to it. Otherwise the State would have to place its trust even in an official who declared of his own accord that he had no confidence in the State (see submission by Mrs. Dorothea Vogt, teacher), employ him, pay him and entrust young people to him for their upbringing.

This principle of the special relationship of trust, the fundamental principle of the legal duty of loyalty of officials to the employer, is certainly to be found in all States of the world and even in the relationship of international organisations to their employees. At the same time it naturally makes a difference whether the duty of faithfulness exists towards an absolute monarch, a totalitarian "Führer" or a democratic, free and pluralistic State. Professor Karl Doehring, in a legal opinion on the question whether existing law and practice in the Federal Republic of Germany to exclude extremists from the public service are in accordance with ILO Convention No. 111, has referred to this point of view and has undertaken extensive research on the subject. The opinion is appended to this statement. The Federal Government points out that even the Staff Regulations of the International Labour Office demand loyalty from the staff (Article 1.4) and require them not to engage in any political activity which is incompatible with the discharge of their duties (Article 1.2). Could, then, a staff member of the International Labour Office engage actively in any movement that was militating to abolish freedom of association and the right to strike, and to impose other limitations on human rights in the world of work, or even to introduce apartheid, without fear of sanctions by his employer?

The question whether the loyalty of officials and concomitant special duties of service are compatible with Convention No. 111 is not of concern only to the Federal Republic of Germany. It is also of considerable importance for all other States Members of the International Labour Organisation. According to the results of the examination, it may also be necessary to investigate whether law and practice in other States are compatible with Convention No. 111. In this connection, the Federal Government would like to refer once again to the considerations set forth at the beginning of its statement: if, despite the specially close ties between employer and officials that characterise every relationship of official, despite the special duties of loyalty and despite the special responsibility of the body of officials for the community at large, Convention No. 111 is of unrestricted application also to officials, then these irrefutable special characteristics must be given consideration at least in the interpretation of Article 1, paragraph 2, of the Convention. Activity as an official would then, as such, be a "particular job" within the meaning of that provision, so that the limitations which of necessity arise out of it for all employees having the status of officials would be covered by that provision. In the Federal Government's opinion, this would be a proper interpretation in the interests of all parties, and the only alternative would be to exclude the applicability of the Convention to officials altogether.

2. In view of the many attempts made by the World Federation of Trade Unions to charge the Federal Republic of Germany with a violation of the fundamental right to freedom of opinion, it should be pointed out once more with reference to the application of Article 1, paragraph 2, of Convention No. 111 that the protective measures taken by the Federal Republic of Germany to maintain a public service faithful

to the Constitution are not concerned with the political opinion of the persons concerned but are aimed at the defence of the free democracy. The frequently quoted remarks of the Committee of Experts on this subject (ILC, 47th Session, 1963, Report III (Part IV), Part Three, Discrimination in respect of Employment and Occupation, p. 192, para. 42) are intended to guarantee to representatives of the political opposition equal access to the public service and continuing employment therein. Exceptions to this rule should be possible only in the case of especially senior positions involving responsibility for the implementation of government policy.

This is taken fully into account in the Federal Republic of Germany. Avowed adherents of parties for the time being in opposition have at all times found employment in the public service in large numbers and have also held top posts in the administration. As will be clear from this, the duty of faithfulness to the Constitution demands not loyalty to the Government of the day and to its policy but, in a totally different sense, loyalty to the State and its free basic order, wholly irrespective of the political convictions with which it is being governed.

This positive attitude to the free democratic basic order that is demanded above and beyond all political views must - as will be further demonstrated - be required of every official, regardless of his function. It is thus a requirement which is inherent in employment as an official, must be met by every official by reason of his function as a guarantor of the free order proper to a State based on law, and therefore falls within Article 1, paragraph 2, of Convention No. 111.

3. In this connection, it is constantly demanded that the application of the protective measures to maintain a public service faithful to the Constitution be differentiated according to the nature of the functions actually performed and, beyond that, according to whether the activity of the official concerned occurred "on duty" or "off duty". The essential points to be made on this are the following:

Under article 33, paragraph 4, of the Basic Law, the exercise of sovereign powers as a permanent task should as a rule to be assigned to members of the public service who are in a relationship of service and faithfulness under public law; in other words, to officials. In the exercise of sovereign powers there can be only uniform rights and duties for all officials. No distinction can be made between officials who must be loyal to the basic values of the free Constitution and others who, despite their status as officials, may behave disloyally with impunity. For the officials together constitute, from the heads of the administration to the countless office-holders at the base, the backbone of the State and at the same time the machinery through which alone the community can exercise its sovereign authority. Enemies of the Constitution who succeed in gaining a foothold here are in a position to undermine the democratic body politic from within in order to destroy it when a crisis arises.

Special requirements as regards the duty of faithfulness are necessary not solely for the holders of particular leading positions in the administration which involve special responsibility for the implementation of government policy. These office-holders, owing to their small numbers and prominent status, always attract the attention of the public and of the political supervisory institutions and are easily interchangeable in the event of a coup; hence they are of less interest for the purposes of planned long-term infiltration of the state machinery.

Of much greater importance for the purpose of attacking the free democratic basic order are precisely the middle and lower positions in the public adminstration, because they make it possible for a totalitarian regime, without appreciable resistance, to make use of the smooth-running official machinery and thus get the State into its clutches. To prevent this infiltration, which in the Federal Republic of Germany is the declared aim of the extremists of left and right (the so-called "march through the institutions"), loyalty and faithfulness to the Constitution must be required of all officials without distinction. For the same reasons, an official's off-duty behaviour cannot be disregarded. For it is not conceivable that anyone should defend freedom and human rights during working hours and combat them when the working day is over. This eminent significance of prevention has not been fully appreciated hitherto. The Federal Government will come back to it again.

The draft of a third Act to amend the legal provisions relating to officials, dated 27 August 1982, which has been mentioned by the German Confederation of Trade Unions in its statement of 27 January 1986 and by other organisations in this connection, is not in contradiction with this position of principle adopted by the Government of the Federal Republic of Germany.

It was not the purpose of this bill to redefine the content of the duty of faithfulness legally incumbent on officials or to change the legal situation on the subject. Instead, specific indications were to be inserted in the laws governing officials on the basis of the decision of 22 May 1975 of the Federal Constitutional Court which has already been mentioned several times. The following addition, closely modelled on the wording of the basic decision, was to have been inserted in section 77(1) of the Federal Civil Service Act and section 45(1) of the Civil Service (General Principles) Act - and hence not in regard to the legal duties of officials but in regard to the consequences of a breach of duty: "A breach of the duties incumbent upon an official under section 35(1), third sentence [of the Civil Service (General Principles) Act or section 52(2) of the Federal Civil Service Act] shall be a disciplinary offence if in the individual case a minimum of weight and evidence of a breach of duty is established. In determining whether off-duty behaviour constitutes a disciplinary offence in relation to the duties incumbent upon the official under section 35(1), third sentence [of the Civil Service (General Principles) Act or section 52(2) of the Federal Civil Service Act], the nature and extent of the behaviour and the tasks assigned to the official shall be taken into account. A disciplinary offence shall be deemed to have been committed if the off-duty behaviour cannot be accepted even with due regard for the official's fundamental rights, and in particular the right to free expression of opinion."

