E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN GERMANY IN 2004

submitted to the Network by **Dr. Wolfgang HEYDE**
on 3 January 2005

Reference: CFR-CDF/DE/2004

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN GERMANY IN 2004

submitted to the Network by **Dr. Wolfgang HEYDE**
on 3 January 2005

Reference: CFR-CDF/DE/2004

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lithuanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), M. Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), M. Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czeck Republic), Ineta Ziemele (Latvia). The Network is coordinated by O. De Schutter, with the assistance of V. Verbruggen.
The documents of the Network may be consulted on :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

TABLE OF CONTENTS

PRELIMINARY REMARKS

I.

In Germany many institutions are responsible for or take care of the protection of human rights.

1. First it has to be referred to the courts. Every court is bound to the fundamental rights. The Federal Constitutional Court and the Constitutional Courts of the Länder, however, have in particular the task to watch over the compliance of fundamental rights and to get them accepted.

2. The following state institutions are important for the protection of fundamental rights on the national level in general.

a) Committee on Human Rights and Humanitarian Aid of the Bundestag; Human Rights Reports of the Federal Government [*Bundestagsausschuss für Menschenrechte und Humanitäre Hilfe; Menschenrechtsberichte der Bundesregierung*].
The Federal Parliament [Deutscher Bundestag] has established this special Committee since the beginning of the 14th legislative term (1998). It sees human rights policy as a cross-sectional task and is therefore involved in human rights aspects in a wide range of foreign policy, foreign economic policy, development policy as well as, which is important, domestic policy including issues of asylum and aliens law. It constantly receives information from the Federal Government on the human rights situation in different countries, on centres of crisis for humanitarian aid and on the Federal Government's policy in these fields. In a dialogue with the Federal Government, the Committee participates in the further development of national, European and international instruments for the protection of human rights and in the legal and political scrutiny of human rights infringements.

b) Defence Commissioner of the Bundestag [*Wehrbeauftragter des Bundestages]*.
By means of Article 45 b Basic Law, a special control body has been created for the federal armed forces. The Defence Commissioner is appointed by the Bundestag to safeguard the fundamental rights of soldiers and to assist the Bundestag in exercising parliamentary control. The Act on the Defence Commissioner [*Gesetz über den Wehrbeauftragten*] contains more precise provisions on appointment, legal position and tasks. He acts on instruction of the Bundestag or its Defence Committee for the examination of certain events. Furthermore, he is obliged to act within his duty-bound discretion on becoming aware of circumstances pointing to a violation of the fundamental rights of soldiers or of the principles of internal management. He informs the Bundestag of his determinations by means of individual reports and in annual reports.

c) Federal Data Protection Commissioner [*Bundesdatenschutzbeauftragter*].
He has the task to monitor adherence by federal public agencies, by the Deutsche Telecom AG and the Deutsche Post AG to the provisions of the Federal Data Protection Act [*Bundesdatenschutzgesetz*] and other provisions concerning data protection. The Federal Data Protection Act is intended to protect the individual from detriment to rights of privacy caused by the use of personal data. The Data Protection Commissioner submits a report to the Bundestag every two years. The Commissioner is independent in the exercise of his office. Observance of data protection provisions by the authorities of the *Länder* is controlled by the *Länder* commissioners.

d) The Commissioner for Human Rights Issues in the Federal Ministry of Justice [*Beauftragte für Menschenrechtsfragen im Bundesministerium der Justiz*]
She is the agent of the Federal Government in proceedings before the European Court of Human Rights under the European Convention of Human Rights. She is member of the

Steering Committee of Human Rights of the Council of Europe and is involved in other Committees dealing with the protection of human rights. In addition she represents the Federal Government before the European Committee for the Prevention of Torture under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and before the Committees of most UN Conventions on the protection of human rights. She is responsible for the reports to be submitted to such Committees under the ICCPR, the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of Racial Discrimination, and the Core Document. And she has to prepare observations in proceedings before such Committees regarding individual complaints ore communications where they are possible that is to say to the UN Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), to the Committee against Torture (CAT) and to the Committee on the Elimination of Racial Discrimination (CERD). And she has to prepare observations in proceedings pursuant to Economic and Social Council Resolution 1503.
– The mentioned "Core Document" is a Document "forming part of the reports of States Parties: Germany" [*Kernbericht Bundesrepublik Deutschland für die Staatenberichte zu den Menschenrechtsübereinkommen der Vereinten Nationen*]. It contains compressed information about country and population, economy, political structure and a general statutory framework within which human rights are protected. It is published on the Internet at www.bmj.bund.de, in English at www.ohchr.org (High Commissioner for Human Rights; link Human rights Bodies, Treaty bodies Date Base – Germany).

e) The Federal Government Commissioner for Immigration, Refugees and Integration [*Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration*].
She supports the Federal Government in its efforts in respect of policy on foreigners and makes proposals for the further development of the policy of integration, including in the European framework. The commissioner is a contact for creating the conditions to enable Germans and foreigners to live together without tension. In particular, she should suggest and support initiatives for integration in the *Länder* and in local communities, as well as in groups within society, in order to further the mutual understanding of Germans and foreigners.

f) The Federal Government Commissioner for the Interests of the Disabled (*Beauftragter der Bundesregierung für die Belange behinderter Menschen*). He has the task of working towards the fulfilment in all spheres of life of the Federation's obligation to ensure equal living conditions for people with or without disabilities.

3. The German Institute for Human Rights [*Deutsches Institut für Menschenrechte*, Zimmerstraße 26/27, 10969 Berlin; www.institut-fuer-menschenrechte.de] is a relative new institution. The Institute was founded in 2001 on recommendation of the Federal Parliament. It is, based on the Paris Principles (1993) of the United Nations, the German "National Human Rights Institution". As to its statutes it is supposed, to offer library services and documentation to the general public, to undertake applied research, to give political advice to governmental and non governmental target groups, to contribute to the field of human rights education in Germany, to engage in international networking and co-operation and to offer a platform for human rights issues to governmental institutions and civil society in Germany. The Institute, as an independent institution, is an institution of civil society, regardless of whether it receives basic financing from the state. The Annual Report 2003, published in August 2004, contains a list of numerous important documentations.
The Institute has also been helpful in preparing this report.

Germany has accepted, as other EU member states, reporting obligations under all 6 major UN human rights conventions. Similar rules apply within 4 European mechanisms with different reporting obligations. The Institute has developed a system to inform the public on how these reports take place and especially, what criticisms are exerted by UN and European

bodies, and what the steps are taken by the German Government in response to this criticism. In 2004 it organised follow-up meetings [*Fachgespräche*], taking part concerned institutions, ministries and NGO's, regarding the following statements and recommendations:
Concluding observations of the Human Rights Committee: Germany, 4 Mai 2004 (CCPR/Co/80/DEU) < see below Article 2, 3, 21, 23, 25 >
Concluding comments: Germany of the Committee on the Elimination of Discrimination against Women, 30 January 2004 (CEDAW/C/2004/I/CRP.3/Add.6/Rev.1) < see below Article 21, 23 >
Conclusions and recommendations of the Committee against Torture: Germany, 18 Mai 2004 (CAT/C/CR/32/7) < see below Article 4, 19 >
Concluding observations: Germany of the Committee on the rights of Child , 26 February, 2004 (CRC/C/15/Add.226) < see below Article 4, 14, 18, 21, 24 >
European Commission against Racism and Intolerance (ECRI), Third Report on Germany, 5 December/June 2004 (CRI (2004) 23). < see below Article 4, 10, 18, 21 >

Further more the European Committee of Social Rights in 2004 adopted Conclusions XVII-1 (Germany) regarding the 21st report of Germany, submitted on 30 October 2003. < see below in particular Article 34 >

4. There is a close co-operation between the German Institut for Human Rights and the Human Rights Centre of the University of Potsdam [*MenschenRechtsZentrum der Universität Potsdam*]. The Centre is a so-called central scientific unit of the University. Its activities in the field of human rights focus on the conduct and publication of research, the setting up of its library and documentation system, and informing about human rights. An important element of the Institute's research activities in previous years was the organisation of colloquies. Experts in the field of human rights were brought together in order to discuss current issues.

5. FORUM MENSCHENRECHTE (Human Rights Forum).
The FORUM MENSCHENRECHTE is a network of 45 German non-governmental organizations (NGO's) who are committed to better and more comprehensive protection of human rights -- worldwide, in specific regions of the world, within countries and also within the Federal Republic of Germany. The Forum was established in 1994 following the International Human Rights Conference in Vienna. Part of its objectives are to monitor critically the human rights policy of the German Government and the German Bundestag (Federal Parliament) at both the national and international level and to create an awareness about human rights issues amongst the German public at large, to draw attention, when required, to human rights violations in Germany and to work for their resolution. -- Various working groups of the Forum are responsible for preparing joint statements and information material and for organizing campaigns, public meetings and forums of experts.
On 21 October 2004 the FORUM presented a Half-Time Balance of the Human Rights policy of the Federal Government and of the Parliament "*In Favour of a Culture of Human Rights and of the International Rule of Law in Germany*". In a 16-issues-catalogue it proves the development of human rights issues in the first 2 years of the current legislative term, appreciates the cooperation between state institutions and NGO's and points out a lot of challenges where it sees a lack[1]. The FORUM appreciates the activities of the German Institute for Human Rights in the field of human rights education and the foundation of the "Human Rights Education Network" by the Institute. The FORUM, however, complains that, regarding the Government's policy in human rights education, declarations of intent and reality are differing to a great extent.

II.

[1] See below Article 3, 7, 18, 19, 21, 24, 34.

This report covers evolutions in the period between 1 December 2003 and 1 December 2004. Therefore the issues reported normally have their ground in the period of scrutiny, e.g. new court decisions, new legislation etc. But, for reasons of connection also a few events of December 2004 are included, for instance the Court decision of 20 Dec. 2004 in the case *Daschner* (see Article 4).

The Federal Republic of Germany is a federal state consisting of 16 States [*Länder*].
The emphasis in the field of legislative power lies within the Federation. Some of the subjects where legislation originates in the *Länder* are: culture (schools, wide sections of higher education, radio and television), communal self-administration and the police. Further and important: Regarding the implementation of statutes, in principle the emphasis is on the *Länder*. A comprehensive consideration of the executive's practice within the 16 *Länder* would blast the scope of this report. Therefore it can only be presented in examples.

III.

Order of the Federal Constitutional Court of 14 October 2004[2] on the consideration of the decisions of the European Court of Human Rights by domestic institutions, in particular German courts.

The decision followed a judgment of the European Court of Human Rights of 26 February 2004[3], and a decision of the Naumburg Higher Regional Court of 30 June 2004. The fundamental rights part of this case will be treated with under Article 7. Apart from this, however, the remarks of the Federal Constitutional Court on the binding effect of decisions of the Eur. Ct. H.R. are of utmost and general importance. They are reported here.

The applicant was the father of a child born out of wedlock. The Naumburg Higher Regional Court had dismissed the applicant's application for transfer of custody. And it excluded the access of the applicant to the child on the grounds of the best interest of the child. On 26 February 2004 a chamber of the Third Section of the Eur. Ct. H.R declared unanimously that the decision on custody and the exclusion of the right of access violated Article 8 of the European Convention of Human Rights and Fundamental Freedoms.

Thereupon, in the parallel proceedings on custody, the Wittenberg Local Court transferred sole parental custody to the complainant by an order of 19 March 2004 in accordance with his application. In addition, the Local Court issued a temporary injunction on the access rights of the complainant to his son. The official guardian and the children's guardian appealed against the decision of the Local Court on access rights. The Naumburg Higher Regional Court first, by order of 30 March 2004, suspended the execution of the temporary injunction, and by a further order of 30 June 2004 cancelled the temporary injunction. It held that arrangements for access could even not be justified by the decision of the Eur. Ct. H.R. The judgment bound only the Federal Republic of Germany as a subject of public international law, but not its bodies, authorities and the courts which are independent under Article 97 (1) of the Basic Law. Where a decision of the Eur. Ct. H.R established that a sovereign German act was contrary to the Convention, neither the European Convention on Human Rights nor the Basic Law created an obligation to accord to that decision the power to reverse finality and non-appealability.

[2] Order of 14 October 2004 – 2 BvR 1481/04 –, NJW, 2004, 3407. It may be found also in English on the website of the Federal Constitutional Court: www.bundesverfassungsgericht.de (link Entscheidungen).
[3] Eur.Ct. H.R. (3rd sect.), *Görgülü v. Germany* (Appl. N° 74969/01) judgment of 26 February 2004 (final).

The Federal Constitutional Court held that the order of the Naumburg Court violates the applicant's fundamental right under Article 6 of the Basic Law (protection to marriage and the family) in conjunction with the principle of the rule of law and reversed it. The grounds of the decision are, in part:
The European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols are international treaties, each of which has been incorporated into German law by the federal legislature in a formal statute (Article 59 (2) of the Basic Law). The Convention and its protocols thus have the status of federal German statutes (Gesetzesrang). For this reason the Convention must be taken into account in the interpretation of domestic law, including fundamental rights and constitutional guarantees. German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federation. – The Federal Constitutional Court emphasizes that the decisions of the Eur. Ct. H.R have a particular importance for the Convention as public international law. Under Convention Law the state parties had agreed that in all cases to which they are party they will abide by the final judgment of the Eur. Ct. H.R.

For this reason, the judgments of the European Court are binding on all parties to the case, but only on those parties. The judgment of the Court is of declaratory nature and cannot revoke the challenged measure. The binding effect of a decision extends to all legal bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention. -- The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they have to decide in a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law.

These clear passages of the order of the Federal Constitutional Court are of great importance. On the other hand the order contains some phrases that are misleading, seem too week and caused irritations[4]:
According to the Federal Constitutional Court the obligation created by the consent Act only means "to take into account" the guarantees of the European Convention on Human Rights and the decisions of the Eur. Ct.H.R and at least it demands "that notice is taken of the relevant texts and case-law and that they are part of the process" of developing an informed opinion of the court appointed to make a decision, of the competent authority or of the legislature (C I 3 b). Misleading is also the phrase that it would be necessary for the national courts "to evaluate the decision when taking it into account", to consider the impact on the domestic legal order.

Elsewhere the Court argues (C I 3 b) aa): If the Eur. Ct.H.R has declared a domestic provision to be in breach of the Convention this must be taken into account by interpretation in conformity with public international law (völkerrechtsfreundliche Auslegung staatlichen Rechts) when applied in practice. But – so the Constitutional Court has found – this principle is not unlimited. Legislation and courts may in exceptional cases leave aside international law when that is the only means to avoid a violation of fundamental constitutional principle. – This may be misunderstood because it may certainly be necessary to amend the Constitution when it is not in line with the Convention.

By these kinds of expressions the Federal Constitutional Court takes the risks of helping other countries to remove themselves from international obligations.

[4] See also *Jens Meyer-Ladewig and Herbert Petzold*, Die Bindung deutscher Gerichte an Urteile des Europäischen Gerichtshofs für Menschenrechte – Neues aus Straßburg und aus Karlsruhe - , NJW 2005 p. 15 , and *Eckart Klein*, comment to the decision, Juristenzeitung 2004, 1176.

Supplement:
In a further proceeding the Naumburg Court again decided against an access right of the complainant and his son. On a constitutional complaint the Federal Constitutional Court (Camber)[5] delivered an interim injunction and confirmed the temporary injunction of the local court regarding the complainant's right of access. The Federal Constitutional Court emphatically repeated sentences of the order of the Senat of 14 October 2004: The binding effect of a decision of the Eur. Ct. H.R. extends to all legal bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention. German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federation.

At last it should be mentioned that on 28 October 2004 the Federal Minister of Justice, *Brigitte Zypries,* expressly announced to the Secretary General of The Council of Europe that Germany of course sees itself bound by the judgments of the Eur. Ct. H.R. and that it will observe these judgments as well in the future.

