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

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **GERMANY**

IN 2005

submitted to the Network by **Dr. Wolfgang HEYDE**

on 15 December 2005

Reference: CFR-CDF/DE/2005

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The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

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 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 (suppléant Birgitte Kofod-Olsen) (Danemark), Henri Labayle (France), 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), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. Tchèque), Edita Ziobiene (Lituanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.
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 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 (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), 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), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
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TABLE OF CONTENTS

PRELIMINARY REMARKS

I. Institutions for the protection of human rights

I. Institutions for the protection of human rights
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, in particular have 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.[1] 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 states (*Länder)* and in local communities, as well as in groups within society, in order to further the mutual understanding of Germans and

[1] See Annual Report 2003/2004 of 19 April 2005, Bundestags-Drucksache 15/5252, reported in detail with Article 8.

foreigners. The commissioner shall submit a report on the situation of foreigners in Germany to the German Bundestag every two years.[2]

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 and to engage in international networking and co-operation. The institute sees itself as a platform for the dialogue between politicians, NGO's, the media and academia and it considers the promotion of human rights activities by members of the civil society to be an important task. 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 2004, published in August 2005, contains a list of numerous important documentations.

The Institute has also been helpful in preparing the Network Reports on the Situation of fundamental rights in Germany.

Germany has accepted, as other EU member states, reporting obligations under all 6 of 7 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 criticisms and recommendations. In 2004, for the first time, it organised follow-up meetings [*Fachgespräche*], taking part concerned institutions, ministries and NGO's, regarding concluding observations[3].[4] During the period of scrutiny, on 3 December 2004, the corresponding meeting on the Concluding Observations of the Human Rights Committee: Germany, 4 Mai 2004 (CCPR/CO/80/DEU) according to the International Covenant on Civil and Political Rights (ICCPR) took place.[5]

The Institute arranged a number of conferences and meetings in 2005, amongst others on human rights and the fight against terrorism on the domestic level, on the human rights of refugees (together with the UNHCR), and the Optional Protocol to the UN Convention against Torture. Publications included a study on planning and evaluating human rights dialogues, a handbook on the individual complaint mechanism under the UN-Convention against Racism (ICERD), the German version of the COMPASS-handbook on human rights education and a compilation of the General Comments of the UN treaty bodies of the core human rights treaties, translated to German and accompanied by introductions.

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[2] See Sixth Report of 22 June 2005, Bundestags-Drucksache 15/5826, considered with Article 18, 19 and others.

[3] Refer to Frauke Lisa Seidensticker, 2005, Examination of State Reporting by Human Rights Treaty Bodies: An Example of Follow-Up at the National Level by National Human Rights Institutions, Berlin: Deutsches Institut für Menschenrechte

[4] Regarding the German state practice in general: Klaus Stoltenberg, Aktuelle Änderungen der Staatspraxis beim Umgang mit den deutschen Staatenberichten und den Schlussfolgerungen der Menschenrechtsausschüsse der Vereinten Nationen, in: Jahrbuch Menschenrechte 2006, ed. by Deutsches Institut für Menschenrechte and others, Frankfurt/Main 2005, page 78 – 92.

[5] Regarding the response by the German Government to paragraph 23 first sentence of the concluding observations, see with Article 2.

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.

Good practices

The System of the German Institute for Human Rights, to organise follow-up meetings [Fachgespräche] regarding concluding observations of European and UN Human Rights bodies in order to discuss their criticisms and recommendations together with concerned institutions, ministries and NGO's in Germany might be a good example for other Member States.

5. Human Rights Forum (*Forum Menschenrechte*)

The Human Rights Forum 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 6 September 2005, looking at the Election Day (18 September, see below n° IV), the Forum presented a paper "Expectations to the coming policy". It points out a lot of challenges regarding an active human rights policy.

II. Period of scrutiny, Germany a federal state

This report covers evolutions in the period between 1 December 2004 and 1 November 2005. 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 November 2005 are included.

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 be very difficult (and blast the scope of this report). Therefore it can only be presented in examples.

III. Important reports of the Government and official institutions

- In August 2005 the Government delivered its Statement of the Federal Republic of Germany on the Conclusions and Recommendations of the Committee against Torture in

regard to Germany dated 11 June 2004 (CAT/C/CR32.7 Concluding Reservations/Comments).[6]

- In December 2004 the Federal Government presented the "Second Report submitted by the Federal Republic of Germany under Article 25, paragraph 2, of the Council of Europe's Framework Convention for the protection of National Minorities".
- 23rd Report submitted by the Government of the Federal Republic of Germany for the period from 1 January to 31 December 2004 in accordance with the provisions of Article 21 of the European Social Charter, the instrument of ratifications of which was deposited on 27 January 1965.

During the period of scrutiny many informative reports were published by the the Government and official institutions. They are considered with the relevant Articles. Some of them shall be already mentioned at this place:

- Siebter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen (Seventh Report of the Federal Government on its Human Rights policy in foreign relations and in other spheres of policy of 17 June 2005, Bundestags-Drucksache 15/5800

- Tätigkeitsbericht 2003 und 2004 des Bundesbeauftragten für den Datenschutz – 20. Tätigkeitsbericht – [Annual Report 2003/2004 of the Federal Commissioner for Data Protectio] of 19 April 2005, Bundestags-Drucksache 15/5252

- Sechster Bericht über die Lage der Ausländerinnen und Ausländer in Deutschland [Sixt Report of the Federal Government Commissioner for Immigration, Refugees and Integration on the Situation of Foreigners in German] of 22 June 2005, Bundestags-Drucksache 15/5826

- Bericht der Bundesregierung über die Lage behinderter Menschen und die Entwicklung ihrer Teilhabe [Report of the Federal Government on the Situation of Disabled Persons and the development of their Participation] of 16 December 2004, Bundestags-Drucksache 15/4575

- Sozialbericht 2005 [Report on Social Affairs 2005] of the Federal Government of 11 August 2005, Bundestags-Drucksache 15/5955

- Jugend in Deutschland [Youth in Germany], Reply of the Federal Government on a major interpellation, Bundestags-Drucksache 15/5028 of 9 March 2005.

IV. Early elections to the Bundestag

On 21 July 2005 the Federal President Horst Köhler decided to dissolve the German Bundestag. He ordered that the election should take place on 18 September.[7] On 1 July Chancellor Gerhard Schröder had lost a vote of confidence and proposed the dissolution of the Bundestag to the Federal President[8]. The Federal Constitutional Court ruled in a 7-to-1-vote of 25 August 2005 that the decision of the Federal President was in compliance with the constitution.

[6] See with Article 4.
[7] See BGBl. 2005 part I p 2169 and 2170.
[8] The German constitution denies Parliament the right to dissolve itself, a safeguard against political instability. The only way to make possible early elections follows Article 68 (1) Basic Law that reads:
"If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. …."

In the election the Christian Democrat Union and the Christian Social Union won a slight majority opposite the Social Democratic Party. After intensive discussions on whether the previous chancellor Gerhard Schröder or the head of the Christian Union Angela Merkel should serve as chancellor, Merkel reached agreement with the Social Democrats that she should become German chancellor in a grand coalition. On 22 November the German Bundestag by the majority of its members elected Angela Merkel as Federal Chancellor for the next four years. On 30 November she delivered her first major address and gave a broad outline of the program of the grand coalition. She added a few rare personal notes. With others she said:"The biggest surprise of my life was freedom" (alluding to her background in East Germany). "I expected the Wall. I did not expect freedom. And once you have had such a wonderful surprise in your life, then you think anything is possible. …. Let us dare to have more freedom".

V. 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

CHAPTER I. DIGNITY

Article 1. Human dignity

Legislative initiatives, national case law and practices of national authorities

At the Federal Constitutional Court is pending a constitutional complaint regarding the Luftsicherheitsgesetz [Air Safety Act] of 11 January 2005. It causes questions of the compatibility with the guarantee of human dignity and the right to life. See for this with Article 2.