All the legal features of these proposed provisions, especially the principle of proportionality and that of evaluation of each individual case, have already been laid down as principles of law by the Federal Constitutional Court in its decision of 22 May 1975. They are thus binding on all state authorities, including the courts.

The principle of proportionality is moreover a fundamental principle of German administrative law and has consequently to be observed, in any case, in all decisions involving a certain margin of discretion or judgement. The definition of the limits of freedom of opinion, which is guaranteed in principle also to every official by Article 5 of the Basic Law, has already been undertaken by the Federal Constitutional Court itself (loc. cit., pp. 366/367).

The "specific indications" contemplated in the bill would therefore perhaps have been debatable, in the Federal Government's opinion, on political grounds; legally, however, they are unnecessary, in view of the clear formulation by the Federal Constitutional Court, which - as is pointed out once again - is directly binding upon the executive and the courts. Consequently the Federal Government did not take this bill any further. In this it was also prompted by concern that the measure might be construed in a manner contrary to its wording, to the effect that the duty of faithfulness to the Constitution applied in practice only to the heads of the official hierarchy and that off-duty behaviour might be disregarded altogether. Such an interpretation would have conflicted with German constitutional law; any such misunderstanding had to be avoided.

4. The majority of the cases included in the inquiry by the Commission concern teachers. The opinion is often given currency that in the specific case of teachers less stringent demands would be sufficient with regard to the duty of faithfulness to the Constitition. The Governing Body Committee, too, evidently comes to this conclusion in its report of 18 February 1985 (see the conclusions, paragraph 40).

The Federal Government would like to counter that contention. The European Commission of Human Rights had the following to say on this problem in paragraph 112 of its report of 11 May 1984 on application No. 9228/80:

> 112. The Commission takes account of the importance to be attached to the opinion and influence of teachers who, in a free society, have a key role in the development and dissemination of ideas. This is particularly relevant in the present case, where the applicant was a teacher in a grammar school and in daily contact with pupils of an impressionable age and at a stage of

intellectual development when the vulnerability of some to indoctrination is a factor which cannot be ignored. In these circumstances the applicant was subject to special duties and responsibilities in relation to her opinions and their expression, both directly at the school and to a lesser degree, as a figure of authority for her pupils, at other times.

Similar remarks appear in paragraph 108 of the Commission's report of 11 May 1984 on application No. 9704/82.

This corresponds to the Federal Government's opinion that precisely employment as a teacher necessitates certain limitations in order to maintain democratic rights to freedom in the long term. In accordance with Article 1, paragraph 2, of Convention No. 111, this cannot constitute discrimination.

It should not be concealed that the European Commission of Human Rights, following the passage quoted above, refers to the special responsibilities of the employer to ensure the free exchange and development of ideas in the context of freedom of expression within the school. As has already been made clear in the foregoing, however, such pluralism of opinions is secured to German schools and indeed is not questioned by anyone. For involved here are not political opinions which differ from those of the Government, but the fundamental principles of a free democracy.

Or should a person remain a teacher who supplies his pupils with literature in which the frightful crimes of the Third Reich are denied (Luthardt case, Lower Saxony)? Should a person who writes books of extreme rightist content such as Das Volk in seiner Wirklichkeit (Kosiek case, Baden-Württemberg) be a teacher at an institution of higher education? Should someone become or remain a teacher who, by standing for election for or holding offices in extremist parties, publicly - and thus also to the knowledge of his pupils - advocates the destruction of the free democratic basic order of the Federal Republic of Germany?

Those who, in this connection, point to the irreproachable manner in which the persons concerned conduct their teaching overlook - even if this claim is correct - that the teacher's authority and the relationship of trust built up in his pupils towards him in the course of his teaching are indivisible: they will be automatically extended to the teacher's "off-duty" ideas. Youngsters who, because of their age and inexperience, can easily be influenced will scarcely be able to distinguish whether the teacher who has their trust makes propaganda for the aims of his anti-constitutional party during lessons or in the street in the afternoon. Precisely this factor makes the education service especially interesting to extremists of all persuasions.

5. Lastly, the preventive significance of the protective measures adopted in the Federal Republic of Germany should also be

taken into account. For in order to defend democracy in the Federal Republic of Germany it is not enough merely to react to specific attacks on the free democratic basic order. Officials inimically disposed towards the Constitution may begin by conducting themselves in a manner extremely faithful to it, and only at a time of crisis or conflict, when the State and citizens especially depend on the entire body of officials to stand up with determination for the free state order and the defence of human rights, reveal their true nature and attempt to promote a totalitarian dictatorship. If the State does not counter such dangers in time, it may be too late for any effective defence. Consequently, past behaviour on duty cannot be taken as the sole criterion.

This preventive purpose of the duty of faithfulness to the Constitution does not, however, lead to specific checks on all applicants. As is clear from the "Principles for verification of faithfulness to the Constitution" adopted by the Government of the Federal Republic of Germany on 17 January 1979 and still in force without change, an applicant is in principle trusted to be faithful to the Constitution. Only if the recruiting authority knows of actual facts which indicate that the person concerned does not offer the guarantee that he will at all times uphold the free democratic basic order will the competent authority be asked, in accordance with the principles of proportionality, for any relevant material already in its possession. Even this inquiry does not bring about a purpose-designed check on the applicant. In the case of officials, a specific disciplinary offence is in any event a prerequisite for the institution of disciplinary proceedings.

In the light of all the preceding indications, the Federal Government sees no room for doubting that the protective measures to maintain a public service faithful to the Constitution are justified by the requirements of employment as an official in the public service of the Federal Republic of Germany and therefore cannot be regarded as discrimination within the meaning of Article 1, paragraph 2, of Convention No. 111.

VI. Application of Article 4 of Convention No. 111

Furthermore, a breach of the Convention by the Federal Republic of Germany would be ruled out by Article 4. That Article expressly permits measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State, provided that he has the right to appeal to a competent body established in accordance with national practice.

1. The purpose of the rule laid down in Article 4 is to arrive at a reasonable line of demarcation between the individual's interest in the protection of his human rights which are protected in the Convention and the interests of the State in safeguarding its own

security. Here the two points of view stand side by side on an equal footing.

So far as the security of the State is concerned, it must be borne in mind that, while this is a general, indefinite legal concept, it involves reference to circumstances which may vary from one State to another and which are also different in practice. The degree of security which a State enjoys a priori depends on a great many factors, and these must be appraised overall. The conclusion may be that one State should be regarded as appreciably more endangered in its security than another, and this, naturally, also affects how actions are judged from the standpoint of Article 4 of the Convention.

The factors which must be taken into consideration here include geographical and historical ones. Geographically the Federal Republic of Germany lies - to put it succinctly - on the boundary between East and West. Historically it learned by experience how enemies of freedom misused the freedom accorded them in the days of the Weimar Republic in order to do away with that very freedom. Later on, the Chief of the Gestapo, Heydrich, put it this way: "We ... destroyed by constitutional means, through legal channels, a system which, lacking inner substance, was ready at any time to give itself up if it happened through legal channels" (see Deutsches Recht, 1936, p. 121).