Some Abbreviations

BGBl.	Bundesgesetzblatt – Federal Gazette
BVerfGE	Entscheidungen des Bundesverfassungsgerichts – decisions of the Federal Constitutional Court (volume, page)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts – decisions of the Federal Administrative Court (volume, Page)
JZ	Juristenzeitung
NJW	Neue Juristische Wochenschrift – New Juridicial Weekly
VGH	Verwaltungsgerichtshof – Higher Administrative Court

[5] Decision of 28 december 2004 – 1481/04 -.

CHAPTER I : DIGNITY

Article 1. Human Dignity

International case law

European Court of Justice, Case OMEGA Spielhallen- und Automatenaufstellungs-GmbH
Omega, a German company, had, since 1 August 1994, been operating an installation known as a 'laserdrome', normally used for the practice of 'laser sport' in Bonn (Germany).
Having noticed that the object of the game played in the 'laserdrome' also included hitting sensory tags placed on the jackets worn by players, the Bonn police authority issued an order against Omega on 14 September 1994, forbidding it from 'facilitating or allowing in its […] establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, by recording shots hitting their targets, "playing at killing" people'.

That order was issued under powers conferred by Paragraph 14(1) of the Ordnungsbehördengesetz Nordrhein-Westfalen (Law governing the North Rhine-Westphalia Police authorities), which provides: 'The police authorities may take measures necessary to avert a risk to public order or safety in an individual case'.
According to the prohibition order, the games which took place in Omega's establishment constituted a danger to public order, since the acts of simulated homicide and the trivialisation of violence thereby engendered were contrary to fundamental values prevailing in public opinion.

Omega's objection against that order was rejected by the Bezirksregierung Köln (Cologne District Authority), by judgement of Cologne Administrative Court and by the Higher Administrative Court for the Land of North Rhine-Westphalia. Omega then appealed on a point of law to the Federal Administrative Court. In support of its appeal, it argued, amongst numerous other pleas, that the contested order infringed Community law, particularly the freedom to provide services under Article 49 EC, since its 'laserdrome' had to use equipment and technology supplied by the British company Pulsar.

According to the Federal Administrative Court the Higher Administrative Court was right to hold that the commercial exploitation of a 'killing game' in Omega's 'laserdrome' constituted an affront to human dignity, a concept established in the first sentence of Article 1(1) of the German Basic (Constitutional) Law. Therefore it took the view that, under national law, Omega's appeal must be dismissed. The Court was, however, uncertain whether that result was compatible with Community law, particularly Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods.

In those circumstances, the Federal Court decided to refer the following question to the Court of Justice for a preliminary ruling: 'Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity – in this case the operation of a so-called "laserdrome" involving simulated killing action – to be prohibited under national law because it offends against the values enshrined in the constitution?'

The Court of Justice, regarding the human dignity question, ruled: "It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of

human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect. As the Advocate General argued in paragraphs 82 to 91 of her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law."

The Advocate General in her opinion of 18 March 2004 had pointed out that the Court in its case law might have given human dignity a comparably far-reaching understanding as is expressed in Article 1 of the Charter. She emphasized the fundamental importance of human dignity in Community law as well and gave her detailed view on human dignity as a legal notion and its roots in the European civilization.

In the view of the Court there could therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right. "Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services."

Legislative initiatives, national case law and practices of national authorities

In German constitutional law the human rights guarantee of Article 1 Basic Law, as an independent test standard, often has practical significance. During the period of scrutiny that applies in particular to the judgment of the Federal Constitutional Court of 3 March 2004 regarding eavesdropping operations. – Article 1 Charter has a high importance as a fundamental legal value decision too. As a single right, however, as an independent test standard, it is only of very small significance, for human dignity is concretely visible in many special rights of the charter. It is – with different intensity – essential to these rights and develops them. Therefore the decisions of the German Federal Constitutional Court that regard human dignity are reported under the relevant Article of the Charter. See Article 7 for the mentioned Judgment of 3 March 2004 and Article 6 for the decisions of 5 February and 17 March regarding preventive detention.

Article 2. Right to life

Euthanasia (active and passive, assisted suicide)

Legislative initiatives, national case law and practices of national authorities

(1) In 2003 a Judgment of the Federal Court of Justice[6] had launched a lively public discussion on the topic. It was continued in 2004. In spring the Higher Regional Court Karlsruhe[7] decided in favour of a patient's guardian who wanted to stop life-supporting measures for a terminally ill patient whose death, however, was not yet immediately imminent. But, according to section 67 (1) of the Non-Contentious Jurisdiction Act, the patient needs a special curator for the proceedings at the Guardian Court.

(2) A working group "Patient's autonomy at the end of Life" enriched by the Ministry of Justice and the Ministry for Health and Social Security wrote a 54-pages report containing recommendations for modifications of the German Civil Code and the Penal Code[8]. In

[6] Judgement of 17 March 2003 – XII ZB 2/03 –, NJW 2003, 1588.
[7] Decision of 26 March 2004, NJW 2004, 1882.
[8] Bericht der Arbeitsgruppe „Patientenautonomie am Lebensende „ vom 10. Juni 2004, Ethische, rechtliche und medizinische Aspekte zur Bewertung von Patientenverfügungen.

November 2004 the Minster of Justice presented basic points to strengthen patient's rights and introduced a bill of an act for modification of the custodian law. One of its main issues is the legal settlement of patient's orders. The discussion of this intention is going on[9].

Positive aspects

The issue of patient's orders is a very sensitive field with legal, ethic and medical aspects and much uncertainty in the legal field. The proposals of the Minister have to be discussed on a broad level. But it is a positive aspect that concrete proposals are now on the table.

Rules regarding the engagement of security forces (use of firearms)

Concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Germany had delivered the 5th State Report by Article 40 of the International Covenant on Civil and Political rights in November 2002. The Commissioner for Human Rights Issues in the Federal Ministry of Justice presented the Report to the Human Rights Committee on 17 March 2004. The Committee, in its Concluding Observations of 30 May 2004, versus alia, welcomes the progress made in the area of human rights education, in particular for police officers, soldiers and youth (§ 5), and commends the continuing positive role of the Federal Constitutional Court in safeguarding fundamental rights.

The Committee, however, noted some principal subjects of concern and recommendations. It notes, for instance, with concern that Germany has not yet taken a position regarding the applicability of the Covenant to persons subject to its jurisdiction in situations where its troops or police forces operate abroad, in particular in the context of peace missions. It encouraged Germany to clarify its position and to provide training on relevant rights contained in the Covenant specifically designed for members of its security forces deployed internationally (§ 11). Further, while the Committee notes with satisfaction that the use of firearms by the police is restricted by law to a measure of coercion in extremis and that the number of persons killed or injured by the use of such force has declined in recent years, it is concerned that in some of these cases the use of firearms might not have been justified (§ 15). The State party should ensure prompt, thorough and impartial investigation of all cases of persons killed or injured as a consequence of the use of firearms by police forces, bring to justice those responsible for violations of the law, and grant full reparation, including fair and adequate compensation, and rehabilitation to victims and their families (§ 15a). The State party should also provide training to police in methods of controlling difficult situations without using firearms.

The German Government has to provide, within one year, the relevant information on the implementation of the committee's recommendation in § 11. As reported by representatives of the ministries, the standards of the ICCPR are fulfilled by German troops and police. But the legal problems are not yet completely settled. It is expected that the information to be given to the Committee in autumn 2005 will be positive.

National case law and practices of national authorities

The death of Aamir Ageeb[10]:

[9] See also „Zwischenbericht der Enquete-Kommission Ethik und Recht der modernen Medizin – Patientenverfügungen" of 13 September 2004, Bundestags-Drucksache 15/3700.

[10] The case has been extensively described in the report of amnesty international of 14 January 2004 (see under Article 4).

On 18 October 2004 the Regional Court of Frankfurt convicted three police officers of the Border Police to nine months imprisonment with probation for common bodily harm followed by death. The victim, a 30-year-old Sudanese asylum seeker, died during his forced deportation on a Lufthansa flight from Frankfurt airport to Khartoum. As he had resisted deportation, on board the aeroplane the police officers restrained him into his seat using plastic restraints, sticking tape and a long rope. During departure they forced his head and upper body down between his knees and kept him in this position until the plane had taken off. This caused death by suffocation. – The presiding judge in his grounds for the judgment justified the very mild sentence with the failure of the superiors of the accused whom he vehemently criticized.

Domestic violence (especially as exercised against women)

Concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Human Rights Committee, with regard to the persistence of domestic violence despite new legislation in Germany, requests Germany to reinforce its policy against domestic violence and, in this framework, to take more effective measures to prevent it and assist the victims. – Similar, the Committee on the Elimination of Discrimination against Women (CEDAW) in its Concluding comments of 30 January 2004 (see under Article 23) encourages Germany to continue its efforts to implement policies, plans and programmes aimed at combating violence against women. It urges Germany to include data and information on the nature and scope of violence against women, including within the family and any new forms of violence against women, including migrant women, and to provide this information in its next periodic report.

Practices of national authorities

It is true, unfortunately, that violence against women as ever is a great problem. According to a study of the Federal Ministry for Family Affairs, Senor Citizens, Women and Youth 37 % of all women suffer physical violence. Already in 1999 the Ministry presented a Plan of Action of the Government to combat violence against women. This plan means the combat of violence against women at all levels. It constitutes the first comprehensive approach to the issue and is aimed at achieving structural change at all levels. It was successful and has been effectively implemented in the meantime. An elaboration of the Ministry "Umsetzung des Aktionsplans der Bundesregierung zur Bekämpfung der Gewalt gegen Frauen" [Implementation of the Plan of Action to combat violence against women] (Materialien zur Gleichstellungspolitik No. 99/2004) shows that in detail. The Ministry stresses that the right to a life free of violence is a political priority for the Federal Government.

In this context the Ministry has published three important studies in 2004:
GEMEINSAM GEGEN HÄUSLICHE GEWALT [IN COMMON AGAINST DOMESTIC VIOLENCE]. Kooperation, Intervention, Begleitforschung (Forschungsergebnisse der Wissenschaftlichen Begleitung der Interventionsprojekte gegen häusliche Gewalt);
GEWALT GEGEN MÄNNER [VIOLENCE AGAINST MEN]. Personale Gewaltwiderfahrnisse von Männern in Deutschland – Ergebnisse der Pilotstudie -;
Lebenssituation, sicherheit und Gesundheit von Frauen in Deutschland [life situation, security and health of women in germany]. Eine repäsentative Untersuchung zu Gewalt gegen Frauen in Deutschland – Zusammenfassung zentraler Studienergebnisse –.

Good practices

These activities of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth are a very good practice in the field of violence against women.

Other relevant developments

Legislative initiatives

(1) The Protocol No. 13 of 3 May 2002 to the ECHR Concerning the Abolition of the Death Penalty in all Circumstances has been ratified by the Federal Republic of Germany. Law of 5 July 2004, Bundesgesetzblatt II No. 22, p. 982.

(2) On 18 June 2004 the Federal Parliament [Deutscher Bundestag] adpted an Air Safety Act [*Luftsicherheitsgesetz*]. It intends that under certain strict preconditions the armed forces may be called in to support the state police in the airspace in order to prevent a particular severe accident. It contented a last resort clause (ultima-ratio-clause): The direct effect by force of arms <i.e. shooting down a plane and therefore killing the passengers> will only be permitted if one can assume according to the circumstances that an airplane is to be put into action against human life and if shooting down the plane is the only means to avert a present danger. The Federal Council [*Bundesrat*], however, objected to the bill for reasons not regarding that aspect. The Bundestag rejected the objection on 24 September 2004. The law is expected to be promulgated soon in the Federal Law Gazette.

Article 3. Right to the integrity of the person

Rights of the patients

Legislative initiatives, national case law and practices of national authorities

Under Article 2, chapt. Euthanasia, there were mentioned the initiatives of the Federal Minister of Justice regarding to put patient's orders on a legal basis. Here I refer to those comments.

Protection of persons in medical research.

Legislative initiatives, national case law and practices of national authorities

The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth has pronounced the „Verordnung über die Anwendung der Guten Klinischen Praxis bei der Durchführung von klinischen Prüfungen mit Arzneimitteln zur Anwendung am Menschen (GCP-Verordnung)" of 9 August 2004[11]. Its objection is the Implementation of the Directive 2001/20/EG of the European Parliament and of the Council of 4 April 2001. It contains concluding regulations on the regular realization of clinical proofs of human medicine.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Also in 2004 Germany did not yet sign the Convention on Human Rights and Biomedicine. It seems that the Federal Government has the objection to sign and to ratify. But the clearing process with the 16 Länder is not yet finished.

[11] BGBl. I 2004, 2081 [Federal Law Gazette Part I 2004 p. 2981]

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

Protection of the child against ill-treatments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In light of Article 19 of the Convention, the Committee on the Rights of Child in its Concluding observations of 26 February 2004 (see under Article 24) is concerned that various forms of violence continue to exist in Germany, in particular, sexual abuse and the growing problem of violence at school. It recommends that Germany undertake a comprehensive study on violence, more particularly on sexual abuse and violence at school, in order to assess the extent, scope and nature of these practices, and strengthen awareness-raising campaigns with the involvement of children in order to prevent and combat child abuse (41).

Legislative initiatives, national case law and practices of national authorities

The Federal Government is aware of these problems. According to the criminal police statistic about 20,000 children become yearly victims of violence The Government gives high priority to the combat of sexual violence against Children and youth persons. In January 2003 the Ministry for Family Affairs, Senor Citizens, Women and Youth presented a Plan of Action to protect Children and Young Persons to sexual violence and exploitation. This plan constituted a comprehensive approach to the issue and was aimed at the achieving of continuing improvements of the development of the criminal protection, of the strengthening of prevention and protection of victims, of the guarantee of international prosecuting and cooperation, and at a network of offers for help and advice. In April 2004 the Ministry informed the public on the Aims and on the implementation of the Plan of Action. It started a campaign for prevention against sexual violence to children and youth persons "Hinsehen. Handeln. Helfen!"[Look. Act. Help!].

New legal measures were, among others: On 1 April 2004 the Gesetz zur Änderung von Vorschriften über die Straftaten gegen die sexuelle Selbstbestimmung und zur Änderung anderer Vorschriften of 27 December 2003 (BGBl. I 3007) [Act for Modification of the provisions on crimes against sexual self-determination and for Modification of other provisions (Federal Gazette Part I 2003 no.67, p. 3007)] came into force. It has intensified the penal provisions regarding the sexual abuse of children (in particular sections 176 following) and has improved their protection.

On 1 September 2004 the Gesetz zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz) of 24 June 2004 (BGBl. I 1354) [Act for Improving the rights of Victims in Criminal proceedings (Federal Gazette Part I 2004 no.31, p.1354)] came into force. It contains in particular modifications of the Code of Criminal Procedure

Behaviour of security forces (including during demonstrations)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Concluding observations of the Human Rights Committee of 4 May 2004 (see already under Article 2) and Conclusions and recommendations of the Committee against Torture (CAT) of 18 May in consideration of the 3rd periodic report of Germany of July 2002:

Both Committees welcome Germany's clear and ambiguous position that torture is never acceptable, whatever the circumstances. With that, CAT has the view also to the criminal proceedings against the vice-president of Frankfurt police Daschner (see below).

In addition, CAT welcomes Germany's confirmation that the ban on refoulement contained in article 3 of the Convention is applicable to all cases, including where the asylum-seeker has been denied refugee status on security grounds. It further welcomes the significant improvements that have been made over the reporting period (i) to the Frankfurt airport refugee facilities; (ii) to the applicable refugee determination processes conducted there; and (iii) to the methods exercised in forcibly returning failed asylum-seekers by air (§ 3 e) and the consideration by Germany of issues of torture and other conduct contrary to the Convention that is committed by non-State actors, when relevant under the Convention, in asylum and removal proceedings, and the fact that according to federal jurisprudence individual claims of mistreatment may also be made where a person originates from a "safe" third country (§ 3 g).

