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SUBMISSION

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to the UN Committee against Torture (CAT) – parallel report to the Sixth State Report of Germany (Sixth Periodic Report)

The German Women Lawyers' Association (Deutscher Juristinnenbund, djB) is an association of female lawyers and economists. The primary goal of the German Women Lawyers' Association is to achieve substantive equality for women in all areas of society and to help realize women's human rights. It was founded in 1948, bringing together women from all legal professions. The German Women Lawyers' Association addresses gender-based discrimination in every field of society, professional and family life by advocating for and participating in law reforms, by submitting *amicus curiae* briefs to the Federal Constitutional Court, by reporting to human rights bodies, by offering continued legal education, by supporting young female legal professionals and scholars, and by bringing together women lawyers from all walks of life.

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The German Women Lawyers' Association is submitting a parallel report to the 6th State Report of Germany to the UN Committee against torture. We are particularly concerned about the persisting shortcomings regarding the cruel and degrading treatment of rape victims in criminal proceedings which constitute a violation of Article 2 § 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Introduction

In the Committee's List of issues prior to submission of the sixth periodic report of Germany from 2013 the Committee, *inter alia*, asked the German government to "indicate which steps have been taken by the State party to raise awareness among all public authorities across the Länder, and specifically among the judiciary, of the rights set forth in the Convention, so that they can give effect to those rights" (List of Issues, No 2). The Committee also asked the government to provide information regarding gender-based violence and requested "Updates on the means of redress provided to victims, including legal, medical, psychological aid and rehabilitation, as well as on the successes and constraints of the national programmes to protect, assist and support all victims (...)" (List of Issues, No 10 [c]).

The German government has, however, made no mention in its Sixth periodic report of States Parties—submitted on August 8, 2017 – of steps to raise awareness among the judiciary of the rights in the Convention (Report, paras. 8, 9). Also, the German government responds to the requested updates in List of Issues No 10 (c) by listing several measures to prevent sexual violence and provides statistics (Report, paras. 43-65) but lacks information on how to protect victims after the offence has happened. In particular, the government remains silent on concrete steps to prevent cruel and degrading treatment of victims of sexual assault and rape during police investigations and court hearings.

In this regard the German Women Lawyers' Association is especially troubled by criminal proceedings that took place within the reporting period of the Sixth periodic report.

Facts of the case

In 2014, a severely intoxicated woman was sexually assaulted several times and in several ways by two men who recorded these assaults in detail. Due to her intoxication, the victim's recollection of the sexual assaults was severely impaired. The recording of the sexual assaults was found on the smartphone of one of the perpetrators and established clear proof. Nevertheless, the defence lawyers argued that the victim must watch the recording "to help her to remember". The court acceded thereby implying that the request was in accordance with the German Code of Criminal procedure (*Strafprozessordnung*). The victim and her counsel rejected this request with counter-arguments, but as the defence lawyers and the judge insisted, they saw no procedural possibility to avoid it. The showing of the recording had to be interrupted after some seconds because the victim collapsed. Although it was obvious that the victim's memory would not return and that the victim became severely traumatized by watching the recording, the judge ordered that the victim had to watch the recording until the end. The showing had to be interrupted for several times because the victim needed urgent psychological support. Nonetheless, the judge did not terminate the showing but made the victim watch the full recording.

These facts and their legal implications were subsequently confirmed by a judgment in the following civil case before the Regional Court of Münster, which decided upon an unusual high amount of compensation for the victim to be paid by the perpetrators.¹ The court found that the high amount of compensation was necessary due to the fact that the conflict defence strategy

¹ Regional Court of Münster, judgment of 7 December 2017, 02 O 229/17, http://www.jus-tiz.nrw.de/nrwe/lgs/muenster/lg_muenster/j2017/02_O_229_17_Teil_Versaumnis_und_Schlussurteil_20171207.html.