What it cost to get rid of that system again, the most recent history has shown. In the summer of 1932 Goebbels wrote in his diary: "Once we have power, we shall never give it up again unless we are dragged out of office as corpses" (Goebbels, Vom Kaiserhof sur Reichskanzlei, 1934, p. 139).

From this it will be clear not only why the Federal Republic of Germany has opted for a "democracy capable of defending itself", but also that it is placed in special jeopardy by persons and organisations that are bent on destroying the free democracy. Under these circumstances, measures against members of the public service who actively support the aims of the DKP or the NPD, by holding office in those parties, representing them in parliamentary representative bodies, or standing as candidates for such a position, must be regarded as justified under Article 4 of the Convention even if it is not established that the DKP or the NDP works by unconstitutional means. In the special circumstances prevailing in the Federal Republic of Germany, it must suffice that the NDP expresses itself against democratic fundamental principles and human rights, or that the DKP wants to replace the free democracy by a dictatorship of the proletariat, a people's democracy or any other system of "real socialism".

This will, of course, apply all the more strongly if it is established that the DKP wants to attain its ends by unconstitutional means - for example, because it aspires to amend parts of the Basic Law which, by virtue of Article 79, paragraph 3, are not capable of any amendment.

2. The free democratic basic order is the core of the state and constitutional order of the Federal Republic of Germany. Any attack on that core constitutes prejudice to the security of the State also within the meaning of Article 4 of the Convention.

The concept of the free democratic basic order has been defined by the Federal Constitutional Court and is clear cut (cf. BVerfGE 2, 1/14; 85/140); it has already been mentioned in Section III.

Only someone who, in principle, questions and combats these free basic values, which the International Labour Organisation itself was founded to disseminate and defend in the world of work, and who thus sets himself against the purposes of the International Labour Organisation, is regarded as unsuited for employment as an official in the public service of the Federal Republic of Germany and as falling within the scope of Article 4 of Convention No. 111.

In this matter, the Federal Government considers its opinion to be fully consistent with the remarks made by the Committee of Experts in the general conclusions concerning Convention No. 111 in 1963 (loc. cit., pp. 193/194, paragraph 47).

Reference is once more made to the fact that the examination of each case is prescribed as mandatory by the Federal Constitutional Court. In the Federal Republic of Germany no-one is denied access to the public service, or the right to remain in it, merely because he is a member of a party or an organisation with aims hostile to the Constitution. Instead, each specific case is examined. Every applicant for a post in the public service is the subject of a forecast of his future faithfulness to the Constitution; this forecast is based on his individual activities and his personality, and takes account of membership in a party or an organisation hostile to the Constitution merely as one criterion of judgement among others. In this process, in principle, the faithfulness of each individual applicant to the Constitution is assumed. Only when actual facts have shaken that trust in the individual case may further checks and conversations be undertaken. In the case of an official, a specific disciplinary offence must be proved in formal disciplinary proceedings, and here again membership of a party or an organisation hostile to the Constitution is not enough in itself. Instead specific activities aimed at destroying the free democratic basic order are necessary. However, those activities attack the core of the state and constitutional order of the Federal Republic of Germany and prejudice the security of the State.

This also happens in an unconstitutional manner, because article 79, paragraph 3, of the Basic Law provides for special protection against any amendment of the core of the Constitution that secures freedom (see Section IV above). However, if anyone prejudices the security of the State by individual activities using unconstitutional methods, this, in the opinion of the Committee of Experts, falls within the scope of Article 4 of Convention No. 111. Repeated

reference has already been made in this connection to the comprehensive legal safeguards required by that provision.

3. It is objected against the legal position thus taken by the Federal Government that the officials dismissed from the service had not been accused of having used or advocated unconstitutional means. This contention misses the point: any person who knowingly works to eliminate the free democratic basic order, even though the Constitution rules out the elimination of these democratic minimum principles of a State based on law, places himself by that endeavour in conflict with the Constitution. His action is hostile to the Constitution.

In this connection it only remains to add some remarks in amplification:

The Committee set up pursuant to article 24 of the ILO Constitution to examine the representation made by WFTU in 1984 closely connected article 4 with Article 1, paragraph 1, of the Convention. This might lead to a situation in which measures under Article 4 of the Convention to protect the security of the State were permissible only in so far as they were permitted anyway by Article 1, paragraph 1, of the Convention and thus - in practical terms - against totalitarian endeavours that called the entire state system into question, and then only in so far as such endeavours were pursued by violence or unconstitutional means or violence or unconstitutional means were advocated (see document GB.229/5/11, paragraph 44).

The fact that this comment by the Committee of Experts, which related to Article 1, paragraph 1, of the Convention, is picked up again here in connection with Article 4 points to the conclusion that the Committee in question wanted to limit the scope of Article 4 of the Convention in such a way that it would offer States nothing more than what already follows from Article 1, paragraph 1, of the Convention: Article 4 would thus have no practical significance, but be devoid of content.

An opinion leading to the conclusion that Article 4 of the Convention would no longer have any independent legal significance - on the ground that the only action still justified would be action which, already by virtue of Article 1, paragraph 1, of the Convention, could not be regarded as dicrimination on the basis of political opinion - would offend the recognised principle of interpretation in international law that for treaties an interpretation is required which takes all provisions into consideration (see advisory opinion of the Permanent Court of International Justice dated 12 August 1922, quoted after Williams/Lauterpacht, Vol. 1, p. 359; Berber I, p. 478; also the codification of this principle of law in Article 31 of the Vienna Convention on the Law of Treaties, dated 23 May 1969).

Only such a comprehensive interpretation of the whole text leads to the "reasonable" construction required by international law (see Permanent Court of International Justice, Series B, No. 11).

To be specific, this means that it is not permissible so to interpret a treaty that individual provisions are meaningless or ineffective. The provisions of a treaty - all of them - must be given by the interpretation a practically usable value (sens utile).

The principle is based on an assumption: "It is taken for granted that the parties intend the provisions of a treaty to have a certain effect, and not to be meaningless" (see Oppenheim/Lauterpacht, p. 955, with further references).

This must be all the more true in the present case, since both Conference sessions at which the Convention was discussed dealt at length with Article 4 - preparatory work which under Article 32 of the 1969 Vienna Convention on the Law of Treaties should also be taken into account as a supplementary means of interpretation. Article 4 was inserted during the first discussion on the proposal of the Employers and revised during the second discussion on the proposal of the Workers.

In this connection it is worth mentioning that during the second discussion the Philippines and Polish Government representatives proposed the deletion of what later became Article 4 on the ground that it was superfluous. This proposal was rejected by a large majority (80 votes in favour and 365 against, with 32 abstentions). This makes it clear that the delegates fully recognised the Article as of practical significance; this is confirmed by the fact that, as already mentioned, the text was further amended on second reading (see International Labour Conference, 42nd Session, 1958, Record of Proceedings, Appendix VI, p. 712, paragraph 26).

The history of its adoption, therefore, provides further confirmation that Article 4 of the Convention must have an independent meaning. This, however, is only true if cases arise which, while constituting discrimination on the basis of political opinion under Article 1, paragraph 1, of the Convention and thus per se contrary to the Convention, are nevertheless, by way of exception, permissible under Article 4 of the Convention because the measures affect persons who are engaged in, or justifiably suspected of, activities against the security of the State.