The Human Rights Committee, while appreciating the reduction in the number of complaints made public in recent years, *expresses its concern* about continuing reports of ill-treatment of persons by the police, including foreigners and members of ethnic minorities. It is concerned that despite the previous concluding observations of the Committee, Germany has not found ways to monitor the situation effectively and still lacks the necessary statistical information on police misconduct (§ 16).
Germany should improve monitoring of police misconduct by designating a central governmental agency to maintain and publish comprehensive statistics on ill-treatment and other relevant misconduct, including racist abuse, the measures taken in such cases and the results of investigations and disciplinary or penal proceedings. Furthermore, the State party should establish independent bodies throughout its territory to investigate complaints of ill-treatment by the police (§ 16 c).

CAT *expresses its concern*, among others, at the length of time taken to resolve criminal proceedings arising from allegations of ill-treatment of persons in the custody of law enforcement authorities, including in particular serious cases where death has resulted, such as that of Amir Ageeb, who died in May 1999 (§ 4a), and the fact that for numerous areas covered by the Convention, the State party was unable to supply statistics, or appropriately disaggregate those in its possession (4c).

It *recommends* that Germany take all appropriate measures to ensure that criminal complaints lodged against its law enforcement authorities are resolved expeditiously, in order to provide prompt resolution to such allegations and avoid any possible inference of impunity, including in cases where counter-charges are alleged (§ 5a). Further, it recommends that Germany create a central point to assemble relevant nationwide statistical data and information on areas covered by the Convention, request such data and information from the Länder authorities or undertake such other measures as may be necessary to ensure that Germany's authorities, as well as the Committee, may be fully apprised of these details when assessing Germany's compliance with its obligations under the Convention (5b) and make all efforts to ratify the Optional Protocol to the Convention (5i). – Germany is requested to provide, within one year, information in response to the Committee's recommendations in § 5a and 5b.

In this context also the *amnesty international report* of 14 January 2004 "Back in the Spotlight – Allegations of police ill-treatment and excessive use of force in Germany" has to be regarded. This impressive report has already been mentioned in the Network Report regarding the situation in Germany in 2003 (page 18). Amnesty in its report of 14 January deplores excessive use of force by the police either at the time of arrest or in police custody as well as against foreign nationals subjected to a removal order from Germany. The report, a

77-pages document, concludes with recommendations. They are similar to those of the Human Rights Committee and of CAT. Some of them read[12]:

- A central government agency should maintain and publish regular, uniform and comprehensive statistics on complaints about serious misconduct by officers of the individual Länder and federal police authorities. These figures should include i.e. the steps taken in response to each complaint and the outcome of any criminal and disciplinary investigations, statistics on allegations of racist abuse and statistics on national origin of complainants.
- Amnesty International believes that there is a need for an independent (central) body to compile comprehensive statistics and, when necessary, to investigate.
- Germany should immediately sign and ratify the Optional Protocol to the Convention against Torture.

Regarding the Optional Protocol,[13] the Federal Ministry of Justice tries hard to come to a positive solution. The Federal Government may not sign before every 16 Länder agree. As to the statistic the government is expected to look for an intensive improvement, may be, on the basis of the existing police criminal statistic [Polizeiliche Kriminalstatistik – PKS], a statistic of the Federal Criminal Police Office, which gets its information from the Länder police. But these improvements can only be reached by a narrow cooperation between the Federal and the Länder. This applies as well to the constantly repeated request to enrich an independent central body that should have the competence to investigate by itself.
Legislative initiatives, national case law and practices of national authorities

Case Daschner:

The Case of the threat of torture by Frankfurt deputy police chief Daschner has brought a two years discussion on the prohibition of torture and inhuman treatment. At the end of September 2002 an 11 years old boy had been kidnapped in Frankfurt. Ransom being paid the suspect Magnus Gäfgen was arrested, but the kidnapped child not found. Gäfgen gave misleading information of the boy's whereabouts. In this situation the police vice president on 1 October 2002 ordered the threat of ill-treatment of the suspect in order to force Gäfgen to reveal the child's whereabouts. He made an annotation that the arrested should be interrogated by threat of harm and pain (no violation) while being observed by a physician. As a result of this threat Gäfgen admitted to have killed the child and gave information about the place where to find the body.

This line of action of the police vice-president became public in February 2003. In February 2004 the public prosecutor preferred charges against Daschner and a fellow investigator. On 20 December a criminal division of Frankfurt regional Court found Daschner guilty of instigation of serious coercion (Anstiftung zur schweren Nötigung) and the interrogation officer guilty of serious coercion because of threatening to use force on Gäfgen. The court issued a warning of one year probation and withholding punishment for both defendants (Verwarnung mit Strafvorbehalt[14]). It issued a fine of 10,800 € for Daschner and of 3,600 €

[12] See to these demands *Susanne Baumann*, Übermäßiger Einsatz von Polizeigewalt in Deutschland, Jahrbuch Menschenrechte <Yearbook Human Rights> 2005, p. 326 – 333.
[13] See to it content *Petra Follmar-Otto* and *Hendrik Cremer*, Das neue Zusatzprotokoll zur UN-Anti-Folter-Konvention, Policy Paper of the German Institute for Human Rights, 2004.
[14] Section 59 German Penal Code "Prerequisites for a warning and withholding of punishment" reads as follows:
(1) If someone has incurred a fine of not more than one hundred eighty daily rates, the court may warn him at the time of conviction, indicate the punishment and reserve imposition of this punishment, if:
1. it can be expected that the perpetrator will commit no further crimes in the future even without imposition of punishment;
2. a comprehensive evaluation of the act and the personality of the perpetrator reveals special circumstances, which make it advisable to exempt him from the imposition of punishment; and

for the interrogator, if the convicted violate their probation term. The presiding judge said the threat of violence was reprehensible and such threats were banned under Germany's Constitution (Article 1 – human dignity –, Article 104[15]) and the European Convention of Human Rights. On the other hand, the judge made it clear that the honourable intentions behind Daschner's behaviour did serve as mitigating circumstances. The Court, however, avoided classifying the behaviour of the two officials as "torture". On this the secretary general of the German branch of Amnesty International, Barbara Lochbihler, was disappointed[16]. In deed, the threatening to use painful force was "torture".

The combination of a guilty verdict and a mild sentence was seen as a legal compromise, aimed at underlining that torture remains an absolute taboo, while also recognising the policemen's honourable motives of saving a life. – The very mild sentence might have a pacifying effect. From its beginning the case had caused in Germany – and especially in the media – an animated debate about the admission of governmental torture as last resort (ultima ratio) in order to save human life. This discussion continued in 2004. The Federal Government and the Hesse Government had clear positions on the absolute validity of prohibition of torture (statement of the Federal Ministry of Justice of 4 June 2003)[17]. The Commissioner for Human rights in the Ministry of Justice confirmed that on a hearing of the Human Rights Committee of 17 March 2004. But many Germans expressed support for Daschner and 68 % thought he should have been found not guilty[18], according to a poll published at the day of the pronouncing the judgment.

Positive aspects

In the case Daschner the verdict of guilty is the decisive point. The Court made clear that under German and international law torture is not allowed and not tolerated, not even in exceptional cases. The (indefeasible) Judgment, by the justification of the verdict, will have effect as a signal in maintaining the absolute ban of torture. Information cannot be forced from someone even if one is seeking to avert danger.

Other relevant developments

Good practices

A real good practice is the Berlin Center for the treatment of torture Victims (bzfo).
It was founded in 1992 with support of the German Red Cross. The bzfo is a non-profit association committed to the rehabilitation of torture victims. It is independent of any political

---

3. the defense of the legal order does not require the imposition of punishment.
Section 56 subsection (1), second sentence, shall apply accordingly.
(2) A warning with punishment reserved shall be excluded, as a rule, if the perpetrator has been warned with punishment reserved or sentenced to punishment during the three years preceding the act.
(3) Forfeiture, confiscation or rendering unusable may be imposed collaterally to a warning. A warning with punishment reserved shall not be permissible collaterally to measures of reform and prevention.

[15] According to Article 104 (1.2) Basic Law persons in custody may not be subjected to mental or physical mistreatment.

[16] See also her Article in Frankfurter Rundschau of 18 November 2004 "The inviolability of human dignity" – the prohibition of torture is absolute.

[17] See also *Heiner Bielefeldt*, Das Folterverbot im Rechtsstaat <The Prohibition of torture in a state governed by the rule of law >, Policy Paper No 4 (June 2004) of the German Institute for Human Rights.

[18] It is remarkable that in two commentaries of the German Constitution in revised editions of the commentary of Article 1 – Human Dignity – for special cases of saving life the threatening of violence is to be seen not incompatible with human dignity. See *Mathias Herdegen*, in: Maunz-Dürig, Grundgesetz, Kommentar, Art. 1, revised edition 2003, n° 45, 90, and *Hans Hofmann*, in: Schmidt-Bleibtreu/Klein, Kommentar zum Grundgesetz, 10. Aufl. 2004, Art. 1 n° 17.

allegiance. The budget was in 2003 1, 57 million Euro (Funding: 58 % public sector, 42 % donations and fundraising).
The number of the patients who were yearly treated has risen to 501 in 2003. The spectrum of psychotherapies offered to adults comprises systematic family therapy, client-centered therapy, Gestalt therapy, art therapy, music therapy, narrative therapy and psychodrama. The children and youth therapy department (since summer 2000) provides psychotherapeutic care and counsel of children and adolescent refugees. – Since the establishment of the bzfo, the therapeutic staffs have carried out research on the specific problematic of therapies with victims of extreme traumatization.

Article 5. Prohibition of slavery and forced labour

Trafficking in human beings (in particular for sexual exploitation purposes)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Human Rights Committee (Concluding observations of. 4 May 2004; see under Article 2) is concerned that, despite positive measures adopted by Germany, trafficking in human beings, especially women, persists within the territory of Germany. Germany should strengthen its measures to prevent and eradicate this practice, as well as to protect victims and witnesses.

Legislative initiatives, national case law and practices of national authorities

Criminal Law

In deed, trafficking in human beings has gained a foothold also in Germany, with organized crime structures becoming more and more visible as high profits at relatively low risk are a great incentive. The victims are mainly women who are often enticed to come to Germany on false pretences and put under pressure by threats, violence and other measures. In this connection the aim of the penal provisions of sections 180 b and 181 of the German Penal Code was the protection of the right of sexual self-determination. But these sections were not enough for an effective fight against trafficking in human being by criminal measures. Therefore the Parliament has adopted a Strafrechtsänderungsgesetz - §§ 180 b, 181 StGB – [Act for Modification the Penal Code – sections 180 b and 181 –] in November 2004 which will be promulgated in the Federal Law Gazette in the beginning of 2005. It is aimed to implement the targets of the UN and of the EU. In particular the criminal definition of trafficking in human beings has to be extended. The new law gives the criminal provisions on Trafficking in Human Beings (section 180 b) and on Serious Trafficking in Human Beings (section 181 Penal Code) a new wording and transferees them in Chapter 18 “Crimes against Personal Freedom” in order to prepare homogeneous provisions against trafficking in human beings. There the new provisions differ between Trafficking in Human Beings for the purpose of sexual exploitation and Trafficking in Human Beings for the purpose of manpower-exploitation.

(2) Regarding the administrative level there has to be mentioned the Federal Government’s Plan of Action to combat violence against women at all levels (see under Article 23). A national working group has been established which acts as a steering body for the implementation of this Plan in the fields of trafficking in women. The Ministry for Family Affairs, Senior Citizens, Women and Youth points out that good progress has been made in institutionalizing cooperation between various levels of government and other service providers.

Protection of the child (fight against child labour – especially with purposes of sexual exploitation or child pornography - and fight against the sexual tourism involving children)

See under Article 24

.

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Case Cevizovic[19]

The applicant was a Croation national. He alleged the length of his detention on remand and the length of the criminal proceedings against him had exceeded a reasonable time. He was held in detention on remand for a total period of four years and nine months. In February 1997 the Oldenburg Regional Court admitted the indictment. The trial started on 14 March 1997, on 2 June 1998 it reopened with two additional lay assessors. On 20 March 2001 the Oldenburg Regional Court pronounced its judgment. It convicted the applicant of attempted murder, aggravated robbery and grievous physical injury as well as of unauthorised carrying of weapons and sentenced him to ten years and six months' imprisonment.

The Eur. Ct. H.R. holds that there has been a violation of Article 5 § 3 (length of detention) and of Article 6 § 1 (length of the proceeding) ECHR. He holds further that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.
The Court recalls that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features and on the basis of the reasons given in the domestic decisions and of the well-documented facts mentioned by the applicant in his applications for release. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. -- The Court concludes that there have been relevant and sufficient grounds for the applicant's continued detention, but regarding the conduct of the proceedings it finds that the trial court did not proceed with diligence when holding an average of less than four court hearings per month without making an effort to summon witnesses and experts in a more efficient way. In the light of various factors, the Court finds that the competent national court failed to act with the necessary special diligence in conducting the applicant's proceedings. Therefore, the Court concludes that the length of the applicant's detention cannot be regarded as reasonable; violation of Article 5 § 3 ECHR. Moreover this conclusion follows that the proceedings were not conducted within a "reasonable time" in the sense of Article 6 § 1 ECHR.

Detention following a criminal conviction (including the alternatives to the deprivation of liberty and the conditions for the access to release on parole)

Legislative initiatives, national case law and practices of national authorities

Judgment of the Federal Constitutional Court regarding preventive custody[20]:

(1) The Federal Constitutional Court had to decide on the constitutionality of section 67d § 3 of the German Penal Code. According to this provision, modified in 1998, offenders can be

[19] Eur. Ct. H.R. (3rd sect.), Cevizovic v. Germany (Appl. no. 49746/00) judgment of 29 July 2004 (final).
[20] Judgment of 5 February 2004 – 1 BvR 2029/01 – , NJW 2004, 739-750.

kept in preventive detention for an indefinite time after they have served their sentences.[21] Up to 1998 there was a 10 years time limit. The Court in its very detailed decision ruled that the new regulation did not violate the convict's constitutionally guarantied human dignity. The court, repeating former decisions, points out that also an offender has to be recognised as a morally responsible person with his/her own value. He/she maintains his/her right to social value and respect and should not be made a mere object of the fight against criminality. Therefore, also with regard to an offender, "the basic conditions of individual and social existence of the human being" must be respected. Human dignity demands that a person convicted to a life-long prison sentence will have the chance to regain freedom some time. The execution of the prison sentence has to be orientated towards this goal. The convicted is entitled to social adjustment. –
These standards apply also to the placement in preventive detention. The state has the right to protect itself against dangerous criminals. The Court reinforced the general idea of preventive custody arguing that human dignity is not violated by long-term detention if the measure is necessary because the convict remains dangerous. The court emphasized, however, that expert opinions have to be commissioned every two years to determine whether detention still is required. The medical prognosis, the Federal Court said, has to be of high quality and must be carefully reviewed by the judges in order to give the convict "a real chance" to be released. Regarding the retrospective application of the new regulation to the case of the complainant, the Court based its decision on the fact that preventive detention is legally considered a disciplinary measure, not criminal sentence. The Constitution (Article 103 § 2 Basic Law) only forbids retrospective criminal sentences.

(2) The Judgment of the Federal Constitutional Court regarded a case in which the preventive detention had already been ordered together with the complainant's conviction to imprisonment. The legislator has now passed a law that makes possible a later order of placement in preventive detention for the case that facts which assume that the convicted will present a danger too the general public, are not yet known in the time of the conviction. Gesetz zur Einführung der nachträglichen Sicherungsverwahrung of 23 July 2004 (BGBl. I , 1838) [Act for the introduction of the later Preventive Detention (Federal Law Gazette Part I no.39 p. 1838]. It contains, among others, a new section 66b of the Penal Code and a new section 275a of the Criminal Procedure Act.