(*Konfliktverteidigungsstrategie*) chosen by the defendants had considerably elongated the victim's suffering and also caused new pain. The trial lasted for 26 days in court, from 17 February 2015 until 20 November 2015. The competent authority (*Landschaftsverband Westfalen-Lippe*) attested that the victim suffered from a post-traumatic psycho-reactive disorder (*posttraumatische psychoreaktive Störung*) caused by the criminal proceedings. It found a degree of harm of 40 on November 30, 2015, 30 on February 31, 2016 and 20 on the date of the civil court's decision on December 7, 2017. The court stated that it was obviously unnecessary to insist on the showing of the recording and that this showing caused severe additional harm and trauma to the victim of the repeated and especially degrading forms of rape. It shall be noted that the judge who decided upon the defence's proposal was neither ordered to pay compensation nor faced any other legal consequences of his decision to make the victim watch the recording despite the obvious consequences for her. In addition, it is important to point out that the victim has to date not received any compensation from the two perpetrators.

It is of essential importance that the case be viewed in the context of the broader developments regarding victims' rights in cases of sexual and gender-based violence in Germany:

In 2017, a fundamental Penal Code reform took place to establish consent or the lack of consent as the central element of the criminal law against sexual assault and rape (among other reasons, to implement the Istanbul Convention).² But there was and is resistance against the reform among the legal professions. Time and again, the few victims whose cases are being tried in criminal courts, report that judges and state attorneys employ little knowledge about sexual violence and its consequences or about the different manifestations of trauma. Victims report court proceedings to be characterized by gender stereotypes, rape myths, blaming the victim, secondary victimization and obstructions to the work of the legal counsel to whose support they are entitled.³

In addition, in many criminal courts, victims' legal counsels (*Nebenklagevertretung*) are being denied access to the case files although they are legally entitled to this access.⁴ This violation of legal counsels' statutory rights is justified by criminal court judges with the allegation that the counsels would 'prepare' the victim-witnesses.⁵ It is still true that no rape myth is more powerful than the myth of the lying woman. And this denial of statutory rights cannot be brought before a higher court due to criminal procedural law.

Furthermore, in 2017, the associations of criminal defence lawyers published a so-called policy paper on victim's participation in criminal proceedings⁶ which was sent to a large number of criminal courts. This paper is extremely critical of many of the well-established rights of victims of criminal offences and generally of victim participation in criminal proceedings.

² djb, Stellungnahme des Deutschen Juristinnenbundes zu weiterem Reformbedarf im Sexualstrafrecht, p. 1, available at: <https://www.djb.de/verein/Kom-u-AS/K3/st19-06/>.

³ djb, Stellungnahme zur effektiven Umsetzung des Übereinkommens des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (Istanbul-Konvention) in Deutschland, 2018, p. 13 ff., available at: <https://www.djb.de/verein/Kom-u-AS/K6/st18-02/>.

⁴ djb, Policy Paper: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, p. 15 f., available at: <https://www.djb.de/verein/Kom-u-AS/K3/st18-18/>.

⁵ Higher Regional Court of Hamburg, judgment of 24 October 2014, 1 Ws 110/14, and judgment of 24 November 2014, 1 Ws 120/14; of a (slightly) different opinion: Regional Court of Leipzig, judgment of 12 August 2015, 1 Qs 195/15.

⁶ Strafverteidigervereinigungen, Policy Paper: Opferbeteiligung in Strafverfahren, 2017, available at: https://www.strafverteidigertag.de/Material/PP_Opfer_2017.pdf.

A violation of Article 2, paragraph 1, of the Convention

According to Article 2, paragraph 1, of the Convention „each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction“.

Torture, as set forth by article 1, paragraph 1, of the Convention “means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

In the past, the Committee has made clear that gender-based violence is a form of torture. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, speaks out for a gender-sensitive interpretation of torture⁷. Rape or any other sexual violence can be torture in the light of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Nowak adds to the criteria for torture the criterion of powerlessness of the victim, to consider a rape as torture⁸.