If we take the previous remarks of the Committee of Experts as a guide, such a case might arise if the activity endangering security was not accompanied by the use or advocacy either of violence or of unconstitutional means or methods, so that the activity would not be already prohibited by Article 1, paragraph 1, of the Convention and not protected by the Convention, but the requirements of Article 4 of the Convention in the interpretation given to it by the Committee of Experts were nevertheless met. This would be precisely the case with office-holders in extremist parties - if it were to be assumed that, although they pursued aims seriously contrary to the Constitution (elimination of the free democratic basic order), they did not (for the time being) pursue those aims by unconstitutional means.

In such a case the measures adopted here might possibly not be justified under Article 1, paragraph 1, of the Convention but nevertheless be justified under its Article 4.

Consequently the Government of the Federal Republic of Germany regards its measures of protection to maintain a public service faithful to the Constitution as justified also by Article 4 of Convention No. 111, particularly since provision is made for comprehensive legal safeguards for the persons concerned.

396. The legal opinion by Professor Karl Doehring appended to the Government's statement was dated 13 May 1985. It examined the question whether law and practice in the Federal Republic of Germany for the exclusion of extremists from the public service were in conformity with ILO Convention No. 111, with reference to the report which had been presented to the ILO Governing Body at its 229th Session by the Committee established to examine the representation presented by the WFTU in June 1984. The summary of Professor Doehring's opinion, as set out at the end thereof, is reproduced below, together with certain additional indications contained in the body of the opinion:

1. It is to be presumed that all member States are subject to the same obligations under the ILO Constitution and Convention No. 111. In the light of this principle, there are grounds for doubts when reproaches are made to the Federal Republic for its methods of keeping extremists out of the public service, while communist States protect incomparably more rigorously their one-sided State ideology and the methods used by Western democracies to protect themselves from extremists do not differ fundamentally from those of the Federal Republic. Consequently, to uphold the representation of the WFTU would be discrimination against the Federal Republic.

2. The methods used by the Federal Republic to exclude extremists from the public service are appropriate, are in accordance with free democratic concepts within the meaning of the United Nations Charter and the ILO Constitution, and respect the principle of proportionality. Already in 1930 the social-democratic government of Prussia forbade officials to engage in activities in the NSDAP and the Communist party, although without success. The Constitution of the Federal Republic, based on the experience of the German Reich, does not permit officials to be unwilling to defend the core provisions of the Constitution, the free democratic basic order, or to seek the elimination of those provisions. In the interests of German citizens as a whole an official can be considered fit for that occupation only if he can guarantee his faithfulness to the Constitution. In making its selection among candidates for appointment as officials State authorities must be guided solely by the public interest. Consequently, a decision not to engage a candidate for lack of faithfulness to the Constitution is not arbitrary discrimination, but an appropriate classification.

State authorities can guarantee the democratic State's tolerance of all political attitudes - with the exception of extremist ideologies hostile to the Constitution - only if its officials are willing to defend precisely the political opportunities of a free opposition. A member of the DKP, who is committed to Marxism-Leninism and therefore to a one-party system and the elimination of all opposition, is prima facie not fit to be an official. If, although aware of the objectives of the DKP, he claims to support the free democratic basic order of the Constitution, his credibility is in doubt. Nevertheless, in such cases there is a specific examination of the individual's aptitude, which provides an opportunity to remove the doubts about his faithfulness to the Constitution. There exist special misgivings, however, if the person concerned has been or is actively supporting the objectives of the DKP. If he does not put an end to these activities, he must be considered to be unfit to become an official.

That the DKP is at present not prohibited attests to the fundamental political tolerance of the legal system of the Federal Republic. Yet it would be an error to infer from this that one may not forbid an applicant for appointment as an official to be a member of that party. If that were so, States that do not have the possibility of prohibiting a party would never be able to exclude extremists and those who oppose the constitution from their civil services. That would, however, conflict with the entire practice of States and cannot be considered a serious proposition.

The removal of an official from the public service presupposes the commission of a breach of duty. Such a breach of duty can exist where an official, despite warning, does not refrain from activities for an extremist party that rejects the Constitution. Such a dismissal is dependent on the decision of an independent court. The burden of proof of the existence of such a breach of duty lies on the State authorities.

An appeal against any decision relating to matters arising under public service law can be made to independent courts; a complaint that fundamental or similar rights have been violated can be addressed also to the Federal Constitutional Court. Moreover, in the Federal Republic, beyond the duty of faithfulness, the extent to which restrictions on freedom of opinion and freedom to engage in political activities are authorised is clearly determined according to functional criteria.

The legal system of the Federal Republic does not permit the imposition of different degrees of faithfulness to the State on officials in different positions. That would be discrimination against officials themselves, which would have intolerable effects contrary to the rule of law in case of transfers, promotions, and on many other aspects of public service law.

That does not mean that reliable officials are not to be assigned to security-sensitive areas in accordance with their functions. The qualities of character to be given preference here, however, do not consist of a different degree of faithfulness to the Constitution, but of additional qualities. According to the Basic Law (Article 33, paragraph 4) and the Civil Service (General Principles) Law (section 2(2)) sovereign powers - and generally only such powers - should in principle be assigned exclusively to officials. In doing so, the legal system of the Federal Republic shows that, as a matter of principle, an official is not to be compared to an "employee" in the service of the State, but rather functions as a holder of sovereign power. It would be difficult and under the German legal system also illegal to divide officials into those from whom one can require "a little faithfulness" and those from whom one can require "a lot of faithfulness". The officials themselves have always resisted any such classification. Even a lower official, holding a perhaps not so important position, is proud to represent State authority by loyally exercising sovereign power. It would be discriminatory to give the lower official to understand that his faithfulness is of no importance, only so as to be able to treat equally an official whose faithfulness to the State is open to doubt. Such discrimination would also have very concrete consequences. German public law is based on the assumption that, if necessary, each official must and can replace any other official who is prevented from carrying out his functions.

Part of the special relationship of faithfulness between the State and the official is the duty of the official to accept transfer if he is needed in a different job. This replacement of one official by another must not be thwarted by the fact that an official is not sufficiently "faithful" for the position to which he is to be transferred. In this respect the argument by the Governing Body Committee that in a modern State the public service is in many ways comparable to the private sector is a fallacy and is not relevant for German law. Similarly, the promotion of officials would be affected by dubious considerations if a difference were made between various levels of faithfulness. To have to tell a technically qualified official that he could not be promoted to a higher position because he was not "faithful" enough, and to promote a less qualified official to the position becasue he was "more faithful" would be to make a distinction that could not be justified under constitutional law. In addition, owing to changing circumstances, an official position may at any time be subject to a change in its significance for the State and security. The "not-so-faithful" official would then have to be transferred.

It would also be incorrect to refer to other legal systems. Every State must be free to organise its civil service law to suit the requirements of its Constitution. When Convention No. 111 was adopted it was known that the public service was

organised in different ways in member States and in States parties to the Convention, a situation that Article 1, paragraph 2 of the Convention takes into account.