Deprivation of liberty for juvenile offenders

Legislative initiatives, national case law and practices of national authorities

The Federal Government in the answer to a Small Question of the FDP fraction made remarks to the legal basis of orders of detention on remand for youth persons (Bundestags-Drucksache 15/2732 of 23 Mary 2004).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

An Answer of the Parliamentary Secretary of 20 February to an oral question in the Parliament contains comments to the numbers of detainees in German penal institutions[22]:
On 31 March 2003 in German penal institutions 70,863 persons were in the enforcement of sentences or in detention on remand. Under these persons were 20,750 persons with foreign nationality.

[21] Section 67d § 3 reads: "If ten years of placement in preventive detention have been executed, the court shall declare the measure satisfied if there is no danger that the person under placement will, due to his proclivity, commit serious crimes, as a result of which the victim is seriously harmed emotionally or physically. Supervision of conduct shall commence upon satisfaction of the measure."
[22] Bundestags-Drucksache 15/2569 p. 16/17.

Article 7. Respect for private and family life

Private life

Intelligence and security services

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Human Rights Committee (see under Article 2) commends the continuing positive role of the Federal Constitutional Court in safeguarding fundamental rights, e.g. through its decisions to strengthen the protection of religious liberties and to improve the protection of privacy in the area of audio surveillance of residential premises.

Legislative initiatives, national case law and practices of national authorities

1. Judgment of the Federal Constitutional Court of 3 March 2004, regarding eavesdropping operations:
In this Judgment the Constitutional Court again took a very significant position[23]. The case concerned an amendment of the Constitution (Basic Law) passed in 1998[24], furthermore provisions of the Code of Criminal Procedure[25] that permit police, under special prerequisites, the acoustical surveillance of any home in order to prosecute major criminals. The Court ruled

[23] Judgment of 3 March 2004 – 1 BvR 2378/98, 1094/99 –, BVerfGE 109, 279 = NJW 2004, 999 to 1022. [Neue Juristische Wochenschrift]

[24] Article 13 § 3 to 6 Basic Law, added to Article 13 by constitutional amendment of 26 March 1998. Article 13 Basic Law [Inviolability of the home], amended by Law of 26 March 1998, reads:
(1) The home is inviolable.
(2) Searches may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.
(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorization shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.
(4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay.
(5) If technical means are contemplated solely for the protection of persons officially deployed in a home, the measure may be ordered by an authority designated by a law. The information thereby obtained may be otherwise used only for purposes of criminal prosecution or to avert danger and only if the legality of the measure has been previously determined by a judge; when time is of the essence, a judicial decision shall subsequently be obtained without delay.
(6) The Federal Government shall report to the Bundestag annually as to the employment of technical means pursuant to paragraph (3) and, within the jurisdiction of the Federation, pursuant to paragraph (4) and, insofar as judicial approval is required, pursuant to paragraph (5) of this Article. A panel elected by the Bundestag shall exercise parliamentary control on the basis of this report. A comparable parliamentary control shall be afforded by the Länder.
(7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual, or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of an epidemic, or to protect young persons at risk.

[25] These provisions have been inserted by the Act for Improving the fight against Organised Criminality of 4 May 1998.

that Article 13 § 3 Basis Law does not infringe Article 79 § 3 Basic Law[26]. But it declared several of the new procedural regulations as not compatible with the protection of human dignity. It began by referring to the so-called "object formula" which was already used in former decisions: It would not be compatible with the dignity of a human being to make him/her a mere object of the state or to treat him in a way that principally doubts his quality as a subject. The Court, however, pointed out as well that the "object-formula" in its general expression only suggests the direction. The human being would often be treated as a mere object not only of the circumstances and of the social development, but also of the law with which he/she has to comply. – But human dignity is impaired, "if, by the kind of the measure taken, the quality of the person concerned as a subject is questioned in principle", then "the treatment by the public authority lacks the value which is due to every human being for his/her own sake".[27] Therefore a "last unimpeachable essence [*unantastbarer Kernbereich*] of private living" has to be preserved. It is absolutely removed from public authority's effect[28]. Even weighty interests of the public are not allowed to justify interference. Acoustical surveillance of a home by the police is prohibited if the people behave in absolute privacy. The Court, however, has declared that in each case this "essence" has to be fixed according to formal and contentual components.

The judgment has entitled a discussion to what extend acoustical surveillance is really needed. In the end of 2004 the Federal Government introduced a bill of an "Act for the implementation of the judgment of the Federal Constitutional Court of 3 March 2004 (acoustical surveillance)"[29]. It contains extensive revised versions of sections 100c to 100f of the Act of Criminal Procedure. The Government considers that acoustical surveillance is indispensable for improving the criminal fight against organised criminality, terrorism and especial grave forms of criminality.

2. Order of the Federal Constitutional Court regarding competences of the Zollkriminalamt:
The German Außenwirtschaftgesetz [Foreign Economy Act] in section 39 contains regulations regarding surveillances of postal and telecommunications contacts. The Zollkriminalamt [Customs Criminal Office] is entitled for special purposes to open post and intercept and record telecommunications. Section 40 and 41 contain provisions regarding the content of the order the judge has to deliver and implementing provisions. The Federal Constitutional Court[30] pointed out that the legislator in such cases has to determine the purpose for using the data specifically for each field clear and precisely; furtheron the data investigation has to be appropriate (i. e. in relation) and needed for this purpose. Sections 39 to 41 would not be conform to these requirements.

The Gesetz zur Neuregelung der präventiven Telekommunikations- und Postüberwachung durch das Zollkriminalamt und zur Änderung der Investitionszulagengesetze 2005 und 1999 of 21 December 2004[31] draws the conlusions from this order. It abrogates sections 39 to 43 of the Außenwirtschaftgesetz and inserts a new chapter regarding preventive surveillance of

[26] Article 79 § 3 Basic Law has the following wording: "Amendments of this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 [Human Dignity] and twenty shall be admissible." So called eternity clause.
[27] Like this, see already Judgment of 15 December 1970, BVerfGE 30, 1 <25 seq.> ("Surveillance judgment". A first important decision regarding the constitutional barriers of surveillance of telephone calls).
[28] This argument is already found in former decisions. They regard the prerequisites to the utilization of a secret tape recording in a criminal procedure (Decision of 31 January 1973, BVerfGE 34, 238<245>) and the prerequisites to the utilization of personal diary entries in a criminal procedure (Decision of 14 September 1989, BVerfGE 80, 367<373>).
[29] Bundestags-Drucksache 15/4533 of 15 December 2004.
[30] Order of 3 March 2004 – 1 BvF 3/92 – , NJW 2004, 2213.
[31] BGBl. I 3603 [Federal Law Gazette Part I 2004 p. 3603]

telecommunication and of post into the Zollfahndungsdienstgesetz [Act concerning the Customs Investigation].

3. The new Telekommunikationsgesetz [Telecommunication Act] of 22 June 2004[32] replaces the former Telecommunication Act of 1996 and implements five competent EU directives of 2002. The project contents chapters concerning privacy of telecommunication (Articles 88 - 90), the protection of data (Articles 91 – 107), and public security (Articles 108 - 115). The section of public security regulates extensively among others the technical transformation of measures of interception for security authorities, admissible interference with privacy of telecommunication and the performance of inquiries of the security authorities.

4. Reports

a) According to Article 13 § 3 Basic Law under special conditions it is allowed to use technical means for the surveillance of a home[33]. Section 100c Criminal Procedure Act specifies this for the area of criminal prosecution. The Federal Government every year has to report on the use. The 2003 report[34] shows: In 8 *Länder* (of 16) altogether 62 procedures (cases) took place regarding 49 homes. The concerned was informed later in 23 of these cases. The Federal Public Prosecutor General carried out 3cases; in two of these he later informed the concerned person.

b) Pursuant to the Act regarding Article 10 [Artikel 10-Gesetz] the secret services are authorised, under special conditions, to monitoring of post and telecommunications. These powers are controlled by the Parliamentary Control Commission [Parlamentarisches Kontrollgremium] and by the Act 10-Commission [G 10 Kommission]. A report of the Parliamentary Control Commission of 24 March 2003 for the period of 1 Jan 2002 to 30 June 2002[35] informs about the control function and about the frequency of relevant measures. They vary according to the different measures and cannot be described in this connection.

The report confirms in its conclusions the previous impression of the Parliamentary Control Commission that the intelligence and security services have act with extreme high conscientiousness and have hold the restrictions of the citizens as small as possible in this area.

c) To similar results comes a report of the Parliamentary Control Commission[36] regarding the new competences of the security services by the Terrorismusbekämpfungsgsetz [Act for the fight against terrorism] of 9 January 2002.

Good practices

The above conclusions to c) and d) emphasise a good practice of the secret services; they would endeavour to held the restrictions of the citizens as low as possible.

[32] BGBl. I 1190.
[33] See footnote 25.
[34] Bundestags-Drucksache 15/3699 of 9 September 2004, Anlage 1.
[35] Bundestags-Drucksache 15/718.
[36] Bundestags-Drucksache 15/3391 of 17 June 2004.

Right to the protection of family life and right of the public to have access to information

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Case Caroline von Hannover of the European Ct. of H.R.
The applicant is the eldest daughter of Prince Rainer III of Monaco. Since the early 1990s she has been trying – often through the courts; several times also the German Federal Constitutional Court – in a number of European countries to prevent the publication of photos about her private life in the tabloid press. In the present case the application regards photos from her private life, v. a., showing Caroline on horseback, shopping on her own, on a skiing holiday in Austria and showing her tripping over an obstacle at the Monte Carlo Beach Club. – The German courts – besides the constitutional measures – decided on the basis of the Kunsturhebergesetz (KUG) [Copyright (Arts Domain) Act]. Secton 22 (1) of this law provides that images can only be disseminated with the express approval of the person concerned. Section 23 (1) of that Act, however, provides for exceptions to that rule, particularly where the images portray an aspect of contemporary society (*Bildnisse aus dem Bereich der Zeitgeschichte*) on condition that publication does not interfere with a legitimate interest (*berechtigtes Interesse*) of the person concerned (section 23 (2)). Regarding the interpretation of section 23 (1) the German Federal Constitutional Court in a landmark judgment held that the concept of contemporary society referred to in section 23 (1) no. 1 of the KUG should not only cover, in accordance with a definition given by the courts, events of historical or political significant, but be defined on the basis of the pubic interest in being informed … . The kernel of press freedom and the free information of opinions require the press to have sufficient margin of manoeuvre to allow it to decide, in accordance with it publishing criteria, what the public interest demands and the process of forming opinion to establish what amounts to a matter of public interest. Entertaining coverage would be no exception to these principles.

The Eur. Ct. H.R. in its judgment of 24 June 2004[37], however, considered that the German courts did not strike a fair balance between the competing interests. There had therefore been a breach of Article 8 ECHR.

The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. That also applies to the protection of a person's picture against abuse by others. That protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention. In that context the Court reiterates that the freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. The situation in the case here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate

[37] Eur. Ct. H.R. (3rd sect.), *von Hannover v. Germany* (Appl. No 59320/00) judgment of 24 June 2004 (final); NJW 2004, 2647.

exclusively to the details of Caroline's private life. In these conditions freedom of expression would call for a narrower interpretation. This point is illustrated in a particularly striking fashion by the photos taken of the applicant at the Monte Carlo Beach Club tripping over an obstacle and falling down. It appears that these photos were taken secretly at a distance of several hundred metres.

In that connection the Court also takes account of the resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy, which stresses the "one-sided interpretation of the right to freedom of expression" by certain media which attempt to justify an infringement of the rights protected by Article 8 of the Convention by claiming that "their readers are entitled to know everything about public figures". The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension. Anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private.

The Court therefore had difficulty in agreeing with the German courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act, which consists in describing a person as such as a figure of contemporary society "*par excellence*". Since that definition affords the person very limited protection of their private life or the right to control the use of their image, it could conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a "private" individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family whereas she herself does not exercise any official functions. In any event the Court considers that, in these conditions, the Act has to be interpreted narrowly to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's image. -- Lastly, the distinction drawn between figures of contemporary society "*par excellence*" and "relatively" public figures has to be clear and obvious so that, in a state governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.

The judgment of the European Court has entitled a broad discussion in Germany because of the fear that it would restrict the freedom of press too much. Notwithstanding the German government decided not to request reverence of the case to the Grand chamber (see Article 44 (2) b) ECHR).

Voluntary termination of pregnancy

Legislative initiatives, national case law and practices of national authorities

Answer of the Federal Government on a small question of the fraction of CDU/CSU regarding the implementation of the judgment of the Federal Constitutional Court of 28 May 1993[38]: The Constitutional Court had ruled to pregnancy and suggested to the legislator to observe in which way the legal protection concept does affect the social reality.

[38] Bundestags-Drucksache 15/3155 of 18 May 2004.

Family life

Protection of family life (in general, developments in family law)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Case Görgülü

The decision of the European Court of Human Rights in the case Görgülü regarding parental custody is of particular importance as it gave the Federal Constitutional Court opportunity to rule on the binding effects of decisions of the European Court. See for that Preliminary remark, chapter III.

In Görgülü the complainant was the father of a child born out of wedlock in 1999. The mother of the child gave the child up for adoption one day after the birth and declared her prior consent to adoption by the foster parents, with whom the child has been living since its birth. Since October 1999, the complainant has unsuccessfully endeavoured in a number of judicial proceedings, including a constitutional complaint, to be given custody and granted a right of access. In an order of 9 March 2001, the Wittenberg Local Court transferred the sole parental custody of the boy to the complainant in accordance with his application. Before this, there had been a total of four meetings between the child and the complainant by way of access. Upon the appeal of the foster parents and the Wittenberg Youth Welfare Office (*Jugendamt*), which was appointed official guardian after the birth, the Local Court's custody decision was reversed by order of 20 June 2001 of the Naumburg Higher Regional Court, and the complainant's application for transfer of custody was dismissed on the merits. At the same time, the Higher Regional Court, of its own motion, excluded rights of access between the complainant and the boy until 30 June 2002 on the grounds of the best interest of the child.

The Federal Constitutional Court, by an (chamber) order not stating grounds of 31 July 2001 – 1 BvR 1174/01 – refused to admit for decision the complainant's constitutional complaint against the order of the Higher Regional Court. In September 2001, the complainant filed an individual application at the European Court of Human Rights. He challenged in particular a violation of Article 8 of the Convention, which protects the right to respect for private and family life.

In a judgment of 26 February 2004, a chamber of the Third Section of the Eur. Ct. H.R declared unanimously that the decision on custody and the exclusion of the right of access violated Article 8 of the Convention[39]. On the basis of Article 41 of the Convention, the Court awarded the complainant EUR 15,000.00 in damages and EUR 1,500.00 to reimburse costs and expenses. With regard to the right of custody, the Court first referred to its case-law, under which in cases where family bonds to a child are shown to exist, the state must act in such a way that these bonds could develop further. This gives rise to the duty under Article 8 of the Convention to endeavour to reunite a natural parent with his or her child. In consideration of the fact that the complainant is the boy's natural father and undisputedly willing and able to take care of him, the Higher Regional Court did not examine all possible ways of solving the problem.