Article 2. Right to life

Euthanasia

Legislative initiatives, national case law and practices of national authorities

In 2004 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 had wrote a 54-pages report containing recommendations for modifications of the German Civil Code and the Penal Code[9]. In November 2004 the Minster of Justice presented basic points to strengthen patient's rights and 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 parliamentarians drew the issue close to themselves. Probably a group of members of the Parliament intends to present an own bill. The Enquete-Commission "Ethik und Recht der modernen Medizin" [Ethics and Right of the modern Medicine] has intensive discussed the problems of active, passive, assisted suicide and of dying with human dignity[10]. The Commission intends to continue the work the in the new 16th term. Besides this the lively public discussion on the topic is going on.

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.

Domestic violence

Legislative initiatives, national case law and practices of national authorities

There are no significant developments to be reported. I would like, however, to remember what was written in the Report 2004: The violence against women as ever remains 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

[9] Bericht der Arbeitsgruppe „Patientenautonomie am Lebensende „ vom 10. Juni 2004, Ethische, rechtliche und medizinische Aspekte zur Bewertung von Patientenverfügungen.

[10] See Bericht der Enquete-Kommission Ethik und Recht der modernen Medizin – Über den Stand der Arbeit – of 6 September 2005, Bundestags-Drucksache 15/5980, p. 67 and 84. In September 2004 the Commission had presented a „Zwischenbericht Patientenverfügungen", Bundestags-Drucksache 15/3700..

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:

Working together to combat domestic violence [Gemeinsam gegen häusliche Gewalt]. Cooperation, intervention, research. Findings of the evaluation research assessing intervention projects against domestic violence;

Health, Well-Being and Personal Safety of Women in Germany [Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland]. A Representative Study of Violence against Women in Germany – Summery of the central research results –;

Violence against men [Gewalt gegen Männer]. Personale Gewaltwiderfahrnisse von Männern in Deutschland – Ergebnisse der Pilotstudie -.

Positive aspects

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

Other relevant developments

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

Response by the Government of the Federal Republic of Germany to paragraph 23 first sentence of the concluding observations of the United Nations Human Rights Committee to the fifth periodic report of Germany under article 40 of the International Covenant on Civil and Political Rights dated 30 March 2004 (CCPR/CO/80/DEU)

In Paragraph 11 of the concluding observations the Committee notes 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 reiterates that the applicability of the regime of international humanitarian law does not preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of its agents outside their own territories. The Commission 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.

In the beginning of January 2005 the Federal Government delivered the following statement:
Pursuant to Article 2, paragraph 1, Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction.
Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.
Germany's international duties and obligations, in particular those assumed in fulfilment of obligations stemming from the Charter of the United Nations, remain unaffected.
The training it gives its security forces for international missions includes tailor-made instruction in the provisions of the Covenant.

Legislative initiatives, national case law and practices of national authorities

In January 2005 the Luftsicherheitsgesetz [Air Safety Act] was promulgated[11].]. 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 enables lives to be sacrificed for the good of other lives. 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 Parliament [Deutscher Bundestag] had adopted the law on 18 June already and it had rejected an objection of the Federal Council [Bundesrat] on 24 September 2004. The Federal President, however, had needed much time to prove the constitutionality of the law. In the end he certified the Act, but recommended to evoke the Federal Constitutional Court.

Lawyers and a pilot imposed a constitutional complaint. The possibilities of Sections 13 to 15 of the Air safety Act would infringe to their fundamental rights of human dignity and life. The Act would make them a mere object of the state. – On 9 November 2005 the Constitutional Court held an oral hearing. The judgment is expected in spring 2005.

Article 3. Right to the integrity of the person

Breaches of the right to the integrity of the person

Legislative initiatives, national case law and practices of national authorities

There were a lot of public discussions on embryonic search and the limits of cloning search, but no real new development.

Rights of the patients

Legislative initiatives, national case law and practices of national authorities

(1) The Zweites Gesetz zur Änderung des Betreuungsrechts [Second Act for Modification the Law of Supervision][12] , v. a., by a supplement of Section 1896 Cicil Code clarifies that it is noct allowed to order supervision against the free will of a person of age.

(2) 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. I refer to those comments.

On 10 August 2005 the Higher Regional Court Celle[13] delivered an interesting order in a case of supervision law regarding forced medical treatment. The patient had expressly declared that she didn't wish a special psychiatric treatment. The doctors and the supervisor were of the opinion that for healthy reasons this treatment would be nevertheless necessary. The lower courts therefore had declared the treatment as admissible. The Higher Regional court held that in this field of a infringement in fundamental rights the lower courts had not done a severe examination of the commensurability. Also the patent's order and its content would have to be proved better.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

[11] Law of 11 January 2005, BGBL. 2005 part I p. 78.
[12] Of 21 April 2005 (BGBl. 2005 I page 1073).
[13] Decision 10 August 2005 – 72 XVII F 447 Amtsgericht H. – .

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.

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

Conditions of detention and external supervision of the places of detention

Penal institutions and institutions for the detention of persons with a mental disability

Legislative initiatives, national case law and practices of national authorities

The condition of detained persons

(1) The legal status of prisoners results from the Strafvollzugsgesetz [Prison Act] (entered into force on 1 Jan 1977). It is federal law. But there is no central prison authority in Germany, but rather the individual Federal Länder operate the prison service on their own responsibility within the statutory framework. Section 2 of the Prison Act defines the objective of prison that "by serving prison sentences prisoners shall be enabled in future to lead a life in social responsibility without committing criminal offences". Prison is therefore to be oriented along the lines of the resocialisation of inmates. As well as this aim, the Act also refers to a further task, namely that prison sentences are to serve to protect the public from further crime.
There is a special system of sanctions under the German legal order for criminal offences committed by juveniles and adolescents, i.e. those who were not yet 21 years of age at the time of the offence. Youth custody is therefore to be enforced in a youth custody centre (section 92 subsection 1 of the Youth Courts Act), so that there is a youth prison system separate from the adult prison system. Of the 221 prisons in Germany, 29 are youth custody centres.

(2) The Prison Act stipulates that inmates are only to be subject to such restrictions on their liberty as are laid down in that Act (section 4 subs. 2). Unless specifically provided in the Act, only such restrictions may be imposed on inmates which are indispensable for maintaining security or to prevent a serious disturbance to the order in the prison. This means that the inmates' general legal position may not be worse than that of individuals living outside prison. Thus, the Fundamental Rights granted to individuals by the Basic Law of the Federal Republic of Germany apply equally to prison inmates, unless the Prison Act connects restrictions on freedom with incarceration. From both a legal and practical point of view, inmates' rights inter alia to respect of their human rights, their right to life and physical integrity, the right to equality of treatment, freedom of faith, of conscience, and freedom to profess a religion, or for instance on principle the guarantee of legal protection provided for in the Basic Law, are not subject to restriction (see e.g. sections 24, 28, 29, 67-69). This guarantee of legal protection means that inmates are not under an obligation to accept measures on the part of the prison authorities which they regard as having been to their detriment in an inadmissible manner without having them examined. Firstly, the Prison Act provides in this respect that inmates are to be afforded the right to approach the prison governor with requests, suggestions and complaints on matters concerning themselves (section 108). If a representative of the controlling authority inspects the prison, it is to be ensured that inmates can also approach them. Beyond this, any inmate who feels that his or her rights have been violated by a measure carried out by the prison authority, or by its refusal, has the right to apply for a court decision (section 109). Written and oral communication with defence counsel is not subject to restriction. Correspondence with counsel and visits by the same are therefore also not monitored.

(3) The statistic per 31 August 2005 seems to show that there is no overpopulation. Together 79,780 places with 74,519 inmates. But the capacity of the open prisons is not fully used (12,337 places and only 10.576 inmates). On the other hand the prisoners on leave have to be considered. This results that some prisons are in deed a bit overcrowded. In the result this regards about 800 inmates. That is no more than about 1 %.

(4) In Germany there are no statistics on observations of ill-treatment of prisoners.

But see below under section "Fight against the impunity of persons guilty of acts of torture" the German statement regarding recommendation in paragraph 5 (b) of the Conclusions and Recommendations of the CAT.