3. The systems of government of all democracies comparable to the Federal Republic demand loyalty and faithfulness of persons holding official positions. Thorough studies of these legal systems and their practice have shown that to be the case. Admittedly, the methods of protection vary. That the requirement of equality of treatment is not as strictly observed as in the Federal Republic is attributable to the specific features of other legal systems, among other things, to selection procedures for officials. The high degree of legal protection in the Federal Republic as compared with many other legal systems is shown also by the fact that in comparable legal systems reasons need frequently not be given for not engaging an applicant or even for dismissing an official. The same applies to judicial protection in cases of rejection of candidates and removal from office. There is probably no comparable State that is prepared to give legal and judicial protection in such cases to a similar extent as the Federal Republic of Germany. In other States, in which the reasons for decisions on the constitutional unsuitability of candidates and officials need not be disclosed, the exclusion of extremists, resulting as it does from purely governmental measures, is not spectacular, while in the Federal Republic public procedures bring about full transparency in this field. Hence the public controversy, which is used in an attempt to criticise the legal system and practice of the Federal Republic and to question their legality.

4. The employees of international organisations, too, are under an expressly stated duty of faithfulness to observe the objectives, purposes, and statutes of these organisations. If, contrary to these provisions, an employee were to be engaged or retained who - like a member of the DKP in the Federal Republic - expressly rejected these objectives and purposes of an organisation, not only would the purposes of the organisation be endangered, but the organisation's legal system would be disregarded. The examples of the United Nations and the European Communities demonstrate this point. There also it would be considered intolerable to employ an opponent of the organisation's legal system as one of its office bearers.

5. The one-party system applied in communist States such as the USSR and the German Democratic Republic, which does not tolerate an opposition and which defines basic rights solely as participation in the collective system, demands of and enforces on persons in official positions unconditional commitment to the State ideology, Marxism-Leninism. In these States there is no protection by independent courts. Apart from the fact that such a system is in accordance neither with the principles of the human rights Covenants and Declaration of the United Nations nor

with those of the ILO, it is absurd, as is evident from a comparison of the respective legal provisions, that representatives of such Marxist-Leninist systems should criticise the Federal Republic. In communist States the system of protection against non-Marxist public servants is rigorous and complete. That is not to say that for this reason the Federal Republic, too, could take protective measures that violate freedoms. Such measures are not applied. So it is not a question of equal injustice. It is only a question of pointing out that it is intolerable and discriminatory to accuse the Federal Republic of an alleged practice, which, in reality, is applied very intensively in communist States.

6. One has to assume that the concept of discrimination that has been developed in general international law, in the principles of the United Nations, and in the practice of the free democracies underlies also the ILO's legal norms. According to this concept, discrimination signifies disregard of the prohibition of arbitrariness. In other words, one cannot assume that there is discrimination if the distinctions are made on the basis of objective considerations that do not violate freedoms. To that effect, especially the principles of the United Nations Covenants on Human Rights show that it appears objectively necessary to limit the activities of those who want to use their rights to impair the freedoms of others. This is a danger that exists especially among public servants. The choice of protective measures against that danger must be left first and foremost to each State system itself. The particular historical, political and also geographical situation of the Federal Republic is to be taken into account in evaluating the admissibility of its protective measures, a point that was emphasised by the European Commission on Human Rights in a similar context.

7. The provisions of Convention No. 111 are to be interpreted in the light of these considerations. Such an interpretation, based on the standards of international law and the ILO Constitution, confirms completely the conformity of the Federal Republic's legal system with these principles. It is not arbitrary and therefore not discriminatory to infer from the basically clear text of Article 1, paragraph 2, of the Convention that in the Federal Republic all State officials perform a "job" that in view of its "requirements" justifies treatment different from that of typical workers. The degree of that difference in treatment is, by virtue of Article 2 of the Convention, to be determined according to "national conditions", with the consequence that also the special legal and political conditions of the Federal Republic are to be taken into account. The same principle is again clearly expressed in Article 3 of the Convention. Article 4 of the Convention allows State security to be used as an objective criterion on which to base distinct treatment, if a person is justifiably suspected of endangering such security. A member of the DKP, who in spite of being

informed of the incompatibility of Marxism-Leninism with the free democratic basic order of the Federal Republic, sticks to his political conviction and actively manifests it, impairs the security of the State as a State official in any position, as is shown by the numerous cases of espionage and subversive activities directed by communist States.

Accordingly, no violation by the Federal Republic of Germany of the principles laid down in Convention No. 111 can be established. These principles are also fully respected in practice.

397. Following the hearing of witnesses at the Commission's second session, the Government of the Federal Republic of Germany communicated further comments, as follows:

(Translation)

I. As the hearings have shown, a distinction is made between the legal provisions in force in the Federal Republic of Germany concerning faithfulness to the Constitution in the public service and administrative practice. The legal provisions are not being challenged. As the Federal Government already pointed out in its statement of 27 March 1986, none of the socially relevant groups in the Federal Republic of Germany departs from this position of principle. The German Confederation of Trade Unions, as the largest organisation of workers, only recently confirmed once again, in its periodical Der Deutsche Beamte, its agreement in principle with the duty of faithfulness to the Constitution for those employed in the public service of the Federal Republic of Germany ("Soviel Freiheit wie möglich, soviel Bindung wie nötig" by Hans-Hermann Schrader, No. 5, May 1986; appended), thus expressing itself somewhat differently from the representatives of two of its affiliates who appeared at the hearings. The Land Government of the Saarland too has not amended the Saarland Civil Service Act, but retains the duty of officials to be faithful to the Constitution. In the international sphere, likewise, it has never been claimed that the duty of faithfulness to the Constitution prescribed in the Basic Law for the Federal Republic of Germany and in the Civil Service Acts of the Federation and the Länder violated per se ILO Convention No. 111. Only administrative practice is always the subject of attack. This overlooks the following:

Either administrative practice is consistent with the legal position, in which case the correct application of existing laws cannot violate the obligations arising out of Convention No. 111 if the laws themselves do not do so; alternatively - and this is what is claimed - administrative practice is not covered by the national laws and is therefore contrary to law; in that case it

would be for the national courts to examine and establish this national violation of the law.

The hearings before the Commission of Inquiry have made it clear that a conclusive clarification of the national legal position by the highest court is being deliberately prevented for political reasons. On that account, not only do the persons concerned lack the right to trouble international bodies with such a matter; there is, above all, no specific object for examination. For, if administrative practice were found lawful and in accordance with the laws by the highest national court, the only possible object for international examination would be the laws themselves, because their correct application is inseparably bound up with them. However, the statutory situation in the Federal Republic of Germany has remained unchanged for decades and has not hitherto been regarded by the International Labour Organisation as a violation of Convention No. 111. If, on the other hand, the highest national court were to hold domestic practice to be unconstitutional or contrary to statute law, there would be no further need for these inquiry proceedings.

A decision by the Federal Constitutional Court is therefore a prerequisite for these international proceedings. Such a decision can be brought about only by the persons concerned. Neither the Federal Government nor a Land Government is in a position to apply to the Federal Constitutional Court on the points at issue.

Reference is made explicitly to the explanations given at the oral hearings by Professor Doehring concerning the problem of non-exhaustion of domestic remedies in international law.