With regard to the right of access, the European Court came to the conclusion that the grounds on which the Naumburg Higher Regional Court based its decision to exclude the complainant's access to his child for the period of one year were not sufficient to justify such a serious encroachment upon the complainant's family life. It held that notwithstanding the

[39] Eur. Ct. H.R. (3rd sect.), *Görgülü v. Germany* (Appl. N° 74969/01) judgment of 26 February 2004 (final).

margin of discretion of the domestic authorities, the encroachment was therefore disproportionate with regard to the lawfully pursued goals. In the present legal matter, it stated, it must be made possible for the complainant at least to have access to his child.
The Court for Human Rights noted that the Naumburg Court of Appeal based its decision on the physical and psychological strain for the child that any contact with his natural father would mean. The Court of Appeal had thereby regard to the unrest and insecurity occasioned by the unresolved legal dispute and concluded that suspending access for a certain time would allow the child to regain the necessary inner repose and emotional balance. But the Court of Appeal's decision rendered any form of family reunion and the establishment of any kind of further family life impossible. In this context, the European Court recalls that it is in a child's interest for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances. There was no evidence of such exceptional circumstances in the present case.

Thereupon, the Local Court, in accordance with the complainant's application, transferred custody to him and granted him a right of access by way of a temporary injunction of the court's own motion. The Higher Regional Court, however, overturned the temporary injunction on the father's right of access. In his constitutional complaint against this, the father challenged the violation of his fundamental rights under Article 1, Article 3 and Article 6 of the Basic Law and of the right to fair trial. He submitted that the Higher Regional Court disregarded international law and failed to recognise the binding effect of the decision of the Eur. Ct. H.R. The Federal Constitutional Court[40] reversed the order of the Naumburg Court. As to the arguments regarding the binding effect of decisions of the European Court as a matter of principle the reasons of the order are already described in the Preliminary remarks, chapter III.

As to the questions of fundamental rights the Federal Constitutional Court ruled:
The decision of the Higher Regional Court violated Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court should have considered in an understandable way how Article 6 of the Basic Law could have been interpreted in a manner that complied with the obligations under international law of the Federal Republic of Germany. Here it would be of central importance that the Federal Republic of Germany's violation of Article 8 of the Convention established by the Eur. Ct. H.R. is a continuing violation, for the complainant still has no access to his child. The Higher Regional Court should have considered the grounds of the European judgment in particular because the decision, which found that the Federal Republic of Germany had violated the Convention, was made on the matter which the Higher Regional Court had to consider again in a retrial. The duty to take the decision into account neither adversely affects the Higher Regional Court's constitutionally guaranteed independence, nor does it force the court to enforce the Eur. Ct. H.R. decision without reflection. In the legal assessment in particular of new facts, in the weighing up of conflicting fundamental rights such as those of the foster family and in particular the best interest of the child, and in the integration of the individual case in the overall context of family-law cases with reference to the law of access, the Higher Regional Court is not bound in its concrete result. However, these interrelations were not discussed in the order challenged.[41]

[40] Order of 14 October 2004 – 2 BvR 1481/04 - , NJW 2004, 3407.
[41] It is amazing that the Naumburg Court, notwithstanding, in an order of 20 December 2004 again refused the father's right of access. The Federal Constitutional Court therefore issued a temporary injunction that made the father's access to his son possible up to the decision in the constitutional complaint (order of 28 December 2004 – 1 BvR 2790/04 -).

Legislative initiatives, national case law and practices of national authorities

On 9 April 2003 the Federal Constitutional Court had ruled that, in principal, also the biological father must be able to contest the paternity of an other man. Moreover the biological father should have the right to personal access, if it serves to the well-being of the child.
The Gesetz zur Änderung der Vorschriften über die Anfechtung der Vaterschaft und das Umgangsrecht von Bezugspersonen des Kindes, zur Registrierung von Vorsorgeverfügungen und zur Einführung von Vordrucken für die Vergütung von Berufsbetreuern of 23 April 2004[42] implements this decision by modifying, among others, sections 1592, 1600 and 1600 e Civil Code.

Removal of a child from the family

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The case Haase is less spectacular, but very important for the understanding of Article 8 of the Convention. Applicants were Mrs and Mr Haase. Mrs Haase is the mother of twelve children. While she was married to M., she gave birth to seven children. With her second husband, Mr Haase, she had five children. In December 2003 Mrs Haase gave birth to her last child.

On 17 December 2001 a psychological expert submitted his report to the Münster Youth Office. According to this report, the deficiencies in the children's care and the home conditions risked jeopardising their development seriously. There was a damaging cycle of events with the applicants being unreasonably harsh with their children on repeated occasions and having beaten them. The children needed to be in a secure long-term placement and any further contact between them and the applicants would have to be avoided.

On 17 December 2001 the Youth Office applied for an interim injunction and this very day the Münster District Court, without hearing the parents, issued the requested interim injunction. The following day the children were separated from their family and partly from each other and placed in unidentified foster homes. The new born baby was taken from the hospital. On 1 March 2001, without holding a hearing, the Hamm Court of Appeal dismissed the applicants' appeal.

On 21 June 2002 the Federal Constitutional Court set these decisions aside, finding that the applicants' parental rights had been violated. According to the Federal Constitutional Court, the question of whether the evidence established that there was a risk of harm to the children had not adequately been considered. It noted in particular that an assessment of the applicants' submissions and considerations as to the possibility to order alternative measures, that would not have required the total revocation of parental rights, were missing. Both the Court of Appeal and the District Court failed to hear the children or to provide the persons taking part in the proceedings with the opportunity to be heard. No reasons were given justifying the urgency of the matter.

On 6 March 2002 the parents had lodged an individual complaint at the Eur. Ct. H.R. The European Court, notwithstanding problems of admissibility, stated a violation of Article 8 of the Convention[43].

[42] BGBl. I 598.
[43] Eur. Ct. H.R. (3rd sect.), *Haase v. Germany* (Appl. N° 11057/02) judgment of 8 April 2004 (final).

In its principal reasoning regarding Article 8 ECHR the Court stresses, as it is well established in the Court's case-law, that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the ECHR.

Although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. Thus, the existence of a family tie having been established, the State must in principle act in a manner calculated to enable that tie to be developed and take measures that will enable parents and child to be reunited. Regard must be taken to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and the State enjoys a certain margin of appreciation. This margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. While the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the Court must still be satisfied in the particular case that there existed circumstances justifying the removal of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to implementation of such a measure. Following any removal into care, a stricter scrutiny is called for in respect of any further limitations by the authorities, for example on restrictions on parental rights and access, and on any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.

The Court observes moreover that, before public authorities have recourse to emergency measures in such delicate issues as care orders, the imminent danger should be actually established. It was true that in obvious cases of danger no involvement of the parents is called for. However, if it is still possible to hear the parents of the children and to discuss with them the necessity of the measure, there should be no room for an emergency action, in particular when, like in the present case, the danger had already existed for a long period. There was therefore no urgency as to justify the District Court's interim injunction. The Court has also given consideration to the method used in implementing the District Court's decision of 17 December 2001. Taking suddenly six children from their respective schools, kindergarten and from home and placing them in unidentified foster homes, and forbidding all contact with the applicants, went beyond the exigencies of the situation and cannot be accepted as proportionate.

In particular, the removal of the new-born baby from the hospital was an extremely harsh measure. It was a step which was traumatic for the mother and placed her own physical and mental health under a strain, and it deprived the new-born baby of close contact with its natural mother and, as pointed out by the applicants, of the advantages of breast-feeding. The removal also deprived the father of being close to his daughter after the birth. – The Court pointed out, that it is not for the Court to take the place of the German authorities and to speculate as to the child's best care measures in the particular case. The Court is aware of the problems facing the authorities in situations where emergency steps must be taken. If no action is taken, there exists a real risk that harm will occur to the child and that the authorities will be held to account for their failure to intervene. At the same time, if protective steps are taken, the authorities tend to be blamed for unacceptable interference with the right to respect for family life. *However*, if such a drastic measure for the mother, depriving her totally of her new-born child immediately after birth, was contemplated, it was incumbent on the competent national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and child, was not possible.

Regarding the understanding of Article 8 Convention the Court concluded that the decision of the District Court of 17 December 2001, the unjustified failure to allow the applicants to participate in the decision-making process leading to that decision, the methods used in implementing that decision, in particular the draconian step of removing the new born daughter from her mother shortly after birth, and the particular quality of irreversibility of these measures were not supported by relevant and sufficient reasons and cannot be regarded as having been "necessary" in a democratic society. The Court further concluded that the applicants sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Having regard to the circumstances of the case and ruling on an equitable basis, the Court awards the applicants jointly EUR 35,000. —
These two decisions of the Eur. Ct. H.R. are impressive. But they also turn out which problems and difficulties youth welfare offices and family courts often have to cope with.

The right to family reunification

Legislative initiatives, national case law and practices of national authorities

The Residence Act of 30 July 2004 (see under Article 18) contains new regulations regarding the residence for family reasons (sections 27 – 36), in particular for subsequent immigrations of dependents and spouses.

Article 8. Protection of personal data

Independent control authority (evolution of its powers, competences)

Legislative initiatives, national case law and practices of national authorities

The Federal Commissioner for Data Protection [Bundesdatenschutzbeauftrager] is an independent authority in the sense of Article 8 § 3 Charter. He is elected upon the proposal of the Federal Government, by the German *Bundestag* for a term of five years; he is eligible for re-election for one additional term. The Federal Commissioner for Data Protection is autonomous and not bound by any instructions. His function and duties are specified in the Federal Data Protection Act[44] [*Bundesdatenschutzgesetz*]. He gives advice to the *Bundestag* and the Federal Government by drafting activity reports and expert opinions, and advises in the course of legislative procedures. He monitors compliance with legal provisions on data protection within the federal administration and telecommunications and postal service organizations.
Every two years the Federal Commissioner shall, pursuant to section 26 § 1 Federal Data Protection Act, submit an activity report to the Federal Parliament.

The last Activity Report was submitted in May 2003 for the years 2001/2002. The next one has to be submitted in 2005 for the years 2003/2004. This report then will be regarded in the CFR Report 2005.

The Federal Commissioner for Data Protection said in an interview that in any case the tightness of observation of the people has increased very much. Therefore side effects had to be considered also with social reforms.

[44] Act of 1990 in the new version of the publication of 14 Jan 2003, BGBl. I 2003 p. 66.

Protection of personal data (in general, right of access to data, to have them rectified and right to a remedy)

Legislative initiatives, national case law and practices of national authorities

No principal developments in the period of scrutiny. But, among others, there were problems of data protection with the forms of the new unemployment benefit II, which will come in effect with the beginning of 2005.

Protection of the private life of the worker and the prospective worker

Legislative initiatives, national case law and practices of national authorities

The red-green coalition in its coalition agreement challenged to reform the data protection law and with this to lay down the protection of the data of employees in a special law. The competent ministry could not yet present a draft.

Intelligence and security services

Legislative initiatives, national case law and practices of national authorities

Se for this under Article 7 ("Private life").

Article 9. Right to marry and right to found a family

Legal recognition of same-sex partnerships

Legislative initiatives, national case law and practices of national authorities

According to German law it is possible for two people of the same sex to establish a partnership for life. Details are contained in the Life Partnerships Act of 2001. It is a special family-law institute for bisexual partners. The Federal Parliament has adopted a new Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts [Act fort the Revision of Life-partnerships Law][45] It schedules far reaching adaptations to marriage law and is another step to bring these partnerships close to having the same legal rights as heterosexual couples. The new law for instance grants homosexuals the right to adopt children of their partners; it contains taking over of matrimonial property law and a far reaching adaptation of the maintenance law. Moreover the life-partner is integrated in the survivor's sustenance; i. e. the surviving partner is allowed to draw the pension benefits of the deceased partner. On the occasion of the adoption of the law, the Minister of Justice said that already 5,000 couples had taken advantage of the partnership law since it was introduced and that about 8,000 children were growing up in same-sex families.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee on the Rights of Child (see under Article 24) notes with appreciation the adoption of the third law to amend the federal law on child benefits (entered into force on 1 January 2001) which improves the possibility for both parents to take parental leave and the amendment of the law on parental custody [elterliches Sorgerecht] which provides for shared

[45] As Act of 15 December 2004 promulgated in the Federal Law Gazette, BGBl. I p. 3396.

parental custody, even when they are divorced, separated, or not married, but remains concerned that the judicial system is not yet prepared to fully implement this latter legislation.

Article 10. Freedom of thought, conscience and religion

Reasonable accommodation provided in order to ensure the freedom of religion.

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Human Rights Committee (see under Article 2) commends the continuing positive role of the Federal Constitutional Court in safeguarding fundamental rights, e.g. through its decisions to strengthen the protection of religious liberties and to improve the protection of privacy in the area of audio surveillance of residential premises.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Head scarf

Regarding the (school-) Land law of Baden-Württemberg, in 2003 the Federal Constitutional Court[46] held that banning teachers from wearing headscarves at school was unconstitutional, because the actual school law was no sufficient clear legal basis for such a prohibition. There must be made specific laws that cover the issue. As a result in 2004 some Land parliaments passed modifications of their law that prohibits teachers from wearing certain religious symbols at schools: Baden-Württemberg, Lower Saxony, Saarland, Hesse and Bavaria. Some of them regard only teachers, others the whole civil service. In Berlin a bill has been introduced, that will ban the display of any religious symbols by those employed in the public sector, including teachers, members of the police force, and workers in the city-state's judicial system. To be Visible symbols of a religious affiliation shall be banned. City-run kindergartens, adult education institutions and vocational schools will be exempted from the ruling. Religious education in public schools will also not be affected. The new law in the other Länder in its result make a difference between Muslim headscarves and Jewish-Christian symbols.

On the basis of the new Law in Baden-Württemberg the Federal Administrative Court[47] decided on the case of Fereshta Ludin who had been the complainant before the Federal Constitutional Court. It confirmed the order of the Land Baden-Württemberg having refused to take into the public school the Muslim lady teacher who insisted on wearying a headscarf for religious reasons also during teaching. Interpreting the Baden-Württemberg school law the Federal Administrative Court determined that this law did not favour Christianity even though it mentions "Christian and occidental educational and cultural values" which may be expressed according to the Land law. It added the state should treat all religions equally in regulating the wearing of political, religious or philosophic symbols in schools.

[46] Judgment of 24 September 2003 – 2 BvR 1436/02 – , NJW 2003, 3111.
[47] Decision of 24 June 2004 – 2 C 45/03 – , NJW 2004, 3581.

Article 11. Freedom of expression and of information

Freedom of expression and information (in general)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Eur. Ct. H.R. in the case Caroline von Hannover has made important statements regarding the balance between the protection of private life and the freedom of press. See to that above under Article 7.

Reasons for concern

Media pluralism and fair treatment of the information by the media

Legislative initiatives, national case law and practices of national authorities

The Federal Government has introduced the bill of a Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen [Seventh Act for Modification the Act against Restrictive Trade Practices][48]. In terms of the German law on this subject, which is rather strict, the basic approach is that cartels are illegal. Exceptions are made where the cartel does not present any great threat to the free market. Mergers which could lead to a single concern dominating a market require authorisation to proceed.

The bill objected to change the competition law regarding newspaper concentrations. It proposed, among others, a loosening of the control of press-mergers, even if that would lead to a dominant share of the market. The advocates of the bill argued that loosening the regulations on press concentration is inevitable, observing the economic crisis in the sector. But most people, also the president of the Federal Cartel Office, believed that this would threaten press pluralism. -- In the meantime the bill was revised. But the law is not yet adopted.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Federal Parliament has adopted a Gesetz zur Änderung des Deutsche-Welle-Gesetzes [Act for Modification of the Deutsche-Welle-Act][49]. The "Deutsche Welle" is the only federal radio and television station. It is financed solely by federal funds and has a statutory obligation to produce and broadcast radio and television programmes, an online-service as well, for foreign consumption which give foreign audiences a comprehensive and well-balanced picture of political, cultural and economic life in Germany. Another one of its functions is to present and explain Germany's position on important issues.

The new law strengthens the autonomy of the corporation and, among others, contains a modern version of its functions (section 3) and objectives (section 4).

[48] Bundstags-Drucksache 15/ 3640 of 7 June 2004.
[49] As Act of 15 December 2004 promulgated in the Federal Law Gazette, BGBl. I p. 3456.