(5) The Regional Court Bautzen decided a case regarding the manner of accommodation in a prison[14]. An inmate had complaint on the matters of his placement and applied for a court decision. The Regional Court held that in this special case the manner of accommodation would have violated the complainant's human dignity.

Centres for the detention of foreigners

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

The **Committee against Torture** had examined the third periodic report of the Federal Republic of Germany (CAT/C49/Add.4) at its 600th and 603rd meetings (CAT/C/SR.600 and 603), which were held on 7 and 10 May 2004, and adopted its conclusions and recommendations on 11 June 2004. In paragraph 6 of the conclusions and recommendations the Committee requested that the Federal Republic of Germany provide information in response to the recommendations in paragraph 5 (a), (b), (e), and (f) within one year. – V.a., the Committee expressed its concern regarding the legal controls over and training of private security companies that are used to provide security at certain detention facilities at the Frankfurt am Main airport (section C no. 4 (e) of its conclusions and recommendations). Based upon this it made in section D paragraph 5 (f) a recommendation regarding the employees of private security companies engaged by the State.

The Federal Republic of Germany on 5 August 2005 submitted the following statement (v.a.):The private security company active at the Hessian initial intake facility at the Frankfurt/Main airport was commissioned by the federal Land of Hesse on its own authority. The Federal Government did not exert any influence over this.

The security company was carefully selected by the federal Land of Hesse. The federal Land of Hesse imposed conditions on the company from the outset and set requirements that had to be fulfilled in order for it to be allowed to exercise the activities. It was made clear that the Hessian initial intake facility at the Frankfurt/Main airport was a sensitive facility with a special status. In addition, the Land of Hesse is represented by its own personnel at the airport accommodations. This includes four trained social workers who guarantee continuous care of the persons housed there. Further, the asylum-seekers are provided medical and pastoral care.

Both as to functional matters as well as to disciplinary ones, the private security workers are also under the authority of the head of the Hessian initial intake facility at the Frankfurt/Main airport, so that at all times it is guaranteed that the security services are properly carried out.

In the case of violations of duty or attacks by employees of the security company, they will be held accountable under criminal law. The protection of the standards of general criminal law

[14] Decision of 18 July 2005 – 2 StVR 133/05 – .

are available to the persons affected, as is true in other cases as well. Inmates of the Hessian initial intake facility at the Frankfurt/Main airport have the possibility of initiating a criminal prosecution regarding the offence by the public prosecution office through filing for criminal prosecution or filing a report of a crime. If filing for prosecution is not necessary pursuant to the Criminal Code, a criminal law investigation will be initiated *ex officio* by the public prosecution office.

Legislative initiatives, national case law and practices of national authorities

(1) Departure facilities for foreigners
Section 61 para 2 of the new Residence Act (see with Article 18) authorises the Länder to establish departure facilities. "The Länder may establish departure facilities for foreigners who are unappealably obliged to leave the Federal territory. At such departure facilities, the willingness to leave the Federal territory voluntarily should be promoted through support and counselling and accessibility for authorities and courts and implementation of the departure procedure should be ensured." This expressly authorisation is new. Some Länder, however, did practise it already before.

(2) Detention for expulsion of minor persons
A request of the Federal Ministry of Interior to the Länder results that in some Länder minor persons are taken in such a detention, but only in the age of 16 to 17 (Paper of the Federal Ministry of 30 May 2005).
According to a statistic of the Federal Ministry of Justice at the fixed day 31 August 2005 in the whole 1,001 foreigners were in detention for expulsion.

Fight against the impunity of persons guilty of acts of torture

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

Regarding this topic, the CAT recommendation paragraph 5 (f) and the relating statement of the German Government of 5 August 2005 has to be reported.
The Committee had recommended that the Federal Republic of Germany, "... take all appropriate measures to ensure that criminal complaints lodged against its law enforcement authorities regarding ill-treatment are resolved expeditiously, in order to resolve such allegations promptly and avoid any possible inference of impunity, including in cases where counter-charges are alleged;"

The Federal Government pointed out that in its responses to the Committee's questions regarding the third periodic report, the Government had previously stated that the, at times, long duration of investigation and prosecution proceedings against public officials would not be due to a fundamental structural defect regarding criminal prosecution in Germany, but rather, to the accumulation of problems specific to the individual cases.
However, the Government would not ignore that, in addition to the many cases in which the activities of the law enforcement authorities cannot be criticized, investigation and criminal proceedings also exist that in part are concluded only after a significant amount of time, without the reason therefore being comprehensible based on the steps in the proceeding. Although in many cases difficulties regarding proof are also responsible for this, awareness of the problem by the criminal prosecution authorities and the courts must be increased in regard to the fact that the responsible authorities must be held accountable as quickly as possible for their actions concerning such crimes.

The responsible federal ministries and the federal Länder (which are responsible for the organization of the police, public prosecution offices, and the courts), therefore, were informed of the Committee's recommendation and required to work towards the criminal

prosecution authorities proceeding resolutely when grounds for ill-treatment or attacks by civil servants become known.

However, even the most effective criminal law examination would have limited usefulness if the punishment imposed is insufficient in regard to the ill-treatment upon which it is based. If ill-treatment is proven, a reasonable punishment must be imposed.
Finally, the competent federal ministries and the federal Länder have also been notified of the 14th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of 21 September 2004. In the chapter "Combating Impunity" the CPT likewise thoroughly addresses the problems raised by the Committee in this recommendation.

The CAT recommendation in section D paragraph 5 (b) regarded the creation of "….. 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 the State party's authorities, as well as the Committee, are fully apprised of these details when assessing the State party's compliance with its obligations under the Convention."

The Federal Government answered its working to comply with this recommendation by an expansion of the existing statistical collection system, particularly in order to make meaningful numbers available regarding the problem of claims of ill-treatment by public officials. A variety of statistics exist in the Federal Republic of Germany that deal with the activities of public prosecution offices and courts, as well as with pending and concluded proceedings. To a large extent it involves the Police Crime Statistics, Public Prosecution Office Statistics, Judicial Business Statistics and Criminal Prosecution Statistics.

The Federal Government takes into account the Committee's recommendation in a first step within the framework of the introduction of the new police crime statistics, which, however, cannot take place before 1 January 2006. In contrast to the current system, the new police crime statistics will contain additional criminal offence keys. Thus, for example, as to the elements of the crime of bodily injury in public office (§ 340 StGB), inclusion of the location of the offence is also intended. Through specification according to location "public building/police" or "public building/prison" it will be possible to garner more information from the numbers regarding § 340 StGB as to the offender groups.

As to a modification or expansion of the criminal prosecution statistics and the judicial business statistics, however, the Federal Government relies upon the participation of the Länder.

Regarding the Optional Protocol,[15] the Federal Ministry of Justice tries hard to come to a positive solution. The Federal Government may not sign before every 16 Länder agree. Three Länder are still lacking.

Reasons for concern

It is regrettable that because of the refusal of some Länder it was not possible up to now for Germany to sign and ratify this Protocol.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

[15] 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.

In the Report 2004 on Germany the case of Frankfurt deputy police chief Daschner was mentioned. On 20 December 2004 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[16]). It issued a fine of 10,800 € for Daschner and of 3,600 € 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[17]) 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[18].

In deed, the threatening to use painful force was "torture". The combination of a guilty verdict and a mild sentence by the court 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 2005.

Article 5. Prohibition of slavery and forced labor

Trafficking in human beings

Legislative initiatives, national case law and practices of national authorities

(1) As already mentioned in the Report 2004, trafficking in human beings has gained a foothold also in Germany, with organized crime structures becoming more and more visible

[16] 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
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.

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

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

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 adopted a Strafrechtsänderungsgesetz - §§ 180 b, 181 StGB – [Act for Modification the Penal Code – sections 180 b and 181 –] which was promulgated in the Federal Law Gazette in the beginning of 2005.[19] It modifies Sections 232 to 233a Penal Code. The new versions aim 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) In this issue the nation-wide working group "Traffic in Women" under the central co-ordination an management of the Federal Ministry for Family Affairs, Citizens, Women and Youth plays an important role. It was set up by the Federal Government in 1997 and meets about quarterly. The tasks of the working group include continuous exchange of information on the numerous activities going on in the federal Länder and in the national and international bodies, analysis of the concrete problems in combating trafficking in women, and elaboration of recommendations and, if appropriate, joint campaigns to combat trafficking in women.