II. Differential treatment of extremists of the left and of the right is possible neither under ILO Convention No. 111 nor under the Constitution of the Federal Republic of Germany. However, while German measures against extremists of the right who seek admission to the public service or are already employed there encounter no criticism in any quarter and indeed are often described as unduly lax (the witness Paech said that in his opinion the human rights safeguards of the Basic Law and of international law did not apply to Fascists), the same measures - despite the principle of equal treatment intended by the ILO Convention - when applied to extremists of the left and in particular to adherents of the German Communist Party (DKP) are alleged to be unconstitutional and to violate international obligations. So it is no longer a matter of whether a special faithfulness to the free democratic basic order may be required of officials in the Federal Republic of Germany and of what consequences are permissible in the absence of such faithfulness to the Constitution; the sole point at issue is whether the Federal Government is right in maintaining that the DKP pursues aims hostile to the Constitution. That question (on which,

according to the consistent wishes of the persons concerned who have been heard, the Federal Constitutional Court is not to rule, although competent to do so) cannot be decided on the basis of Convention No. 111. Nor can the Federal Government recognise any reference here to the functions and aims of the International Labour Organisation. Which party or organisation pursues aims hostile to the Constitution at the national level can be determined only in accordance with national constitutional law.

III. At the hearings, reference was made repeatedly to alleged or actual differences in administrative practice in the Federation and the Länder. On this the following may be said:

1. The Federation and all the Länder alike stand by the principle of faithfulness to the Constitution in the public service and are convinced of its necessity. Even the Saarland has not amended the corresponding provisions of its Civil Service Act.

2. Administrative practice is based everywhere on the evaluation of the individual case which the Federal Constitutional Court has made a mandatory requirement, and in which - as in every administrative decision - the principle of proportionality must be respected. Since every individual case presents itself differently, many of the differences which have come to light are due to differences in the circumstances.

3. It should not be disputed, however, that there are in addition some general differences among the individual employers in the Federation and the Länder as regards the practical application of statutory provisions which are the same everywhere, for example with regard to the so-called routine request for information. This is due partly to a subsequent change of view by elements of the Social Democratic Party of Germany (SPD) and partly to the federal system of the Federal Republic of Germany. In their practical effects, however, the varying rules of procedure are less significant than would appear. The most appropriate and effective means of unifying administrative practice would be a decision of the Federal Constitutional Court on the questions which remain at issue: something which is deliberately prevented.

4. In the Federal Government's opinion, only the Constitution and laws of the Federal Republc of Germany and the adminstrative practice derived therefrom, which coincides with the practice in the majority of Länder, can form the basis for the Commission's inquiry. If individual Länder in individual cases decide otherwise in favour of those concerned for avowed political or even merely tactical reasons, that can have no effect on the question whether the

practical application maintained by the Federal Government corresponds to the national legal position and whether that legal position is in conformity with Convention No. 111. Furthermore it should be borne in mind that decisions in favour of those concerned are not subject to any judicial control as to their lawfulness, because the beneficiaries have no cause to appeal to the courts.

IV. Repeated attempts were made during the hearings to portray the measures adopted in the Federal Republic of Germany to maintain a public service faithful to the Constitution as unnecessary and therefore impermissible. It was said that those concerned had not been accused of any breach of duty in the performance of their service; that also in their activities outside the service there had been neither criminal actions nor violent aggressive attacks on the constitutional order; that their conduct had not impaired respect and confidence in a manner significant for their functions or for the prestige of the civil service; that, where persons accused of activities hostile to the Constitution had remained at their posts, no recognisable consequences or prejudice for the free democratic basic order had been discernible; that therefore the persons concerned were not dangerous to the democratic existence of the Federal Republic of Germany; that consequently the duty of faithfulness to the Constitution could not be regarded as an inherent requirement of employment in the public service within the meaning of Article 1, paragraph 2, of Convention No. 111, nor could the application of Article 4 of Convention No. 111 come into play.

Such an approach - as the witnesses called by the Federal Government have already shown - misses the point and disregards the real problems:

1. It misses the difference between reaction and prevention. The Federal Government has always emphasised the preventive nature of the duty of faithfulness to the Constitution and of the measures connected with it. The free democracy in the Federal Republic of Germany can be protected effectively in the long run only if, in possible future crises and situations of conflict, the body of officials is ready without reserve and together to defend the free democratic basic order. Consequently the necessity and effectiveness of safeguards applied for this purpose cannot be evaluated according to whether specific impairments become discernible already now, in the absence of such a crisis situation, wherever officials with a hostile attitude towards the Constitution have been working for a relatively long period or are still working. A sytem of safeguards cannot be judged before the contingency for which it is designed has arisen.

2. A connection with the conduct - in and out of the service - of the persons concerned is established, not by way of reaction, but by way of prevention as just described. A person who makes it clear by his present activities, say for a party with aims hostile to the Constitution, that the citizens will not be able to rely on him at the crucial moment to defend their free democracy is unfit for the service of the State and cannot become or remain an official. This has nothing to do with "punishment" for a particular course of conduct but is a question of "fitness" for a particular kind of work, namely as an official in the service of the State.

3. It cannot and should not be disputed that the few officials in the public service of the Federal Republic of Germany who are known to be of hostile disposition towards the Constitution at present represent no specific danger to the free democratic basic order. But the interpretation of Convention No. 111 cannot depend on this insignificant number and the consequent slight danger which it presents for the time being. The question whether faithfulness to the Constitution is a permissible element of suitability and a requirement for employment within the meaning of that Convention is not a question of quantity. The measures adopted by the Federal Republic of Germany cannot violate Convention No. 111 when there are 500 extremists in the public service and be consistent with it when there are 5,000 or 50,000 extremists in the public service. In principle, therefore, every single supporter of aims or endeavours hostile to the Constitution in the public service endangers the security of the democratic State. If one waited until the total of such extremist-minded employees represented an acute danger, it would be too late for effective measures.

4. The crucial question is: who is suitable for a post as an official in the public service of the Federal Republic of Germany? What requirements must be imposed as regards suitability for a particular job can be determined only within the framework of the national Constitution. The suitability requirements are based on the job itself if they form a central feature of the corresponding job description as is the case here, where they are prescribed by the Constitution. The International Labour Organisation and its bodies cannot alter or negate the job description developed nationally. They can only measure it as a whole against the principles of Convention No. 111; it is not open to them to establish an independent definition of the national duty of faithfulness to the Constitution and of the requirements pertaining thereto.

established at the time of his appointment and in principle is expected of all employees; it is much more a matter of whether he also satisfies the increased requirements as regards security, for example, whether he may be open to blackmail (for debt, criminal acts, etc.) or represents a specific security risk (e.g. alcoholism, drug addiction). Here, one is not concerned with service obligations. If an employee does not satisfy these special requirements, he may nevertheless be or remain employed in other sectors of the public service which are not security sensitive to the same degree. The purpose of the security check is not to establish suitability for state service as such but only suitability for highly specific functions.

Consequently it is also wrong to describe checks and transfers related to these special security requirements as "job-ban measures", as the opponents of the free democratic basic order are always trying to do in order to arrive at larger numbers of cases. Otherwise even an official of the defence administration who is moved to a labour exchange on account of alcohol problems would have to be regarded as the victim of a "job ban".

Owing to the much wider range of tests involved in the security check, it would be disproportionate and unwarranted to extend this procedure to all officials, such as teachers, solely in order to determine whether they were suitable for the proposed job from the standpoint of faithfulness to the Constitution.