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

The Federal Constitutional Court regarding freedom of speech and the ban on a NPD assembly.

A group of the right-wing National Demokratische Partei Deutschland (NPD) [National Democratic Party of Germany] had announced an assembly with manifestation for the 26 June 2004. Theme should be "No tax money for building a synagogue. In favour of freedom of expression". The competent authority in Bochum (a town in North Rhine-Westphalia) ordered to ban this demonstration. It would endanger public order because of an offence against section 130 (1) no.1 German Penal Code (agitation of the people). The higher Administration Court refused the party's request to give suspensory effect to the remonstrance against the ban. The Federal Constitutional Court[50], by an interim injunction restored the suspensory effect.

The Court noted that in a proceeding for interim injunction there would be possible only a provisional examination. By this kind of examination it would not be possible to recognize a legal basis for the ban of the assembly. The motto of the assembly would be a form of free speech. The fundamental right to Freedom of expression, however, could be restricted only in the framework of the general law in the sense of Article 5 § 2 Basic Law. According to this provision the right to freedom of expression finds its limits only in the provisions of "general laws", in provisions for the protection of young persons, and in the right to personal honor. Public order would be no limit in this sense. The fundamental right to the freedom of speech would be a right also for the protection of minorities. It is not allowed to put its exercise in general under the reservation that the spoken contents of the opinions are not in contradiction to the prevailing social or ethical opinion[51].

2. Different from this was the case of a planned NPD demonstration in Berlin for the 25 September 2004. Under the motto "Berlin remains German" it shoud be directed against Islamic centres. The (state) interior minister of Berlin pointed out that the NPD had left the area of what would be admissible by law, and banned the demonstration. The administrative courts including the Federal Constitutional Court confirmed the prohibition.
(That is only one example of banning NPD demonstration by the competent authorities in the local communities of the Länder.)

3. For the time from 1 – 3 October 2004 in Berlin, there was planned a "First Arabic, Islamic Congress in Europe". According to newspapers one could read on its web pages "No to the U.S. occupation of Iraq. No to Zionist occupation of Palestine….the Tour of the blessed AL-Aqsa & Intifada". As to the Berlin police the Web pages revealed that the authors of the Internet site endorsed attacks on the United states and Israel. It was called on restistance against "American, Zionist terror". The police banned the congress.

4. I should mention two examples of large peaceful demonstrations.

a) Caused by the murder of Theo van Gogh and the following violence attacks in the Netherlands the Türkisch-Islamische Union (DITIB) had called on Islamic people and others

[50] Order of 23 June 2004 – 1 BvQ 19/04 – , NJW 2004, 2814.
[51] See to this problematic also *Wolfgang Hoffmann-Riem,* Demonstrationsfreiheit auch für Rechtsextremisten? – Grundsatzüberlegungen zum Gebot rechtsstaatlicher Toleranz, NJW 2004, 2777.

in Germany to participate at a demonstration in Cologne on Sunday 21 November, About 20,000 to 30,000 people demonstrated in an impressive manner for peace and against terror.

b) Remembering the "Monday demonstrations" in the former DDR in 1989, in August 2004 thousands of people demonstrated in Berlin and elsewhere for protests directed against the social reforms which were introduced by the Government and the governing coalition in the Parliament (see for the reforms under Article 34).

Article 13. Freedom of the arts and sciences

Freedom of research

Legislative initiatives, national case law and practices of national authorities

The Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen (Stammzellgesetz) [Act ensuring Protection of Embryos in connection with the Importation and Utilization of Human Embryonic Stem Cells – Stem Cell Act][52] enables, under special conditions, research with embryonic stem cells. According to section 15 of this act the Federal Government presented a First Report of experience on the implementation of the Stem Cell Act[53] . The report covers the period of 1 July 2002 – 31 December 2003. It reports approved applications, the examination and evaluation by the Central Ethics Commission on Stem Cell Research and the stand of research.

2. In September 2004 the German National Ethics Council published an opinion regarding "Cloning for reproductive purposes and cloning for the purpose of biomedical research". The National Ethics Council was inaugurated, following a Federal Government's decision, on 8 June 2001 as a national forum for dialogue on ethical issues in the life sciences. It is intended to be the central organ for interdisciplinary discourse between the natural sciences, medicine, theology and philosophy, and the social and legal sciences, and to express views on ethical issues relating to new developments in the field of the life sciences and on their consequences for the individual and society. The National Ethics Council has up to 25 members, who represent the scientific, medical, theological, philosophical, social, legal, ecological and economic worlds and are appointed for a four-year term by the Federal Chancellor.
In its opinion the National Ethics Council recommends, for the time being, not to change the existing restrictions of researching with human stem cells. Cloning of human being for purposes of research should not be admitted at present. Unanimously the 25 members support a world-wide prohibition of cloning for reproductive purposes.

Article 14. Right to education

Vocational training

Legislative initiatives, national case law and practices of national authorities

The problem of apprenticeships places for young people is a great one in Germany. In May 2004 the Parliament adopted a Berufsausbildungssicherungsgesetz [Act for Ensuring and Promoting qualified Junior-employees and the chances of vocational training of the young Generation]. It stipulates that companies with more than 10 employees should have at least one apprenticeship place for every 15 workers. Companies falling below this ratio would have to pay a levy into a vocational training fund, while those above the ratio will receive payouts

[52] Act of 28 Jun 2002 (BGBl. 2002 I p. 2277).
[53] Bundestags-Drucksache15/3639 of 3 August 2004.

from the fund. The law should come into effect in autumn 2004 if the required number of apprenticeships would not be reached this time, more precise, that at the deadline 30. September would not be reached an agreement on this number. This law had been debated for months and remained controversial. The Bundesrat in July refused to give its approval.

In June, however, it succeeded that Government and business representatives signed a pact for apprenticeships. Under this pact companies are committing themselves to create 30,000 new opportunities for apprentices places a year over the next three years. In addition, the companies have bound to provide 25,000 places for getting in practical training for those young people whose qualifications are considered to be insufficient for apprenticeship positions. In November the president of the Federal Institute for vocational Training said that the pact probably would have reached its aim.

In May 2004 the Ministry for Education and Research presented the Berufsbildungsbericht 2004[54] [Report on vocational Training 2004]. It contains information and dates regarding vocational training, remarks regarding stand and structure of vocational education, its arrangement in content, remarks regarding further vocational training and regarding European and international cooperation.

Article 15. Freedom to choose an occupation and right to engage in work

The right for nationals from other member States to seek an employment, to establish himself or to provide services

Legislative initiatives, national case law and practices of national authorities

EU enlargement. The Gesetz über den Arbeitsmarktzugang im Rahmen der EU-Erweiterung [Act on the acess to the job market in the framework of EU enlargement] of 23 April 2004 (BGBl. I 602) adapts German law to the new situation from 1 May 2004 on. The regulations regard the law of permission to work for citizens of the new EU member states for a transitional period up to full freedom of movement.

The prohibition of any form of discrimination in the access to employment

Legislative initiatives, national case law and practices of national authorities

The Gesetz zur Förderung der Ausbildung und Beschäftigung schwerbehinderter Menschen [Act for the Improvement of training and employment of severely handicapped persons] of 23 April 2004 (BGBl. I p. 606) contains several improvements: inter alia the improvement of the possibility for a company training disabled youth persons and a promotion of the change from the workshop for disabled persons into the general job market.

Access to employment for asylum seekers

Legislative initiatives, national case law and practices of national authorities

The new Immigration Act of 30 July 2004 (see under Article 18) contains a new Residence Act and (in Article 3) Modifications of the Asylum Procedure Act. The revised version of section 61 (2) Asylum Procedure Act in connection with sections 39 – 42 Residence Act allows certain facilitations for the access to employment of asylum seekers. But a statutory instrument first has to rule the details.

[54] Bundestags-Drucksache 15/3299 of 12 May 2004.

Freedom to choose an occupation

Legislative initiatives, national case law and practices of national authorities

See article 29 of the Charter.

Article 16. Freedom to conduct a business

No significant developments to be reported.

Article 17. Right to property

Public expropriations and compensation

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Eur. Ct. H.R.: Case Jahn and Others[55]

The decision affects land redistributed to farmers, especially refugees from formerly German areas in Eastern Europe, during the agrarian reform under the Soviet occupation of eastern Germany. In March 1990, seven months before the official reunification of the two separate German states, the new, freely elected East German parliament declared the owners of the land under the soviet redistribution or their heirs to be lawful owners; so the applicants were owners or their heirs. Two years later, however, the full German parliament revoked that decision. It allowed only those landowners who had been active in agriculture, forestry or food processing before 1990 to keep their property. Subsequently, the German courts ordered the applicants to reassign their land to the tax authorities of the Länder, pursuant to regulations of the Introductory Act to the Civil Code., because they had neither been carrying on an activity in the agriculture sector nor been members of an agricultural cooperative.

The Eur. Ct. H.R. considered that the interference with the applicant's right had to be regarded as a "deprivation" of property within the meaning of the second sentence of Article 1 of the Protocol No.1 to the ECHR which was not justified under that provision. Having regarded all relevant factors, the Court concluded that even if the circumstances pertaining to German reunification have to be regarded as exceptional, the lack of any compensation for the State's taking of the applicants' property upsets, to the applicants detriment, the fair balance which has to be struck between the protection of property and the requirement of the general interest. There had therefore been a violation of Article 1 of Protocol No. 1. --

The problems which the Court had to solve are grounded in the exceptionel German situation of the reunification. Therefore the case and its legal questions will remain a special case.

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

After long parliamentary negotiations the bodies responsible for the enactment of federal law adopted a „Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des

[55] Eur. Ct. H.R. (3rd sect.), *Jahn and Others v. Germany* (Appl. No. 46720/99, 72203/01 and 72552/01) judgment of 22 January 2004, NJW 2004, 923.

Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)" [Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act)]. It was promulgated in August 2004 and takes effect on 1 January 2005.[56] As an Article three the Immigration Act contains extensive modifications of the Asylum Procedure Act to shorten the asylum procedure. Some of the modifications of the Asylum Procedure Act by Article 3 of the new law are not conform to the 1951 Geneva Convention. UNHCR[57] has criticised the new section 28 § 2 Asylum Procedure Act according to which subjective post-flight reasons are generally not taken into consideration. Contrary, the 1951 Convention makes no difference between pre-flight and post-flight reasons. UNHCR acknowledges that asylum procedure in the whole should be streamlined. However, any streamlining must be done in conformity with the 1951 Convention. UNHCR suggested for example to ensure that asylum seekers receive qualified counselling during the early stages of the procedure.

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

The Immigration Act, as Article 1, includes a new Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz) [Act on the Residence, Economic Activity and Integration of Foreigner in the Federal Territory (Residence Act)] to replace the Foreigners' Act of 1990. It brings about a comprehensive new regulation of residence, gainful employment and integration of foreigners, which would lead to several improvements with regard to their status. The law also includes new regulations in the field of refugee law and an improvement of the legal status of persons benefiting from subsidiary forms of protection.

Section 60 § 1 Residence Act which incorporates the refoulement prohibition of Article 33 § 1 of the Geneva Convention into the Act, clarifies that victims of non-state or gender-specific persecution are to be considered Convention refugees.[58] This will be an important improvement for the protection of refugees, which UNHCR has repeatedly demanded. UNHCR has therefore in principle welcomed the draft regulation but has also asked for further amendments.[59]

UNHCR has pointed out that according to an interpretation of the term "refugee" in line with international law, the perpetrator of the persecution is not decisive but the possibility of the

[56] Act of 30 July 2004, BGBl. I 2004 p. 1950 (Federal Law Gazette part I).
[57] UNHCR-Statement of June 2003 for the Hearing „European Harmonisation of the Asylum Policy" by the Committee on Home Affairs of the Federal Parliament at 2 July 2003, p. 11 and follows.
[58] Section 60 (1) – Prohibition of Removal – reads as follows:
"In application of the Convention of 28 July 1951 relating to the Status of Refugees (…), a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions. This shall also apply to foreigners who enjoy the legal status of foreign refugees in the Federal territory or are recognised as foreign refugees outside of the Federal territory within the meaning of the Convention relating to the Status of Refugees. When a person's life, freedom from bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group. Persecution within the meaning of sentence 1 may emanate from
a) the state,
b) parties or organisation which control the state or substantial parts of the national territory, or
c) non-state parties, if the parties stated under letters a and b, including international organisations, are demonstrably unable or unwilling to offer protection from the persecution, irrespective of whether a power exercising state rule exists in the country, unless an alternative means of escape is available within the state concerned. … "
[59] UNHCR-Comments of February 2003 on the Draft of the Federal Government for an Immigration Law.

state to protect. This interpretation is accepted by the vast majority of the Convention's State parties.[60] An interpretation of the Convention aimed at the protection of human rights (see Article 1A and the refoulement prohibition of Article 33 of the 1951 Convention) requires the inclusion of non-state persecution in the term "refugee". The application of the term "refugee" is not only relevant for the admissibility of removal but also for the status the applicant will obtain. -- Up to now, the competent authorities and courts applied a restrictive interpretation of the term "refugee". Only refugees fleeing from state or quasi state persecution were recognised. (See for that already the Germany Report 2003.)

Positive aspects

The new section 60 (1) German Residence Act is a positive aspect.

Unaccompanied minors seeking asylum

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In light of article 7, 22 and other relevant provisions of the Convention on the Rights of Child, the Committee on the Rights of Child (see under Article 24) recommends that the State party take all necessary measures: To fully apply the provisions of the Youth Welfare Act to all refugee children below the age of 18 years; To ease refugee family reunification requirements and procedures, in particular for those covered by the Refugee Convention of 1951, and to ensure that birth certificates are issued for all children of refugees and asylum-seekers born in the territory of the State party.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Section 23a Residence Act, as an express legal basis, authorises the Länder to establish a Hardship Commission by virtue of a statutory instrument. The Hardship Commission may decide to file a hardship petition after establishing that urgent humanitarian or personal grounds justify the foreigner's continued presence in the Federal territory.

Article 19. Protection in the event of removal, expulsion or extradition

Legal remedies and procedural guarantees regarding the removal of foreigners

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Eur. Ct. H.R. in the two cases Ghiban and Dragan, regarding removals to Romania, stated that the complaints would be inadmissible[61]. I refrain from explaining these complicated cases in detail.

It has to be reported on a decision of the Committee against Torture under article 22 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Decision of 10 September 2004 on the Complaint No. 214/2002 submitted by M. A. K.

[60] UNHCR-Statement of June 2003 for the Hearing „European Harmonisation of the Asylum Policy" by the Committee on Home Affairs of the Federal Parliament at 2 July 2003, p. 11 and follows.
[61] Eur. Ct. H.R. (3rd sect.), *Ghiban v. Germany* (Appl. No. 11103/03) judgment of 16 September 2004. Eur. Ct. H.R. (3rd sect.), *Dragan and others v. Germany* (Appl, no 33743/03) judgment of 7 October 2004.

The complainant is M. A. K., a Turkish national of Kurdish origin, born in 1968, currently residing in Germany and awaiting expulsion to Turkey. He claimed that his forcible return to Turkey would constitute a violation by the Federal Republic of Germany of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.—In 1990/1991 he had claimed political asylum, which has been rejected. The German Courts considered that his submissions lacked credibility.

The issue before the Committee was whether the forced return of the author in Turkey would violate the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. On the burden of proof, the Committee recalled that it is normally for the complainant to present an arguable case and that the risk of torture must be assessed on grounds that go beyond mere theory and suspicion. It emphasized that considerable weight must be attached to the findings of fact by the German authorities.