Protection of the child

See with Article 24.

[19] 37. Strafrechtsänderungsgesetz - §§ 180b, 181 StGB – [37th Act for Modification of the Penal Code – sections 180b, 181 –] of 11 February 2005 (BGBl. 2005 part I p. 239).

CHAPTER II FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention.

Legislative initiatives, national case law and practices of national authorities

Order of the Federal Constitutional Court of 22 February 2005[20].

Article 2 para 2 sentence 1 Basic Law[21] corresponds to Article 6 of the Charter. It was a criterion in a decision of the Federal Constitutional Court[22] concerning the period of detention for investigation. According to section 121 para 1 Criminal Procedure Act a detention for investigation in principle is determined on 6 months. Extensions may only follow because of important reasons and on strict premises. As to the case to be decided by the Federal Constitutional Court the defendant had been arrested for 2 and a half year. The Higher Regional Court [*Oberlandesgericht*] had ordered after all to continue the detention of investigation.
The Fed. Const. Court reminded on the fact that in the fundamental right of a person's freedom also the precept of acceleration is established. The Oberlandesgericht, v. a., did not have considered factors which show that in the case were large delays in the proceedings for which the state is responsible.

Detention following a criminal conviction

Legislative initiatives, national case law and practices of national authorities

Order of the Federal Constitutional Court regarding the continuity of the placement in a psychiatric hospital[23].

In this case the complainant had been for more than 23 years in a psychiatric hospital. The Regional Court and the Higher Regional Court had ordered the continuing placement. The constitutional complaint was successful. The Federal Constitutional Court strengthened the requirements on the proportionality of the deprivation of liberty; a further requirement would be a sufficient judicial clearing-up of the facts. Under these circumstances the Regional Court would have requested an actual expert opinion.

Order of the Federal Court of Justice[24] regarding preventive custody.

The Court held it as admissible to take a dangerous offender in preventive custody even if he had been already discharged out of the prison.

Deprivation of liberty for foreigners

See with Article 4 (centres for the detention of foreigners).

Other relevant developments

[20] - 2 BvR 109/05 -
[21] Article 2 (2) sentence 2 Basic Law reads: "Freedom of the person shall be inviolable."
[22] Federal Constituional Court (Chamber) 6 May 2003-2 BvR 530/03- NJW 2003. 2895.
[23] Decision of 14 January 2005 – 2 BvR 983/04 -.
[24] Judgment of 1 July 2005 – 2 StR 9/05 -.

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

Two judgment of the European Court of Human Rights are reported, case Epple and case Storck.

(1) Case Epple, Judgment of 24 March 2005[25]
During the "Lindauer Chaostage" the police brought the complainant in police custody on 29 July 1997 at 18.45 h. Not earlier than the following day 13.45 h the competent judge confirmed the permissibility of the custody, but did not rule upon continuation and ordered the release. This time proceeding seemed to be in the scope of Article 104 para 2 sentences 2 and 3 Basic Law. [26]
The European Ct. H.R., however, pointed out that it has to prove in every special case whether the deprivation was in a reasonable relation to the objection of the deprivation. It held that Article 5 (1) lit. b) ECHR is violated.

(2) Case Storck, Judgment of 16 June 2005[27]
The case concerns the applicant's repeated placement in a psychiatric institution, her stay in a hospital, her medical treatment and her various compensation claims. The applicant is currently 100% disabled and receives an invalidity pension. She claims to be constantly suffering from significant pain, especially in her arms and legs and her vertebral column. She has spent (from 1974 to 1993, with short interruptions) almost twenty years of her life in different psychiatric institutions and other hospitals. From 29 July 1977 (when she was 18 years old) to 5 April 1979, for instance, she was placed in a locked ward (geschlossene Station) at a private psychiatric institution, the clinic of Dr Heines in Bremen, at her father's request. There had been serious conflicts between the applicant and her parents, following which her father believed her to be suffering from a psychosis. The applicant – who by that time had attained the age of majority – had not been placed under guardianship, had never signed a declaration that she had consented to her placement in the institution, and there had been no judicial decision authorising her detention in a psychiatric hospital.

On 6 October 1999 Dr Köttgen, a psychiatrist, submitted an expert opinion. Confirming the findings of another expert Dr Lempp, she considered that the applicant had never suffered from an early onset of schizophrenia, but that she had been in the midst of an identity crisis (Pubertätskrise) at the relevant time.

On 12 February 1997 the applicant, on the basis of the expert report by Dr Lempp, brought an application for legal aid and an action for damages against Dr Heines's clinic in the Bremen Regional Court. She claimed, firstly, that her detention from 29 July 1977 to 5 April 1979 and from 21 January 1981 to 20 April 1981 had been illegal under German law. Furthermore, the medical treatment she had received had been contraindicated because of her poliomyelitis. She argued that her forcible detention and the medical treatment she had received had ruined both her physical and mental health. Several claims for damages didn't have success.

The Eur. Court H.R. concluded that Germany has breached its existing positive obligation to protect the applicant against interferences with her liberty by private persons from July 1977 to April 1979. Consequently, there had been a violation of Article 5 § 1, first sentence, of the Convention. The Bremen Court of Appeal, as was confirmed by the higher courts, had failed to interpret the provisions of civil law relating to the applicant's compensation claims in

[25] Eur.Ct.H.R. (3rd sect.), Epple v. Germany (Appl. N° 77909/01).
[26] Art.104 (2) Basic Law reads: "Only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold now one in custody on their own authority beyond the end of the day following the arrest. ……"
[27] Eur. Ct. H.R. (3rd sect.), *Storck v. Germany* (Appl. n° 61603/00), final 16 September 2005

contract and tort in the spirit of Article 5. There had therefore been an interference imputable to Germany with the applicant's right to liberty as guaranteed by Article 5 § 1 of the Convention.

Further there had been a violation of Article 8 of the Convention (with regard to the applicant's stay in a private clinic from 1977 to 1979. The Court of Appeal, as the higher courts confirmed, did not interpret the provisions of civil law relating to the applicant's compensation claim in tort or contract in the spirit of Article 8 (respect to private life). The Eur.Ct.H.R. held that the respondent State is to pay the applicant EUR 75,000 in respect of non-pecuniary damage, and EUR 18,315 in respect of costs and expenses.

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

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

Case Buck, Judgment of the Eur. Ct. H. R. of 28 April 2005[28]
The judgment concerns an interesting borderline case.(Search of abusiness and residential premises because of the prosecution for a speeding offence.)
In August 1996 the Dettingen municipal authorities imposed a fine of 120 German marks (DEM), plus costs on V.B., the applicant's son, for having exceeded the speed limit of 50 kph by 28 kph on the evening of 21 May 1996, when travelling in a car belonging to the private limited company Trinkomat. V.B. lodged an objection against the administrative decision imposing the fine. In the trial in the case opened before the Bad Urach District Court, V.B. pleaded not guilty, stating that about fifteen other persons could have been driving the company car in question on that day. The hearing was adjourned.
One day later the District Court issued a warrant to search the business and residential premises of the applicant. The search was affected at the same day. The Tübingen Regional Court, in a decision addressed to V.B., dismissed the appeal. A panel of three judges of the Federal Constitutional Court refused to admit the constitutional complaint.

The applicant complained that the search of his business and residential premises and the seizure of documents, which had been ordered by the District Court, had been in breach of his right to respect for his home. He argued in particular that the search was disproportionate. The Eur.Ct H.R., having regard to the special circumstances of this case, in particular the fact that the search and seizure in question had been ordered in connection with a minor contravention of a regulation purportedly committed by a third person and comprised the private residential premises of the applicant, concluded by four votes to three that the interference could not be regarded as proportionate to the legitimate aims pursued. There has been a violation of Article 8 of the Convention.