V. Since repeated reference was made during the hearing of expert witnesses to the difference between officials and persons employed under a labour contract in the public service of the Federal Republic of Germany, the Federal Government would like to make the following comments:

1. Under article 33, paragraph 4, of the Basic Law, the exercise of sovereign powers as a permanent function is as a rule to be entrusted to members of the public service who are in a relationship of service and faithfulness under public law: that is to say, to officials. It is true that the dividing line between the sovereign area reserved to officials and the area of persons employed under a labour contract in the public service is difficult to draw and is not always consistently maintained.

   There are many reasons for this. For instance, it is permissible under budgetary law to employ persons under labour contracts in posts which in the budget are earmarked for officials (though the converse does not apply). Use is often made of this opportunity in the case of contracts for part-time employment, employment relationships of limited

duration and cases in which employment relationships allow of a more flexible personnel policy than the relatively rigid relationship of an official, which is meant to be for life. However, persons employed under labour contracts in officials' posts are subject to the same requirements as regards the duty of faithfulness to the Constitution as officials (the Federal Labour Court has expressly ruled to that effect for teachers).

There may also be areas in which officials are employed even though they are not exclusively concerned with the exercise of sovereign powers; this is perfectly permissible under article 33, paragraph 4, of the Basic Law. There are historical and political reasons for this, and it is also due in part to different conceptions of what should be regarded as "sovereign activity".

2. This coexistence of officials and persons employed under labour contracts in the public service of the Federal Republic of Germany, who are not and indeed cannot always be clearly distinguished, is without significance for the questions to be dealt with here. For the aim is not to ascertain what status should be prescribed for particular jobs in the public service, but whether German officals may be required to uphold the free democratic basic order at all times. This element of suitability is a prerequisite for appointment of an official as such such, irrespective of the specific function.

   If an official should be doing a job which could properly be assigned also to a person working under a labour contract, no argument could be drawn from this against his duty as an official to be faithful to the Constitution, but at most an argument in favour of transferring him or of a reorganisation. Questions of state organisation, however, are not covered by Convention No. 111. Nor can it be the function of the International Labour Organisation to dictate to its member States the proportion of officials in the public service and the areas of administration in which they may be placed.

3. For these reasons there is no force in the objection that faithfulness to the Constitution need not be required from German officials because the same job may also in certain circumstances be performed by persons employed under a labour contract, on whom less severe demands would be made as regards faithfulness to the free democractic basic order. This argument also misses the following point. For persons employed under a labour contract, in contrast to officials, there is neither a career with regular promotions nor the principle that they can be transferred at any time. In principle, therefore, they remain in the job to which

they have been assigned, whereas officials, in the course of their professional life, are subject to a continuous process of development as regards functions and rank.

Furthermore a person employed under a labour contract may for serious reasons be dismissed without notice at any time. While any proceedings for protection against dismissal are in progresss, he remains outside the public service. On the other hand, an official for life can be removed from the service only through lengthy, formal disciplinary proceedings, during which he remains an official. Consequently the long-term potential for danger is greater by reason of their status in the case of officials than in that of persons employed under a labour contract.

If the present practice in the Federal Republic of Germany concerning the different status groups were regarded as unjustified, then the duty of faithfulness under civil service law would have to be extended to all persons employed in the public service; in other words, the practice would have to be made more severe as a result of these inquiry proceedings.

VI. A few more observations about the number of relevant cases. Even before the witnesses were heard, the Federal Government had supplied the Commission of Inquiry with comprehensive statistical material but had at the same time expressed doubts as to taking account of those numerical data in considering the questions of principle which are at issue. These indications by the Federal Government with regard to the extremely small number of relevant individual cases were strikingly confirmed at the hearings of witnesses.

All the more remarkable, therefore, are the large numbers of cases quoted by the opponents of the free democratic basic order, but not substantiated. Obviously, every "routine request for information" made at the time of appointment is counted by them as a "job-ban measure" irrespective of the result, and also, for example, every hearing and reassignment in connection with security checks although, as has been explained, this has nothing to do with the verification of faithfulness to the Constitution. The purpose of this manipulation of figures is so obvious that the Federal Government refrains from comment.

VII. There are no "job bans" in the Federal Republic of Germany. The Federal Government therefore reiterates its hope that also on this point the International Labour Organisation will support it in its efforts to provide lasting security for a democracy that guarantees freedom and human rights.

398. By letter of 18 November 1986, the Government communicated the following final comments:

(Translation)

In presenting these final comments, the Government of the Federal Republic of Germany wishes to stress once more its support for the unrestricted application of the procedures for the supervision of standards of the International Labour Organisation. The Federal Government has therefore sought, by the means at its disposal, to provide as quickly as possible all requisite factual data for examining the matter before the Commission of Inquiry. The Federal Government also received the Commission in the Federal Republic of Germany in August, and made the necessary arrangements to facilitate the carrying out of its mandate without hindrance.

In the course of the inquiry, the Government of the Federal Republic of Germany has already set out its views comprehensively on several occasions, and has dealt with all elements which in its opinion are legally and factually significant. It trusts that its arguments will be given due consideration, and therefore abstains from repeating in its final comments all that has been said previously. Instead, it will deal in detail essentially with matters which have arisen since the Commission's visit to the Federal Republic of Germany; apart from that, the points which in the Government's view are the most important are recapitulated.

I. As regards the procedure followed by the Commission of Inquiry, the Federal Government has repeatedly pointed to what it considers the improper attribution to the World Federation of Trade Unions of a role similar to that of a complainant, particularly by the presence of its representatives at the hearings of witnesses, and has objected accordingly. It refers in particular to the written statement presented during the first sitting of the hearings of witnesses, on 15 April 1986.

Because of the much greater and far-reaching significance of the appointment of a commission of inquiry against a member country, as compared with the other procedures for supervising the implementation of standards, the observance of due process must be ensured especially in the inquiry procedure. For that reason, particular importance attaches to the principle that the form and course of the proceedings should be foreseeable for the government concerned. That government must be in a position, before proceedings begin, to foresee the likely steps in the procedure, in order not to be surprised by the course taken.

The absence of rules of procedure for proceedings under Article 26 of the Constitution or at least of a compilation of the procedure followed by earlier commissions of inquiry constitutes a general procedural shortcoming. Reference to so-called "established practice" to justify individual steps in the procedure appears highly problematical, if such a "practice" cannot be found in writing at least in an official document of the International Labour Organisation. The "rules for the hearing of witnesses" adopted by the Commission are only one part of rules of procedure, and therefore do not meet the needs for a comprehensive set of rules.

II. By letter of 12 September 1986 the Federal Government transmitted to the Commission of Inquiry two judgements of the European Court of Human Rights dated 28 August 1986 (complaints by Glasenapp and Kosiek against the Federal Republic of Germany, cases 4/1984/76/120 and 5/1984/77/121). During the hearing of expert witnesses in Geneva, in response to a request by the Federal Government, the Commission decided, at its eighth sitting on 21 April 1986, to take these two cases into account, in so far as the information was relevant to the issues before it.