The Committee against Torture concluded that Germany's decision to return the complainant to Turkey did not constitute a breach of article 3 of the Convention.
Conclusions XVII-1 (Germany) of the European Committee of Social Rights, delivered 2004 (see under Article 34)
One point of the conclusions regarded Article 19 of the Social Charter – Right of migrant workers and their families to protection and assistance. The Committee, noting that Article 19 § 8 restricts the grounds for expulsion, concluded that the situation in Germany would not be in conformity with Article 10 § 8, on the ground that migrant workers who are nationals of Contracting parties may be expelled on grounds that are not authorised by the charter.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Two decisions of the Federal Constitutional Court regarded issues of extradition. In the first case the complainant was charged in Peru to have been member of a criminal association. The Higher Regional Court declared the extradition to Peru admissible. The complainant argued that in Peru he would suffer Torture and mistreatment. The Federal Constitutional Court[62] refused to admit the constitutional complaint. A danger of a treatment contrary to human rights could only be presumed if there was a "reasonable probability" in the concrete case to become the victim of torture or other cruel, inhuman or humiliating treatment in the requesting state which was not the case here.

The second case regarded extradition to Italy for reasons of executing a criminal judgment that was delivered in the absence of the defendant. The Federal Constitutional Court considered that in a case of extradition the legality of the foreign criminal decision in principal had not to be proved. But possibly they had to prove whether the extradition and the acts on which it is based would be compatible with the binding standard of international law and with the inalienable constitutional principles of the public order in Germany. It would be of the elementary demands of the rule of law that nobody is allowed to become the mere object of a procedure, this especially with view to the requirement to a hearing in accordance with law. That would also be a question of human dignity. In the presenting case the defendant did not know anything on the fact of a criminal procedure against him in Italy and he did not have any possibility afterwards to get a hearing in accordance with law and to defend himself effectively. For these reasons the Federal Constitutional Court declared the order on the extradition as unconstitutional.

[62] Decision of 1 December 2004 – 2 BvR 879/03 –.

CHAPTER III : EQUALITY

Article 20. Equality before the law

No significant developments to be reported.

Article 21. Non-discrimination

Protection against discrimination

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

(1) The Human Rights Committee (see under Article 2), while taking note of the firm stance of Germany in favour of respect for human rights within the framework of the anti-terrorism measures it adopted subsequent to the events of 11 September 2001, expresses its concern regarding the effect of those measures on the situation of human rights in Germany, in particular for certain persons of foreign extraction, because of an atmosphere of latent suspicion towards them. Germany should ensure that anti-terrorism measures are in full conformity with the Covenant. Germany is requested to ensure that the concern of terrorism is not a source of abuse, in particular for persons of foreign extraction, including asylum-seekers. It is also requested to undertake an educational campaign through the media to protect persons of foreign extraction, in particular Arabs and Muslims, from stereotypes associating them with terrorism, extremism and fanaticism.

The Human Rights Committee is concerned that the Roma continue to suffer prejudice and discrimination, in particular with regard to access to housing and employment. It also expresses its concern at reports that Roma are disproportionately affected by deportation and other measures to return foreigners to their countries of origin. Germany should intensify its efforts to integrate Roma communities in Germany in a manner respectful of their cultural identity, in particular through the adoption of positive action with regard to housing, employment and education. It should guarantee the principle of non-discrimination in its practice relating to deportation and return of foreigners to their countries of origin.

(2) The European Commission against Racism and Intolerance (ECRI) has adopted its Third report on Germany on 5 December 2003 and made public on June 2004. It covers the situation as of December 2003. The Executive Summary of the very extensive and detailed report welcomes several activities of the German authorities. But in its view, in spite of the initiatives taken, racist, xenophobic and antisemitic violence continues to constitute an issue of concern for ECRI in Germany, affecting particularly asylum seekers, members of the Jewish communities, Roma and Sinti. Members of visible minority groups appear to be particularly susceptible to such violence. Further efforts are needed to ensure that non-citizens and persons of immigrant background enjoy genuinely equal opportunities in all fields of public life as the rest of the population of Germany. In this respect, an adjustment of the legal framework to combat racism and racial discrimination is still necessary. Progress is still needed in the field of recognising the positive role of immigration, as reflected, in part, in the stigmatisation of immigrants, asylum seekers and refugees in public debate. Antisemitism and Islamophobia, and prejudice and discrimination *vis-à-vis* visible minority groups and Roma and Sinti continue to pose serious challenges.

In this report, ECRI recommends that the German authorities take further action in a number of areas. It recommends, *inter alia*, that measures be continued and intensified to effectively counter racist, xenophobic and antisemitic violence. It recommends that further progress be

made in shaping immigration and integration policies which reflect the positive role of immigration and the fact that immigrants constitute an integral part of German society. ECRI also recommends that legislation against racism and racial discrimination be made more comprehensive and be implemented more effectively, notably in order for the racist dimension of offences to be brought more into light. In order to improve equal access and opportunities in such areas as employment, education and housing for minority groups, ECRI recommends the adoption of further initiatives, including in the field of legislation. It furthermore formulates recommendations aimed at ensuring that the rights of asylum seekers and persons with tolerated status in Germany are thoroughly respected.

Legislative initiatives, national case law and practices of national authorities

To date, the Council Directives 2000/43/EC, 2000/78/EC and 2002/73/EC, regarding measures of antidiscrimination, are not yet realized in Germany. But the governing parties have prepared the draft of a bill for an Act for Antidiscrimination. They have announced to present it in December 2004.

Fight against incitement to racial, ethnic, national or religious discrimination

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

For concluding observations see above. The German Institute for Human rights has organised a first follow-up meeting [Fachgespräch] taking part concerned institutions, ministries and NGO's.

Legislative initiatives, national case law and practices of national authorities

In the policy of the Federal Government the fight against right-wing extremism rates extremely high. The Government sees there a centre of gravity in domestic policy, because intolerance, racism and xenophobia disturb the inner balance of a democratic society. This high priority has also importance stating that the right-wing NPD captured 9.2 % of the vote in the state elections of Saxony in September 2004.

Regarding practices of the national authorities, there has to be mentioned the „Bericht über die aktuellen und geplanten Maßnahmen und Aktivitäten der Bundesregierung gegen Rechtsextremismus , Fremdenfeindlichkeit und Gewalt" of 2002 [Report on the actual and intended measures and activities of the Federal government against Rightwing-extremism, Xenophobia, Anti-Semitism and Violence].[63] Still at present it is an exemplary survey on the problems, issues and concrete practical measures. It sets great store on the responsibility of the civil society. One of the living activities is the Bündnis für Demokratie und Toleranz - gegen Extremismus und Gewalt [Alliance for Democracy and Tolerance – against Extremism and Violence].

The "Alliance for Democracy and Tolerance – against Extremism and Violence was founded by the Federal Government in 2000, under the overall responsibility of the Federal Ministry of Interior and the Federal Ministry of Justice. It has the following tasks:
Support of the advisory beard of the alliance, and preparation of its sessions; Pooling, co-ordination and documentation of the activities of its allies; Publication of the Alliance's activities and results achieved, performance of other administrative and current duties of the Alliance, and – important – point of contact for initiative groups and associations. The alliance functions as a network of state and non-governmental projects and initiatives for the prevention and combating of rightwing-extremist, xenophobic, anti-Semitic violence. Up to

[63] Bundestags-Drucksache 14/9519 of 14 May 2002.

now about 800 organisations, associations and initiatives have joined this alliance. The alliance itself give financial support to such initiatives, gives awards to examples of good practice and organises a big conference in Berlin every year on 23 May (Constitution Day). The alliance invites young people to that conference to exchange opinions and experiences and gives awards to selected projects. Under the roof of the alliance an action programme "Youth for Tolerance and Democracy –against Right-wing-Extremism, Xenophobia and Anti-Semitism" is carried out. Important elements are three programmes called XENOS – life and work in pluralism, ENTIMON – in common against violence and right-wing extremism, and CIVITAS – initiative against right-wing extremism in the new Bundesländer. These programmes started in 2001 and were funded with 50 million EUR and continued in the following years. – An annual report gives a vivid survey of actual activities, socially of young persons.

Good practices

The Government Report of 2002 and this Alliance are a very good practice.

Protection of Gypsies / Roms

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

See the above cited concluding observations.

Legislative initiatives, national case law and practices of national authorities

The First Report (1999) submitted by the Federal Republic of Germany under Article 25 of the European Framework Convention for the Protection of National Minorities Charter and the Second Report (2003) submitted under Article 15 of the European Charter for Regional Languages in form on this issue. A Second Report (2004) under Article 25 of the Convention is prepared at time. It will contain actual information.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

While acknowledging the prohibition of discrimination in the Basic Law (Articel 3), the Committee on the Rights of Child (see under Article 24) is concerned at the de facto discrimination against foreign children and at incidents of racial hatred and xenophobia that have a negative effect on the development of children. The Committee is also concerned that some of the Land disparities in practices and services provided and in the enjoyment of rights by children may amount to discrimination.

Article 22. Cultural, religious and linguistic diversity

Protection of linguistic minorities

Legislative initiatives, national case law and practices of national authorities

See the mentioned Second Report under Article 15 of the charter. No significant developments.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Federal Government in an answer on a parliamentary question has reported on the live situation of women and girls from Muslim families in Germany[64].

Article 23. Equality between man and women

Gender discrimination in work and employment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Germany had delivered the 5th Periodic Report according to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in November 2002. On 21 January 2004 the representative of Germany presented the report. The CEDAW Committee in its Concluding comments, among others (regarding violence against women see under Article 2), notes with appreciation the extensive network of institutions and mechanisms for gender equality at all levels of government, and the wide range of policies and programmes covering many areas of the Convention. It also notes with appreciation the integrated approach to gender mainstreaming and the recent inauguration of the Gender Competence Centre to support the introduction and implementation of gender mainstreaming at various levels, including business, policies and administration. – The Committee further commends Germany for adopting a substantial number of laws and amendments with a view to improving the legal position of women including, v. a., the Federal Act on Implementing the Concept of Equal opportunities between Women and Men. The Committee is pleased to note the active role played by NGO's working on gender equality and their cooperation with German authorities, including through regular consultations, membership in supradepartmental working parties, contribution to the legislative process and membership in the German delegation to the Commission on the Status of Women since the twenty-third special session of the General Assembly.

Principal areas of concern and recommendations were, among others: The Committee is concerned about the continuation of pervasive stereotypical and conservative views of the role and responsibilities of women and men. It recommends that policies be strengthened and programmes complemented, including awareness-raising and educational campaigns directed at women and men. While noting the "Agreement to promote the equal opportunities of women and men in private industry" of 2001, the Committee expresses concern at the high level of long-term unemployment of women, the increase in the number of women in part-time work and in low-paid and low-skilled jobs, the continuing wage discrimination women face and the discrepancy between their qualifications and occupational status. Similar to this the Human Rights Committee (see under Article 2) is concerned about wide disparities, in the private sector, of remuneration between men and women. The CEDAW Committee calls upon Germany to intensify its efforts to increase women's de facto equal opportunities in the labour market, including their access to full-time employment.

The CEDAW Committee is concerned, as the Human Rights Committee does, that women are underrepresented in the higher echelons of several other sectors of public life, particularly in the Civil service, the diplomatic service, science and research and academia.

[64] Antwort der Bundesregierung auf die keine Anfrage „Lebenssituation von Frauen und Mädchen aus muslimischen Familien in Deutscland", Bundstags-Drucksache 15/3598 of 15 July 2004.

Positive actions seeking to promote the professional integration of women

Legislative initiatives, national case law and practices of national authorities

(1) The CEDAW Committee has welcomed the extensive network of institutions and mechanisms for gender equality at all levels of government, and the wide range of policies and programmes. In September 2004 the Federal Ministry for Family Affairs, Senior Citizen, Women and Youth documented the status of the implementation of Gender Mainstreaming in the work of the Federal Government. An inter-ministries working group "Gender Mainstreaming" has been established. A working arrangement shall ensure the further implementation in all ministries. (See also www.gender-mainstreaming.net)

(2) An evaluation of activities implemented under the agreement of 2001 between the Federal Government and Central Associations of German Business to promote equal opportunities of women and men in private industry has been presented early in 2003 *(„*Bilanz 2003 der Vereinbarung zwischen der Bundesregierung und den Spitzenverbänden der deutschen Wirtschaft zur Förderung der Chancengleichheit von Frauen und Männern in der Privatwirtschaft", published by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, December 2003). It demonstrates that equal opportunities between women and men and the balance of family and profession has been promoted and strengthened in many areas.

But there still a lot has to be done. The German Federal President Horst Köhler said in his Inaugural Address to the German Bundestag on 1 July 2004: "Germany must become a country where equal opportunities for men and woman are a matter of course. That means in particular that woman must be able to rise to top positions in all areas of national life. In this respect Germany is a developing country. With my international experience, I can assure you, that is the case."

The wage discrepancy exists as well. A study of an international Consulting Company results[65] that woman in German companies earn only 78 % of the salary of men. That is one of the back places in international comparison.

Participation of women in political life

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The CERD- Committee appreciates that women's participation in political life has exceeded the critical threshold of 30 %.

Other relevant developments

International case law

Decision of 14 July 2004 of the Committee on the Elimination of Discrimination against Women (Communication No 1/2003, *Ms. B.-J. v. Germany):* The author of the communication had alleged that she was subjected to gender-bases discrimination under the statutory regulations regarding the law on the legal consequences of divorce (equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage) and that she had since continued to be affected by those regulations. In her view, the regulations systematically discriminate against older women with children who are divorced after long marriages. The Committee decided that the communication was inadmissible under article 4, § 1 for the author's failure to exhaust domestic remedies and under § 2 (e) because of the

[65] According to Frankfurter Allgemeine Zeitung of 6 November 1004.

disputed facts occurred prior to the entry into force of the Optional Protocol for Germany (15 April 2002) and did not continue after that date.

Legislative initiatives, national case law and practices of national authorities

An actual example of active policy implementing equality is the German army. In November 2004 the Bundestag has adopted an „Gesetz zur Durchsetzung der Gleichstellung von Soldatinnen und Soldaten der Bundeswehr (Soldatinnen- und Soldatengleichstellungsgesetz) [Act on Implementing the concept of equal opportunities between women and men as soldiers in the German Army].

Article 24. The rights of the child

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Germany had delivered its 2nd periodical Report according to the Convention on the Rights of Child in July 2002. The German Representatives presented the Report on 16 January 2004 to the Committee on the rights of Child. The Concluding observations of the Committee are very extensive and cover broad issues. Therefore they can be mentioned in this report only at certain points.

In light of the 1993 Vienna Declaration and Programme of Action, and in line with its previous recommendations (CRC/C/15/43, para. 22), the Committee recommends that the State party expedite the process for the withdrawal of the reservations and declarations it had made before the submission of its next periodic report and increase, in particular, its efforts to convince the Länder of the need to withdraw them (8). In light of its previous recommendations, the Committee recommends (10) that Germany:

(a) Reconsider the incorporation of the Convention into the Basic Law;
(b) Ensure, through an appropriate mechanism, that all national and Länder laws fully conform with the Convention;
(c) Ensure that adequate provision is made for the effective implementation of those recommendations, including through budgetary allocations.

The Committee recommends that Germany establish an adequate permanent national mechanism to coordinate the implementation of the Convention at the federal level, between the federal and the Länder levels and between the Länder (12).

It encourages the State party to consider the establishment of an independent national human rights institution, in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles, General Assembly resolution 48/134, annex), taking into account the Committee's general comment No. 2 (2002) on the role of national human rights institutions in the protection and promotion of the rights of the child, to monitor and evaluate progress in the implementation of the Convention at the national and local levels. In addition, the Committee recommends that the institution be allocated adequate human, technical and financial resources and that its mandate include the power to receive, investigate and address effectively complaints of violations of child rights in a child-sensitive manner (16).