Three Judges delivered a DISSENTING OPINION. They could not agree with the majority in their finding of a violation of Article 8. They noted that the burden of proof in respect of the offences charged remained at all times on the prosecution.

As a consequence, two ways were then left to the authorities to prove the identity of the driver. The first of these was to ascertain the identity of those fifteen other persons. This was pursued by way of the search, seizure and copying of personnel records. The second way to prove the offence was to have an expert compare the photos taken on the occasion of the radar

[28] Eur.Ct. H. R. (3rd sect.), *Buck v. Germany* (Appl. N° 41604/98), final 28 July 2005.

check with the passport photograph taken of V.B. in 1994. In his constitutional complaint to the Federal Constitutional Court, the applicant stated that at the first hearing the District Court could not establish the identity of V.B from the radar photograph as the driver of the car. He further stated that in the search of his personnel records all the other employees were excluded by either age or gender. The expert photo comparison was eventually done and in fact satisfied the District Court that V.B. had been driving the car at the relevant time. It is clear, however, that the photographic evidence might not have been conclusive particularly as V.B. had changed his appearance somewhat between the two photos and expert evidence was required.
Notwithstanding the petty nature of the offence, it had been reasonable and proportionate for the authorities to embark simultaneously upon both these ways of proving the case against V.B. Namely to ascertain the identity of those fifteen other persons. This was pursued by way of the search, seizure and copying of personnel records. The second way to prove the offence was to have an expert compare the photos taken on the occasion of the radar check with the passport photograph taken of V.B. in 1994. "We cannot overlook the fact that the District Court could not know at the first hearing on 12 March 1997 whether expert evidence regarding the photo would be sufficient to satisfy the burden of proving the identity of the accused. In any event the personnel records did play a part in proving identity by excluding all other possible drivers. We also note that the search of the applicant's private premises as well as the office was reasonable and proportionate bearing in mind the nature and size of the applicant's business." On the day of the search, the applicant would have had the opportunity of avoiding the embarrassment of the search of his premises but chose not to take it. He should not complain of the action he forced upon the authorities.

Legislative initiatives, national case law and practices of national authorities

(1) In the Report 2004 it was informed on the Judgment of the Federal Constitutional Court of 3 March 2004, regarding eavesdropping operations. In this Judgment the Constitutional Court [29] had declared provisions of the Code of Criminal Procedure[30] that permit police, under special prerequisites, the acoustical surveillance of any home in order to prosecute major criminals as not compatible with the protection of human dignity. A "last unimpeachable essence [*unantastbarer Kernbereich*] of private living" had to be preserved. It would be absolutely removed from public authority's effect.

The judgment has entitled a discussion to what extend acoustical surveillance is really needed. In the end of 2004, following an bill of the Federal Government, the Parliament adopted the Gesetz zur Umsetzung des Urteils des Bundesverfassungsgerichts vom 3. März 2004 (akustische Wohnraumüberwachung) [Act for the implementation of the judgment of the Federal Constitutional Court of 3 March 2004 (acoustical surveillance)][31]. 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, but it has to follow very strict limitations.

(2) Another Order of the Federal Constitutional Court of 2004 regarded 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] was 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

[29] Judgment of 3 March 2004 – 1 BvR 2378/98, 1094/99 –, BVerfGE 109, 279 = NJW 2004, 999 to 1022. [Neue Juristische Wochenschrift]
[30] These provisions have been inserted by the Act for Improving the fight against Organised Criminality of 4 May 1998.
[31] Act of 24 June 2005 (BGBl. 2005 I p. 1841).

Constitutional Court[32] had pointed out that the legislator in such cases has to determine the purpose for using the data specifically for each field clear and precisely; further on 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[33] drew the conlusions from this order. It abrogates sections 39 to 43 of the Außenwirtschaftgesetz and inserts a new chapter regarding preventive surveillance of telecommunication and of post into the Zollfahndungsdienstgesetz [Act concerning the Customs Investigation].

(3)Three actual orders of the Federal Constitutional Court regarded criminal investigations and the use of special or particular methods of research.

The judgment of 12 April 2005[34] regarded the use of the Global Positioning System (GPS) to monitor the movement of suspects according to Section 100c para 1 n° 1 lit. b) Code of Criminal Procedure. The Federal Constitutional Court determined that such technologically assisted surveillance did not violate a person's right to privacy. But the Court also expressed its concerns about the technological methods that investigators could use. The Federal Government should keep a close watch on technical developments and make corrections in the law if necessary.

In the decision of 4 February 2005[35] a constitutional complaint had success. The complainant, v. a., had criticised that a search of his home happened without previous authorisation by a judge. The Federal Constitutional Court held that in the case at stake was no time of the essence and therefore a previous authorisation by a judge necessary.

The judgment of 27 July 2005[36] declared provisions of the Lower Saxony Act on public Security and Order null and void. These provisions (Section 33a para 1 n° 2 and 3 of the Act) authorized the police to preventive surveillance of telecommunications. The Constitutional Court held that the concerned provision was formally unconstitutional because the Land had no competence for this. The Court, however, pointed out that the provision also would violence the Constitution in a substantive way. The possible surveillance measures would not be adequate certain and they would be a disproportionate interference in the privacy of telecommunications. Further on, and this is very important, the Court reminds to its judgment of 3 March 2004 regarding eavesdropping operations. The unimpeachable essence [unantastbarer Kernbereich] of private living had to be observed with surveillances of telecommunication contacts as well. That would make necessary strong limits and security measures by the legislator.

Positive aspects

The two acts (1) and (2) show, that public discussions on the importance of protection of privacy can lead the Government and the Parliament to reasonable solutions in the balance of freedom and security.

The strengthening of the unimpeachable essence [unantastbarer Kernbereich] of private living by the Federal Constitutional Court also for the surveillance of telecommunications is an important aspect of the protection of private life and human dignity.

[32] Order of 3 March 2004 – 1 BvF 3/92 – , NJW 2004, 2213.
[33] BGBl. I 3603 [Federal Law Gazette Part I 2004 p. 3603]
[34] Order of 12 April 2005 – 2 BvR 581/01 –.
[35] Order of 4 February 2005 – 2 BvR 308/04 –.
[36] Order of 27 July 2005 – 1 BvR 668/04 –.

Other relevant developments

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

Regarding the judgment of the Eur. Ct. H.R. in the case Storck see with Article 6.

Case Caroline von Hannover, Judgment of 28 July 2005[37]

In a judgment delivered on 24 June 2004 ("the principal judgment"), the Court had hold that there had been a violation of the applicant's rights under Article 8 of the Convention. It found that the domestic courts had failed effectively to protect the applicant's private life against interferences resulting from the publication by various German magazines of photos of the applicant in her daily life (see *Von Hannover v. Germany*, no. 59320/00, §§ 43-81, ECHR 2004-VI). This decision is reported in the CFR Report on Germany 2004 (see there with Article 7, page 35).

Under Article 41 of the Convention the applicant sought just satisfaction of EUR 50,000 in non-pecuniary damage. She further claimed EUR 142,851.31 in reimbursement of her costs and expenses. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicant to submit, within six months from the date on which the judgment becomes final, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach.

On 8 June the parties reached a Friendly settlement, according to this the Federal Republic of Germany shall pay to Caroline von Hannover a global sum of EUR 115,000 in just satisfaction within the meaning of Article 41 of the Convention. This sum comprises EUR 10,000 in compensation for non-pecuniary damage and EUR 105,000 for costs and expenses, including tax. Having regard to its terms, the Court fond the agreement equitable within the meaning of Rule 75 § 4 of the Rules of Court and that it was based on respect for human rights as defined in the Convention or its Protocols Consequently, the Court took formal note of the agreement and considered it appropriate to strike the case out of the list pursuant to that provision.