In the opinion of the Federal Government, that is the case. At first sight, admittedly, the proceedings before the European Court of Human Rights related to two individual complaints - i.e. two specific cases - concerning admission to employment as an official, whereas the inquiry procedure is concerned generally with law and practice in respect of the duty of faithfulness in the German public service and in that connection cases of dismissal from a relationship of official have prominence. A closer analysis of the grounds for the judgements shows, however, that the two decisions have very great significance for the present proceedings.

Both before the European Court of Human Rights and in this inquiry the issue concerns freedom of expression; in each case this has to be judged according to international, not national standards (nationally, as the Federal Constitutional Court has decided, there exists no violation of the basic right to freedom of expression). The Court, by a majority of 16 to 1, has found that it is not a violation of freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights - indeed, that it is not even an interference with freedom of expression - to admit to employment as officials only those whose future faithfulness to the Constitution is guaranteed. The Court has regarded this requirement of faithfulness to the Constitution as an element of personal qualification, as a question of access to the public service, which can and must be regulated by each State under its own responsibility according to its national circumstances. It has expressly found that this requirement of personal qualification cannot in itself be considered incompatible with the European Convention on Human Rights. It is

permissible to take account of the opinions and attitude of an applicant to determine whether he possesses the necessary personal qualifications for the employment sought.

The Court has thus accepted the understanding of faithfulness to the Constitution as constantly presented by the Federal Government, in line with the decisions of the Federal Constitutional Court: the mere fact of having a political conviction and the mere fact of making that known can never constitute a violation of the duty of faithfulness. An official must go further and draw consequences from his political conviction for his attitude towards the constitutional order of the Federal Republic of Germany, for the manner of fulfilling his official duties, for his dealings with his colleagues. The duty of faithfulness therefore requires merely that - as stated in the relevant provisions governing service by officials - the official must "offer the guarantee that he will at all times uphold the free democratic basic order within the meaning of the Basic Law".

Discrimination on the ground of political opinion, as ruled out by Article 1, paragraph 1, of Convention No. 111, would certainly be a violation of the basic right to freedom of expression. Inversely, where there is no violation of freedom of expression, there can be no question of discrimination on the ground of political opinion. The position adopted by the European Court of Human Rights supports the view of the Federal Government that Article 1, paragraph 1, of Convention No. 111 has not been violated.

A second point is to be noted. Suitability for a particular employment is determined by its requirements. This calls for the development of a particular occupational profile with corresponding qualifications; that can be done only according to national circumstances and legal provisions, from which may be deduced what qualifying conditions have to be met by applicants for the occupation concerned. Since, according to national constitutional law, the duty of faithfulness is a necessary qualification for all officials, it necessarily falls within the exception clause in Article 1, paragraph 2, of Convention No. 111. Otherwise intrnational bodies would be able to impose on the national legislator what qualificatons he might lay down for given occupations.

The question of qualifications is, however, of significance not only for admission to employment and for giving a lifetime appointment to an official on probation and his dismissal from a probationary relationship when he does not meet expectations, on which the European Court of Human Rights had to rule. It also plays a decisive role for maintenance in the public service. Anyone who, as an official, violates his duty of faithfulness to the Constitution and thus makes evident that he is no longer fit for employment in the public service cannot remain in state

service. As the Federal Government has already repeatedly indicated, that has nothing to do with a sanction or "punishment" for a particular opinion, but is a logical and obvious reaction to the disappearance of a requisite qualification, which in these cases is, moreover, to be attributed to the persons concerned. In essentials, therefore, cases of admission to employment and of dismissal are alike. In both instances the issue is fitness to work as an official in state service. The fact of taking into account attitude towards faithfulness to the Constitution and the consequent conduct of those concerned is merely a means for ascertaining such fitness, which also the European Court of Human Rights regards as permissible.

III. In the course of this inquiry it has repeatedly been sought to create the impression that in the Federal Republic of Germany there has since 1982 been an intensification of measures for the maintenance of a public service faithful to the Constitution. The contrary is the case, as is also confirmed by the figures made available to the Commission by the Länder during its visit. The number of disciplinary proceedings too has not risen. The representative of the Federal Ministry of Posts and Telecommunications, for instance, pointed out once more during the discussions on 5 August 1986 that in the Postal Service the investigations which led to formal disciplinary proceedings were all, without exception, begun before 1982.

The fact that, in spite of these known and verifiable facts, the contrary is asserted shows once again how political interests take the place of legal considerations.

IV. The decision of the ILO Governing Body of 3 June 1985 to establish this Commission for a full examination of all significant legal and factual questions related to the duty of faithfulness to the Constitution was taken, inter alia, because the report of the committee which examined the representation of the World Federation of Trade Unions of 13 June 1984 had, in the opinion of the Federal Government, not taken essential aspects into account. Consequently, in conclusion, the central arguments of the Federal Government are recapitulated as follows:

1. Failing the exhaustion of national remedies for determining the individual cases referred to, international bodies cannot deal with the legal issues arising therefrom. As in these cases there exists as yet no generally binding interpretation of national law, they cannot be made the basis for a conclusive evaluation of national practice.

2. The Federal Republic of Germany, in taking measures to maintain a public service faithful to the Constitution, is seeking to defend and promote freedom and human rights. It would be paradoxical if Convention No. 111, which is directed to the same objective, could be misused to hinder the Federal Republic

in so acting and to give the opportunity to supporters of a totalitarian system in the Federal Republic of Germany, by means of employment in the state apparatus, to undermine the free democratic State from within. The aims and endeavours of the International Labour Organisation would thereby be transformed into their opposites.

3. As has been decided also by the European Court of Human Rights, the central issue concerns qualification for employment as an official in state service. Someone may become an official only if out of inner conviction he supports the free democratic basic order of the community which he is to serve, is prepared constantly to defend it and acts in that spirit. Anyone who does not satisfy or no longer satisfies this indispensable and obvious requirement for a particular employment in the public service cannot be engaged or continue to be employed. That does not involve discrimination on the grounds of political opinion: every official or applicant to that extent is also treated alike.

4. Article 1, paragraph 2, of Convention No. 111 expressly recognises that distinctions based on the requirements of a particular job are not discrimination. The personal qualification of faithfulness to the Constitution in any event constitutes such a requirement. What is involved here is not a qualification for a particular position, but the indispensable prerequisite for every relationship of official to serve the State and its free democratic basic order and not to seek to combat and to eliminate that order.

5. Article 4 has an independent significance apart from Article 1, paragraph 1, of Convention No. 111. Anyone who wants to eliminate the essential features of the State and constitutional order of the Federal Republic of Germany, which are specially protected by the Constitution as unalterable, acts against the security of the State or its democratic constitutional system. The European Commission and the European Court of Human Rights have regarded it as legitimate for a State to protect itself against an imperceptible slide into totalitarianism and to take precautions against threats to national security and the democratic social and political order (Case of Klaas and others, Series A, Vol. 28, paras. 46ff.). The Federal Government has already referred to this in its comments on the results of the hearings of witnesses, point IV.6. The prospects of success of such endeavours or already verifiable negative effects are not relevant for the application of Article 4 of Convention No. 111.

6. The objective of all measures for maintenance of a public service in the Federal Republic of Germany that is faithful to the Constitution is prevention, the preservation of democracy and thereby of the rights to freedom of all citizens in the future. That is the meaning of the "militant democracy". This aim of securing freedom must not be ignored in the legal evaluation of those measures.