It recommends that further efforts be made to ensure the implementation of the principle of respect for the views of the child. In this connection, particular emphasis should be placed on

the right of every child to participate in the family, at school, within other institutions and bodies, and in society at large, with special attention to vulnerable groups. This general principle should also be reflected in all policies and programmes relating to children. Awareness-raising among the public at large as well as education and training of professionals on the implementation of this principle should be reinforced (29). Regarding the right to an adequate standard of living the Committee remains concerned at the prevalence of poverty, mainly affecting large families, single-parent families, families of foreign origin and disproportionally families from the eastern part of Germany, as indicated in the eleventh Youth Report (50). Regarding violence see under Article 4 (protection of the child against ill-treatments).

Legislative initiatives, national case law and practices of national authorities

The German Institute for Human Rights has organised a first follow-up meeting [Fachgespräch] taking part concerned institutions, ministries and NGO's.

The Federal Ministry for Family Affairs, citizens, Women and Youth has prepared the draft of a National Action Plan for Germany. For the Federal Government it will become an important instrument for the implementation of the Convention and of the concluding observations.
Germany has ratified the Optional Protocol to the Convention on the Rights of Child on the involvement of children in armed conflict after consent by Law of 16 September 2004 (BGBl. II 2004 p. 1354 [Federal Law Gazette part II]).
The experts were asked for statistics regarding the frequency and the kinds of situations where children were removed from their family. Here an example:

In the year 2001 altogether 31,438 children were removed from their family (24,615 with German nationality, 6,823 with other nationality). Reasons were:
Excessive charge of the parents or of one of them 10,754; problems in school or education 1776; neglect 2,793; punishableness of the child 2,302; other reasons 2,547.
In an answer to a parliamentary question the Federal Government has given a report on the Improvement of the Prospects for the Future of Boys[66].

Article 25. The rights of the elderly

Specific measures of protection for the elderly (ill-treatment and isolation)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Human Rights Committee in its Concluding observations of 4 May 2004 (see under Article 2) notes the vulnerable situation of elderly persons placed in long-term care homes, which in some instances has resulted in degrading treatment and violated their right to human dignity. Germany should pursue its efforts to improve the situation of elderly persons in nursing homes (§ 17).

Legislative initiatives, national case law and practices of national authorities

In 2002 the Federal Government had presented to the Bundestag a Report of Experts: "Vierter Bericht zur Lage der älteren Generation in der Bundesrepublik Deutschland: Risiken, Lebensqualität und Versorgung Hochaltriger – unter besonderer Berücksichtigung demenzieller Erkrankungen" [Forth Report on the situation of the elder generation in the Federal Republic of Germany: risks, quality of life and care for very old persons – especially

[66] „Verbesserung der Zukunftsperspektiven für Jungen", Bundestags-Drucksache 15/3607 of 16 June 2004.

considering mental deficiencies][67]. The Bundestag has considered the report and accepted a resolution in which it appreciates the report and stresses special issues, namely strengthening of research regarding elderly persons (Gerontology), residing and life in old age, medical care and care by nursing staff, risks of mental deficiency and the life with mental illness. Recommendation and report of the committee for Family, Senior persons, Women and Youth of 10 November 2004 (Bundestags-Drucksache 15/4192)..

Article 26. Integration of persons with disabilities

Professional integration of persons with disabilities: positive actions and employment quotas

Under Article 15 there was already reported the Act for the improvement of training and employment of severely handicapped persons of 23 April 2004. It modifies the Book IX of social Law – Rehabilitation and Participating of disabled persons -. According to these regulations, versus alia, the employee can get subsidies for integration up to 70 % of the wages which he pays to the disabled. The Act of 30 April 2004 improves the advising to the employees and develops the special services.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In March 2004 the Federal Government presented a governmental "Bericht über die Beschäftigung schwerbehinderter Menschen im öffentlichen Dienst des Bundes [Report of the Federal Government on the employment of severely handicapped persons in the Federal Civil Service][68]. According to the report, the offices of the Federal had a part of 6.7 % of employed severely handicapped persons. In the private sector was the employment quota 3.4 % in 2001.

[67] Bundestags-Drucksache 14/8822.
[68] Bundstags-Drucksache 15/2734 of 18 March 2004.

CHAPTER IV : SOLIDARITY

Article 27. Workers' right to information and consultation within the undertaking

No significant development to be reported.

Article 28. Right of collective bargaining and action

Social dialogue

The social dialog took part on many levels. It is going on.

The right of collective action (right to strike) and the freedom of enterprise or the right to property

Legislative initiatives, national case law and practices of national authorities

Regarding the private level there were no relevant legislative initiatives occurring the right to collective action. The balance between the right of collective action and the freedom of enterprise or the right of property, of course, is not an easy one. But in every case or conflict, as it was possible to observe, the parties in the end were able to find reasonable results.
Collective conflicts were solved without intervention of the judiciary.

The right of collective action (right to strike) and the continuity of public services

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Committee of Social Rights again has criticised that in Germany civil servants are not allowed to strike.

Legislative initiatives, national case law and practices of national authorities

In the period of scrutiny there were no significant changes in the structure of the civil service. Some Länder extended the weekly working time.

Article 29. Right of access to placement services

Access to placement services

Legislative initiatives, national case law and practices of national authorities

The difficult economical situation and the huge numbers of unemployed persons lead to a number of reform proposals and adopted law. Important are the Drittes Gesetz für moderne Dienstleistungen am Arbeitsmarkt of 23 December 2003 (BGBl. I p. 2848) and the Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt of 24 December 2003 (BGBl. I p. 2954), both very extensive. Some important regulations take effect on the 1 January 2005.
They cannot explained and be presented within this report. This applies as well to the considerations and measures concerning the reformation of the public social security system.

Article 30. Protection in the event of unjustified dismissal

Remedies against the decision of dismissal

It was not possible to collect relevant information in order to be able to deliver an informative account on the grounds for invalid dismissals, the compensation in case of unjustified dismissal or in cases of insolvent employers and on the use of the right to a remedy by workers who were dismissed.

Article 31. Fair and just working conditions

Health and safety at work

Legislative initiatives, national case law and practices of national authorities

In the end of 2003 the Federal Government has presented a report on the status of security and health at work and on accident victims and occupational diseases in the Federal Republic of Germany in 2002. It is an interesting and informative survey of 60 pages on the stand of security and health at work[69].
Further I have to mention the Gesetz zur Neuordnung der Sicherheit von technischen Arbeitsmitteln und Verbraucherprodukten of 6 January 2004 (BGBl. I p. 2). Its main content is the Gesetz über technische Arbeitsmittel und Verbraucherprodukte (Geräte- und Produktsicherheitsgesetz). It implements many relevant EU Directives.

Working time

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Judgment of the European Court of Justice of 5 October 2004 regarded, as a preliminary ruling, the interpretation of Article 2 of Council Directive 89/391/EEC of 12 June 1998 on the introduction of measures to encourage improvements in the safety and health of workers at work and of Articles 1(3), 6 and 18(1)(b)(i) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (here: emergency service of the German Red Cross).

Article 32. Prohibition of child labour and protection of young people at work

No significant developments to be reported.

Article 33. Family and professional life

Family life and professional promotion

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In line with articles 18 (3) and 25 of the Convention and in light of the recommendations of the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.68, para. 44), the Committee on the rights of child (see under Article 24) recommends that the State party take

[69] Bericht der Bundesregierung über den Stand von Sicherheit und Gesundheit bei der Arbeit und über das Unfall- und Berufskrankheitengeschehen in der Bundesrepublik Deutschland. Bundestags-Drucksache 15/2300 of 29 december 2003.

measures to establish more childcare services to meet the needs of working parents, and to set up national standards to ensure quality childcare is available to all children.

Legislative initiatives, national case law and practices of national authorities

It has be reported of two important and successful initiatives of the Federal Minister for Family Affairs, Senior citizens, Women and Youth, Renate Schmidt: Already in the middle of 2003 she grounded together with the Bertelsmann-Foundation and business Associations the "Alliance for the Familiy". The idea is: Companies learn that family-friendliness is not always expensive.
The other initiative was founded in the beginning of 2004 and called "Local Alliances for Family". On the local level City-authorities, companies, chamber of handicrafts, chamber of commerce, churches and social associations shall cooperate in order common to improve the situation of families. Up to November 100 of such alliances were established – and with great success.

Good practices

These are very good practices.

Employers' initiatives to facilitate the conciliation of family and professional life

See above the ministerial initiatives. Many companies have learned of them and develop own ideas for family-friendliness and a work-life-balance.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion (in general)

What was said under Article 29, in a similar way applies also for the field of social security and the relevant reforms. In the essence it is the question of social justice. The public discussion on this still has to go on.

Social assistance for undocumented foreigners and asylum seekers

Legislative initiatives, national case law and practices of national authorities

The Zuwanderungsgesetz (see under Article 18) contains also modifications of social law. But these are more adaptations to the new Aufenthaltsgesetz than substantial changes or improvements of the situation of foreigners and asylum seekers in the field of social assistance.

Article 35. Health care

Access to health care

In the framework of this report it is not possible to describe the complicated and controversial reforms on the field of health.

Article 36. Access to services of general economic interest

There could new developments not be found.

Article 37. Environmental protection

Right to a healthy environment

Legislative initiatives, national case law and practices of national authorities

Important legislative initiatives are not to be seen. In September the leading German Environment Associations criticised the environment Policy of the Federal Government.

In November the Federal Government has presented a Bericht der Bundesregierung zum Jahresgutachten 2003 "Welt im Wandel – Energiewende zur Nachhaltigkeit" of the Scientific Advisory Board of the Federal Government Global Environmental Changes. [70]

The right to access to information in environmental matters

Legislative initiatives, national case law and practices of national authorities

The Parliament has adopted a new Umweltinformationsgesetz [Environmental Information Law]. [71] It implements the EU Directive 2003/04/EG and is a contribution to the implementation of the targets of the Aarhus Convention. The free access to environmental information is extended. The new law precises the term environmental information.

Article 38. Consumer protection

Protection of the consumer in contract law

Legislative initiatives, national case law and practices of national authorities

Gesetz gegen den unlauteren Wettbewerb UUWG) [Unfair Competition Act] of 3 July 2004[72]. It is new version of an elder law. The aim of this law is the preservation of a functioning market economy by combating forms of competition which are considered to be unfair. The new Act includes the consumers in the protection area as equal partners.

[70] Report of 8 November 2004, Bundestags-Drucksache 15/4155.
[71] Promulgated as Gesetz zur Neugestaltung des Umweltinformationsgesetzes und zur Änderung der Rechtsgrundlagen zum Emissionshandel vom22. December 2004 (BGBl. I p. 3704). It implements the EU Directive 2003/04/EG
[72] BGBl. I p. 1414.

CHAPTER V : CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

Right to vote and to stand as a candidate at elections to the European Parliament

Legislative initiatives, national case law and practices of national authorities

There were no special initiatives adopted in order to improve the electoral participation on non national residents.

Article 40. Right to vote and to stand as a candidate at municipal elections

Right to vote and to stand as a candidate for EU citizens non nationals of the member State

Legislative initiatives, national case law and practices of national authorities

In 2004 municipal elections in Germany took place in the Länder Baden-Württemberg, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Thuringia and North Rhine-Westphalia. There don't exist any statistics about the numbers or the proportions of EU foreigners as electors or as candidates.

Right to vote and to stand as a candidate at municipal elections for third country nationals

Legislative initiatives, national case law and practices of national authorities

According to German Constitutional Law the right to vote and to stand as a candidate to the local elections applies only for persons who are nationals of an EU member state. Article 28 § 1 sentence 3 reads as follows: „In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law."

Germany does not plan to amend the constitution and to extend this right to third country nationals.

Article 41. Right to good administration

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 43. Ombudsman

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 44. Right to petition

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residence

Right to social assistance for the persons who have exercised their freedom of movement

The right to social assistance depends of whether the person took place of residence and has himself/herself regularly registered with the local authority.

Prohibition to enter certain zones or portions of the national territory during particular events

Legislative initiatives, national case law and practices of national authorities

No case has become known, during the period of scrutiny, in which any use has been made of Article 2 (2) of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985.

Article 46. Diplomatic and consular protection

Decision 96/409/CFSP of 25 June 1996 on the establishment of an emergency travel document

Legislative initiatives, national case law and practices of national authorities

The Directive 95/553/EC of 19 Dec 1995 was ratified by Germany on 17 Jul 1996 and was realized by an issuing (Runderlass) of the Foreign Office.
The Decision 96/409/CSFP of 25 Jun 1996 as well became effective for Germany. It was realized as far as a realization was needed. The practical realization may be still worked on.

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

Access to a court

Legislative initiatives, national case law and practices of national authorities

According to Article 19 (4) Basic Law every person may have recourse to the courts, if her rights should be violated by public authority. An equivalent applies for civil and commercial issues, according to the constitutional principle of the rule of law. The different Laws of procedure are conforming to these constitutional Rules. There is no need for procedural improvements

Interim judicial protection

Legislative initiatives, national case law and practices of national authorities

The right to interim judicial protection exists in all Laws of procedure. No new developments happened.

Legal aid / judicial assistance

Legislative initiatives, national case law and practices of national authorities

In October 2004 the Bundestag adopted an Gesetz zur Umsetzung gemeinschaftsrechtlicher Vorschriften über die grenzüberschreitende Prozesskostenhilfe in Zivil- und Handelssachen [Act implementing rules of community law on border-crossing Legal Aid in Civil- and commercial matters][73]

Independence and impartiality

Reasons for concern

The Düsseldorf Regional Court on 22 July 2004 promulgated its Judgment – an acquittal – in the Case Mannesmann and others. It has been called the biggest business case since world war two. After handing down her ruling, the presiding judge made a remarkable personal statement about the massive attempts of politicians, business leaders and many other people to influence the court's decision. Telephone terror, threats and vilifying letters were commonplace.

Article 48. Presumption of innocence and rights of defence

In Germany all criminal courts of the first and second instance are courts of the (16) Länder. It was not possible to observe whether and to what extend criminal proceedings have taken place (and can be reliable reported) in which to the debit of the defendant problems appeared, regarding means of the proof, the right to a legal counsel or the right to an interpreter.

There were no modifications of criminal procedure law during the period of scrutiny.

[73] Promulgated as Act of 15 December 2004 (BGBl. I p. 3392).

Article 49. Principles of legality and proportionality of criminal offences and penalties

It was not possible to establish special consequences of the qualification of a criminal offence as being of "terrorist" criminality or of the qualification of certain criminal offences as being linked to forms of "organised" criminality or to observe relevant practices. This applies also for the question whether prosecuting authorities or courts have given a criminal qualification to their behaviour, extending the meaning of such qualification.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No significant developments to be reported.

APPENDIX: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (O.J. C-364 OF 18.12.2000)

CHAPTER I: DIGNITY

Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
a) the free and informed consent of the person concerned, according to the procedures laid down by law,
b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
c) the prohibition on making the human body and its parts as such a source of financial gain,
d) the prohibition of the reproductive cloning of human beings.

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

CHAPTER II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 9: Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15: Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 18: Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19: Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III: EQUALITY

Article 20: Equality before the law

Everyone is equal before the law.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic
features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views

freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25: The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26: Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER IV : SOLIDARITY

Article 27 : Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Article 28: Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29: Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30: Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32: Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33: Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34: Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient
resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35: Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36: Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 37: Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38: Consumer protection

Union policies shall ensure a high level of consumer protection.

CHAPTER V: CITIZENS' RIGHTS

Article 39: Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40: Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
a) the right of every person to be heard, before any individual measure which would affect him or her
adversely is taken;
b) the right of every person to have access to his or her file, while respecting the legitimate interests of
confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43: Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Article 44: Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered

office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence
1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46: Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

CHAPTER VI : JUSTICE

Article 47 : Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48: Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49: Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission
which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

CHAPTER VII: GENERAL PROVISIONS

Article 51: Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 52: Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under

the conditions and within the limits defined by those Treaties.

Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54: Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.