Legislative initiatives, national case law and practices of national 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[38]. Section 100c Criminal Procedure Act

[37] Eur.Ct. H. R. (3rd sect.), *von Hannover v. Germany* (Appl. N° 59320/00)

[38] These provisions have been inserted by the Act for Improving the fight against Organised Criminality of 4 May 1998. The constitutional basis is Article 13 para 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.

specifies this for the area of criminal prosecution. The Federal Government every year has to report on the use. The 2004 report[39] shows: In 6 Länder (of 16) altogether 17 procedures (cases) took place regarding 11 homes. The concerned was informed later in 7 of these cases. The Federal Public Prosecutor General carried out 1 case; in this he later informed the concerned person.

b)The Terrorismusbekämpfungsgesetz [Act for the Fight against Terrorism][40] of January 2002 extended especially the competencies of the secret services[41] and of the Federal Criminal Police Office (BKA)[42]. The Federal Office for the Protection of the Constitution (BfV) – similar to the Federal Intelligence Service and the Military Counterintelligence – gained far-reaching new authorities,[43] which are as well entitled to the Länder-Offices for the Protection of the Constitution. In an isolated case and under certain circumstances, the BfV was allowed to make inquiries at banks, financial services and financial companies, airlines as well as postal and telecommunications services to reveal the financial and personal background of international terrorist networks. In this connection technical means may also be used to locate an active mobile phone and to determine the device and card number (so called IMSI-Catcher). The BKA was allowed to raise data directly at all public or non-public institutions without first contacting the police authorities in the federal states. 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 12 May 2005 for the period of 1 Jan 2002 to 31 December 2004[44] informs about the control function and about the frequency of

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(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.

[39] Bundestags-Drucksache 15/5971 of 24 August 2005, Anlage 1.
[40] Gesetz zur Bekämpfung des internationalen Terrorismus [Act for the Fight Against International Terrorism] of 9 Jan 2002 (BGBl. 2002 I p.361) .
[41] Secret services are:
Bundesamt für Verfassungsschutz (BfV) *[Federal Office for the Protection of the Constitution]*. The BfV is the federal authority charged with the protection of the free democratic basic order, the duration and security of the Federal Government and the Federal States. On the federal level, it is assigned to collect and evaluate relevant informations. It cooperates with the corresponding state agencies.
Bundesnachrichtendienst (BND) [Federal Intelligence Service]. The BND collects and evaluates the relevant information to gain knowledge about foreign countries which is significant for the foreign and security policy of the Federal Republic of Germany.
Militärischer Abschirmdienst (MAD) [Military Counterintelligence]. The MAD is the authority charged with the protection of the constitution concerning the Bundeswehr [the armed forces].
[42] The BKA is the central office for police information and communications and for the criminal police. It supports the national police forces and the police in the federal states with the prevention and prosecution of petty crimes with cross-border, international or otherwise relevant significance.
[43] Art. 1-3 Act for the Fight Against Terrorism: Modifications of the Act for the Protection of the Constitution, the MAD Act and the BND Act.
[44] Zusammenfassender Bericht zum Zwecke der Evaluierung, Bundestags-Drucksache 15/5506.

relevant measures. They vary according to the different measures and cannot be described in this connection.

The Parliamentary Control Commission in its conclusions points out that the intelligence and security services have act with caution and high conscientiousness and have hold the restrictions of the citizens as small as possible in this area.

c)To similar results, agreeing with previous impression come two reports of the Parliamentary Control Commission[45] according to section 6 of the Act on the Parliamentary Control of measures of the Secret Services of the Federal.

Positive aspects

The above conclusions to b) and c) emphasise positive aspects of the secret services; they would endeavour to hold the restrictions of the citizens as low as possible.

Family life

Protection of family life

Legislative initiatives, national case law and practices of national authorities

The Report 2004 has informed on the Case Görgülü. The Eur. Ct. H.R by judgment of 26 February 2004 had declared unanimously that the German court decision on custody and the exclusion of the right of access of the complainant Görgülü had violated Article 8 of the Convention[46].

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 Naumburg, however, overturned the temporary injunction on the father's right of access. The Federal Constitutional Court[47] reversed the order of the Naumburg Court.
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

[45] Report of 2 December 2004 (Bundestags-Drucksache 15/4437), period of scrutiny August 2002 to October 2004, and report of 8 September 2005 (Bundestags-Drucksache 15/5989, period of crutiny November 2004 to September 2005.
[46] Eur. Ct. H.R. (3rd sect.), *Görgülü v. Germany* (Appl. N° 74969/01) judgment of 26 February 2004 (final).
[47] Order of 14 October 2004 – 2 BvR 1481/04 - , NJW 2004, 3407.

Regional Court is not bound in its concrete result. However, these interrelations were not discussed in the order challenged.

It was 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 on 28 December 2004 that made the father's access to his son possible up to the decision in the constitutional complaint[48]. In the period following two further orders of the Federal Constitutional Court were necessary to point out to the Naumburg Higher Regional Court that it did not take sufficient account of the judgment of the European Court of Human rights.

In the order of 5 April 2005[49] the complainant in his constitutional complaint has challenged a decision on custody of the Naumburg Court. In the order of 10 June 2005[50] the constitutional complaint related to the exclusion of the right of the complainant to have contact to his child.

Reasons for concern

These cases show the, fortunately not very widespread, difficulties and problems for German courts following the decisions of the European Court of Human rights.

Right to family reunification

Legislative initiatives, national case law and practices of national authorities

Under the new Residence Act (see with Article 18) residence-titles were re-structured. There are now only two types of residence permits: the temporary residence permit (Section 7) and the permanent settlement permit (Section 9). The new law takes account of the purpose of residence (gainful employment, family reunion, educational purposes, humanitarian grounds).

In the 23rd Report submitted by the Government of the Federal Republic of Germany for the period from 1 January to 31 December 2004 in accordance with the provisions of Article 21 of the European Social Charter (page 64 to 66) it is in detail described under which conditions family reunion of foreigners in respect of the spouse or long-term partner and for children is permitted.

Article 8. Article 8. Protection of personal data

Independent control authority

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[51] [*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

[48] Order of 28 December 2004 – 1 BvR 2790/04 -.
[49] Order of 5 April 2005 – 1 BvR 1664/04 –.
[50] Order of 10 June 2005 – 1 BvR 2790/04 –.
[51] Act of 1990 in the new version of the publication of 14 Jan 2003 (BGBl. 2003 I p. 66).

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. Its homepage contains a wide variety of current information: www.bfd.bund.de or www. datenschutz.bund.de.

The Federal Data Protection Commissioner is responsible for the audits/controls of all federal agencies, all telecommunication services and all postal services.

The 16 Commissioners of the Länder are responsible for the audits/controls of all agencies of the Länder including municipalities and local authorities and some of them (Berlin, Bremen, Hamburg, Lower Saxony and Northrhine-Westphalia) are also responsible for private sector agencies. So-called supervisory authorities for data protection (according to the terminology of Sect. 38) are institutions of the Länder. They are responsible for controls of private sector agencies.

In April 2005 The Federal Data Protection Commissioner submitted the 20. Tätigkeitsbericht 2003/2004 [20th Activity Report 2003/2004) to the Parliament.[52] The real report covers 200 pages complemented with 15 supplements. It contains a description of the main developments concerning data protection in the public sector and in the private sector, all telecommunication services and postal services, but also in some areas of the private sector. In 22 cases he had lodged formal complaints (supplement 3). In principle the report shows while on the one hand there was much reached for the strengthening of the fundamental right to informational self-determination, on the other hand the protection of data has not yet rated as high by all ones as it should have. – The Report goes much in detail on many important issues. The competences and the practice of the security authorities take a broad room with partly critical remarks, questions and recommendations. The Federal Commissioner criticises the increasing of telecommunication monitoring[53]. He warns on the dangers that might follow out of the sum of the new possibilities to interfere. Regarding the fight against terrorism he states: Intensifying the cooperation between police and security services would be justifiable only in narrow limits of data protection law. The principle of separation of powers in the field of personal data (Prinzip der informationellen Gewaltenteilung) has to be considered (n° 5.1.1).