The woman in the above-mentioned court proceeding was confronted with the recording of the rape and suffered deeply under this treatment by the court. She was confronted with the recording of the rape and thereby traumatized. As a result of the decision of the judge to show the recording of the sexual assaults in front of the parties of the proceedings, the woman was powerless. She was ill-treated as a consequence of her complaint. As the showing of the recording was not necessary to prove the sexual assaults by the accused, the court should not have allowed this as a means of evidence. The suffering of the victim was predictable and not necessary in the concrete case. Therefore, the judge should have denied or should have been obliged to deny the showing of the recording in accordance with the German Code of Criminal procedure. As the course of events in the process and the requests of the defence lawyers are not known in detail, it cannot be assessed whether the decision of the judge was in accordance with the German Code of Criminal procedure *per se* or whether the rules should have been applied in the light of the CAT. Irrespective of this assessment, the court committed an act of torture by not denying the request for evidence of the defence lawyer.

Additionally, the Regional Court of Münster deciding the civil law claim for compensation against the perpetrators granted compensation with an argumentation that needs to undergo a critical evaluation. By granting compensation due to the fact of a conflict defence strategy, the Court practically “punished” a behaviour of the defendants that had been considered lawful by the judge during the criminal proceeding. A defendant has the right to use all lawful means under the German Code of Criminal procedure to defend him- or herself in court. Yet protecting the victim in the courtroom clearly would have been the obligation of the Criminal Court itself by denying the request of the defendant. Instead the judge approved a cruel and degrading treatment. If the possibility to deny the request did not exist in accordance with the current rules of procedure considering the circumstances of this individual case it would be upon the German legislative to protect victims by setting up rules for such cases. This failure of effective protection should therefore lead to a legal right for compensation against

⁷ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3, 15 January 2008, para. 25.

⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3, 15 January 2008, para. 27.

German authorities. But German state liability law has a high burden of proof regarding fault and therefore claims are successful only in very exceptional cases.

In its General Comment No. 2 on the Implementation of Article 2 by States Parties the Committee “observes that States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention. Thus, States Parties should adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture.”⁹

That means, that the States Parties do not only have the duty to prevent acts of torture by their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law in any territory under its jurisdiction. But they also have an obligation to protect (“positive obligation”) the people under its jurisdiction against torture by state entities and third parties.

Consequently, States Parties have the obligation to protect victims and parties in court proceedings from being ill-treated or intimidated as a consequence of his/her complaint or any evidence given. If States Parties do not protect the victims and parties in court proceedings against these acts, the victims and witnesses of a criminal act might be kept of complaining this act (“chilling effect”).

By not preventing the woman’s torture in the court hearing, Germany has violated Article 2, paragraph 1, of the Convention.

The Women Lawyer’s Association demands:

- **immediate measures by the German government to abolish cruel and degrading treatment of rape victims in criminal proceedings, to hold judges accountable for cruel and degrading treatment of rape victims in criminal proceedings and to safeguard the statutory rights of victims’ legal counsels through for instance mandatory special training focused on sexual offence trials for judicial staff; peer supervision programs for judges and prosecutors; adequate staffing of the judiciary; prioritization of criminal proceedings for sexualized violence and serious gender-specific violence; the development of standards for dealing with traumatized victim-witnesses; the guarantee of the effective application of victim protection schemes; the establishment of an effective state liability scheme in cases of degrading treatment of victims, the lack of protection of victims by the court, unreasonable delay of proceedings, as well as obstruction of the ancillary action;**
- **the introduction of a binding and gender-sensitive definition of torture and degrading treatment in international law, including situations in court where victims of sexual crimes are (re-)traumatized, degraded and seriously mentally harmed due to gender stereotypes, rape myths or a lack of commitment to effective victim protection.**

⁹ Committee against torture, General Comment No. 2, Implementation of article 2 by States Parties, CAT/C/GC/2, 24 January 2008, para. 17.