In the whole the Commissioner (see n° 1 of the report) finds it a regrettable fact that, during his period under review, little progress was made in data protection law. Drafting and or adoption of the Data Protection Audit Act required for implementation of the 2001 Federal Data Protection Act, the Data protection Act regarding Employees and Wage-Earners, which had long requested by the German Bundestag, and the urgently needed Gene Diagnostics Act continue to be put off, an the announced basic modernization of data protection legislation had come to an halt. – Encouraging results were obtained only in a number of special regulations – e.g. the data protection provisions relating to the health insurance chip card (see n° 21.1)
As an example of the private sector my be mentioned the report's critic at improper registration in a bonus programme which would blatantly violate customers' data protection rights (n° 13.2.4). Customers of a large telecommunications service provider had repeatedly received mail from a company that manages the "Happy Digits" bonus programme welcoming them as new subscribers although they had not given any permission for this ar had actually explicitly refused to join this programme. (There had been irregularities in the telecommunications service provider's registration.)

Good practices

[52] Bundestags-Drucksache 15/5252.
[53] Regarding this matter see above with Article 7 (*Practice of national authorities*).

The commissioner's report is a very good example for the thorough and responsible work in this function. Moreover the report brings an excellent survey on relevant problems of data protection in many sectors of state activity and in important private fields.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

For the Informationsfreiheitsgesetz [Freedom of Information Act] see with Article 11.

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

Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals

Legislative initiatives, national case law and practices of national authorities

The Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts of 15 December 2004[54] [Act for revision of the Law on Life-Partnerships] contains adjustments to the marriage, in particular regarding matrimonial property, duty of support, divorce, equalization of pensions.

Article 10. Freedom of thought, conscience and religion

Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection

Legislative initiatives, national case law and practices of national authorities

(1) Islamic religious teaching
In German schools religious teaching normally is regular portion of the curriculum. It is held in cooperation with the Christian Churches. The possibilities of Islamic religious teaching are discussed for some years. The Catholic and Protestant churches support this as an expression of the freedom of religion. Problems arise, however, out of Article 7 Basic Law. Article 7 § 3 rules: "Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice for state's right of supervision, religious instruction *shall be given in accordance with the tenets of the religious community concerned."* The problem is whether there exists an Islamic institution which is able to represent the main Islamic branches in Germany and to fix such tenets.

The Federal Administrative Court[55] decided that also a multistage roof organisation can be a religious community in the sense of Article 7 para 3 Basic Law. Article 7 para 3 Sentence 1 and 2 would give to the religious communities a title to introducing religious teaching which corresponds with their contents of faith.

(2) A decision of the Federal Administrative Court regarding the conscious objection of a Major of the Bundeswehr attracted wide attention.

[54] Act of 15 December 2004 (BGBl. 2004 part I p. 3396)
[55] Judgment of 23 February 2005 – 6 C 2.04 -, Deutsches Verwaltungsblatt 2005 p. 1128.

In April 2003 when the United States was waging its war against Iraq, the major refused to continue working on a software program that he maintained could be used to support the war in Iraq. He argued that none of his superiors could guarantee that his work would not be used to provide logistical support to the USA. A support of the war would be amounted to a break of the German Constitution and human rights. – The military charged him and wanted to dismiss him from service. A military Court (Truppendienstgericht) convicted the major in February 2004 of refusing to obey an order and demoted him to captain.
On the appeal of the officer to the Federal Administrative Court this Court[56] ruled that an order could not take precedence over the officer's conscience. The constitution would guarantee the fundamental right to freedom of conscience unconditional. According to Article 4 para 1 Gundgesetz "Freedom of faith and of conscience ... shall be inviolable." That means that everybody has the freedom not to be obliged by state power to act against orders and prohibitions of his conscience. Freedom of conscience would be a principle norm of fundamental value and of high constitutional status which claims for attention at every activity of state authorities.

Article 11. Freedom of expression and of information

Freedom of expression and of information

Legislative initiatives, national case law and practices of national authorities

Decision of the Federal Constitutional Court[57] regarding the mention of the Weekly "Junge Freiheit" in the North Rhine-Westphalia Report regarding the protection of the constitution.

In the reports 1994 and 1995 of the Land North Rhine-Westphalia regarding the protection of the Constitution th weekly "Junge Freiheit" was extensively mentioned in the framework of reporting right wing extremist intentions. The Federal Constitutional Court held that this reporting would touch the fundamental right of freedom of the press. Therefore the principle of proportionality had to be taken into account. In the case at stake reasonable important clues had to be established. This, however, had been not proved by the North Rhine-Westphalia authorities. The Federal Constitutional Court therefore decided on a violation of the fundamental right of the freedom of press.

Secrecy of journalistic sources

National case law and practices of national authorities

(1) A decision of the Federal Constitutional regarded the search of an editorial office of a periodical[58]. The search had violated the freedom of press. He lower court didn't have proved whether the infringement would be appropriate.

(2) In September /October the case "Cicero" attracted wide attention and critic by the media. The Magazine "Cicero" in Potsdam had published an article on terrorism and in this quoted from confidential documents of the Federal Criminal Police Office. On complaint of an offence by the office the redaction of Cicero and the private home of the journalist were searched on the 12 September. In the public the admissibility of this measure was critically discussed.

Other relevant developments

[56] Judgment of the Federal Administrative Court of 21 June 2005 – BVerwG 2 WD 122.04 -
[57] Order of 24 May 2005 – 1 BvR 1072/01 -.
[58] Decision of 1 February 2005 – 1 BvR 2019/03 - .

Legislative initiatives

(1) The Informationsfreiheitsgesetz [Freedom of Information Act][59] will take affect on 1 January 2006. It regulates the access to information held by the Federal Government. This enables citizens to access files of the federal administration and to request information kept with the federal authorities.

(2) The Gesetz zur Änderung des Deutsche-Welle-Gesetzes [Act for Modification of the Deutsche-Welle-Act][60] was promulgated in December 2004. 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 gives 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).

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

(1) Prohibition of assemblies
The Assembly Act (sections 5 and 15) regulates the conditions for prohibiting an assembly. The competent authority is the local community in the *Länder*. Such prohibitions time and again are expressed. Numbers could not be determined.

(2) The Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuchs[61] [Act amending the Associations Act and the Criminal Code] has amended Section 15 Assembly Act. (For the amendment of the Criminal Code, Section 130, see below with Article 21.) It makes concrete the possibilities, to take action against assemblies under free heaven which are extremist motivated. It clears up the admissibility of impositions and prohibitions.

This new provision is controversial in public discussion because of a potential limitation of freedom of expression and freedom of assembly. The Federal Constitutional Court in a decision of 16 August 2005[62] has pointed out to the scientist critic regarding the constitutionality of the new paragraph 4 of Section 130 Criminal Code in connection with new wording of Section 15 Assembly Act, problems of the reconcilability of this provision with freedom of assembly and freedom of expression. There would be some difficult legal questions. – A group of the right-wing persons had announced an assembly with manifestation for the 20 August 2004 "reminding of Rudolf Heß", a former NS leader. It should take place in Wunsiedel, the birth town of Heß. The competent authority ordered to ban this demonstration. It would endanger public order because of an offence against section 130 (4) German Penal Code. The higher Administration Court refused the group's request to give suspensory effect to the remonstrance against the ban. The Federal Constitutional Court revised the application of an interim injunction, but announced doubts on the constitutionality.

[59] Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz) [Act regulating the access to information held by the Federal (Freedom of Information Act)] of 5 September 2005 (BGBl. 2005 I page 2722).
[60] Act of 15 December 2004 (BGBl. 2004 I p. 3456).
[61] Act of 24 March 2005 (BGBl. 2005 I p. 969)
[62] Decision of 16 August 2005 – 1 BvQ 25/05 – .

Article 13. Freedom of the arts and sciences

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In September 2005 the Enquete-Commission Ethics and Law of modern medicine of the German Bundestag published a report on the state of its working[63]. This Commission was established in 2003.

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 April 2005 the Ministry for Education and Research presented the Berufsbildungsbericht 2005[64] [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.

An important reform issue was the Gesetz zur Reform der beruflichen Bildung [Act regarding the Reform of vocational training] [65]. It contains a new Berufsbildungsgesetz [Act on Vocational Training] and modifications of some other law.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In 2005 a new discussion on improvements of the school and education systems, among others triggered by the OECD-PISA study, has arisen.

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

The right to engage in work and the right for nationals from other member States to seek an employement, to establish themselves or to provide services

Legislative initiatives, national case law and practices of national authorities

[63] Bundestags-Drucksache 15/5980 of 6 September 2005.
[64] Bundestags-Drucksache 15/5285 of 12 April 2004.
[65] Act of 23 March 2005 (BGBl. 2005 part I p. 930).

Regarding this issue the"23rd Report submitted by the Government of the Federal Republic of Germany for the period from 1 January to 31 December 2004 in accordance with the provisions of Article 21 of the European Social Charter" contains extensive and important information. V.a. it notes the National pact for Career Training and Skilled Manpower development of 2004 which had have success (page 5 -8). Measures to promote access of young people to training and employment are target-group oriented and they had a variety of contents. – The whole range of active labour market policy instruments of Social Code III serves to integrate long-term unemployed people into the labour market.

Regarding acceptability provisions of employment promotion legislation: Matching processes in the labour market are focused on placing the "right worker" in the "matching job". This is the priority of the employment agencies' placement efforts. They will, above all, seek to place unemployed persons in jobs in accordance with their experience because such placement will yield the most promising results. Employment promotion legislation therefore requires jobless persons receiving benefits from the community of contribution payers, to adjust their personal interests, placement desires and concepts to the requirements of the labour market in accordance with the relevant provisions in order to finish their unemployment as soon as possible. The provisions of employment promotion legislation concerning job acceptability take account of these principles. In the whole the Acts on Modern Services on the Labour Market elaborated the principle of "challenge and support".

Access to employment for asylum seekers

Legislative initiatives, national case law and practices of national authorities

The new Immigration Act (see under Article 18) which has taken into effect on 1 January 2005 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. .

Article 16. Freedom to conduct a business

Article 17. Right to property

The right to property and the restrictions to this right

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

Two decisions of the Eur. Ct.H.R., regarding the property situation in the former DDR, have to be reported.

(1) Case Maltzan and Others ….[66]

The case concerned one of the major issues to arise after the reunification of Germany: compensation for those whose property was expropriated either between 1945 and 1949 in the soviet Occupied Zone of Germany following the land reform (Bodenreform) or after 1949 in the German Democratic Republic (DDR) [GDR]. During the reunification negotiations the both German Governments issued a Gemeinsame Erklärung zur Regelung offener

[66] Eur. Ct. H.R. (Grand Ch.) von Maltzan and Others, von Zitzewitz and Others and MAN FERROSTAAL and ALFRED TÖPFER STIFTUNG v, Germany (Appl. N° 71916/01, 71917/01 and 10260/02) judgment of 2 March 2005.

Vermögensfragen) [Joint Declaration on the Resolution of Outstanding Property Issues] of 15 June 1990. The applicants had been owners of land or the heirs of owners; their land or buildings were expropriated under the land reform between 1945 and 1990. After the reunification they had, unsuccessfully, applied for the rehabilitation of their ascendants. The Federal Constitutional Court had refused constitutional complaints.

To the Eur.Ct.H.R. the applicants submitted that the relevant German laws and the leading judgment of the Federal Constitutional Court had infringed the property rights guaranteed by Article 1 of the Protocol no.1 to the ECHR. The Court, however, pointed out that the Fed. Republic of Germany does not have any responsibility for acts committed at the instigation of the Soviet occupying forces or for those perpetrated by another state against his own nationals. Accordingly the Court would lack competence *ratione temporis* and *ratione personae* to examine the circumstances in which the expropriations were carried out or the continuing effects produced by them up to the present date. – "Where a State elects to redress the consequences of certain acts that are incompatible with the principles of a democratic regime but for which it is not responsible, it has a wide margin of appreciation in the implementation of that policy." – The Court declared the applications inadmissible.

(2) Case Jahn and Others[67]

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. on 22. January 2004[68] 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. --

On 20 April 2004 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. The panel of the Grand Chamber accepted this request on 14 June 2004. The Grand Chamber in its judgment of 30 June 2005[69] did not share the Chamber's opinion on that point however.
Having regard to all the foregoing considerations and taking account, in particular, of the uncertainty of the legal position of heirs and the grounds of social justice relied on by the

[67] Eur. Ct. H.R. (Grand Ch.), *Jahn and Others v. Germany* (Appl. No. 46720/99, 72203/01 and 72552/01) judgment of 30 June 2005.

[68] 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.

[69] See Footnote 41.

German authorities, the Court concluded that in the unique context of German reunification, the lack of any compensation does not upset the "fair balance" which has to be struck between the protection of property and the requirements of the general interest.

The Court held by eleven votes to six that there has been no breach of Article 1 of Protocol No. 1.
It is interesting that the German Judge, Ress, delivered a Dissenting opinion. He founds still the reasoning of the Chamber, which had adopted a judgment on 22 January 2004 in the present case holding unanimously that there had been a violation of Article 1 of Protocol No. 1 on the ground that the State had compelled the applicants to assign their property to the State without any compensation, more convincing than the Grand Chamber's reasoning.

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

No further significant developments to be reported.

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

(1) The new Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des 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)] of 30 July 2004 came into force on 1 January 2005.[70] It consists of several Aerticles. Article 1 is the 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. Article 2 consists of the Gesetz über die allgemeine Freizügigkleit von Unionsbürgern [Act on the General Freedom of movement for EU Citizens]. As an Article 3 the Immigration Act contains extensive modifications of the Asylum Procedure Act to shorten the asylum procedure.

The Residence Act and many other relevants Laws were amended by the Gesetz zur Änderung des Aufenthaltsgesetzes und anderer Gesetze [Act for Modification the Residence Act and other Laws][71]

It is not possible to describe this large and important legal complex in detail. It contains a lot of improvements. The Federal Government Commissioner for Immigration, Refugees ant Integration has mentioned[72] that the new law contains relevant legal progress of integration policy in many points.

Some problems, on the other hand, of the new asylum provisions have already been mentioned in the Report 2004. The European Council on Refugees and Exiles (ECRE) in its country Report 2004 Germany, submitted to the Network in October 2005, points out the far-reaching consequences of any violation of the obligation to register (Meldepflicht). If an alien

[70] Act of 30 July 2004, BGBl. 2004 I p. 1950 (Federal Law Gazette part I).
[71] Act of 14 March 2005 (BGBl. 2005 page 721).
[72] Sixt Report of the Federal Government Commissioner for Immigration, Refugees and Integration on the Situation of Foreigners in Germany of 22 June 2005 (*Sechster Bericht über die Lage der Ausländerinnen und Ausländer in Deutschland*), Bundestags-Drucksache 15/5826, page 240.

communicates a request for asylum to an authority, which is not competent to examine asylum claims, he/she will be referred to the nearest reception centre. If the alien does not comply with the demand to register with the competent reception facility they will not be able to enter the asylum procedure. In the event that he/she makes another asylum claim at a later date this application will be regarded as a follow-up application, i. e., the person concerned is treated as if a first application had been unsuccessful (new para 2 sentence 1 of Section 23). In this case an asylum procedure is only carried out if the situation or legal position has changed for the individual concerned since the moment when the asylum application could have been made as required, or if new evidence has come to light.

It needs to be stressed that this amendment is directed against aliens with bogus claims rather than genuine refugees. In the past, illegal aliens who got apprehended by the police often requested for asylum only in order to avoid expulsion. Subsequently, many of them absconded instead of reporting to the Federal Office for Migration and Refugees as requested by the authorities. The amendment is meant to prevent such abusive behaviour. The new law does not apply to aliens who have a valid reason for not reporting to the Federal Office in due time (for example in case of sickness).

Art. 4 of the Immigration Act modifies the Gesetz über das Ausländerzentralregister (AZR-Gesetz) [Act on the central index for foreigners]. These modifications precise and extend the provisions which rule in detail under which conditions and to which purpose personal data of foreigners that are storaged in this central index may be transferred to other institutions.

(2) Memorandum regarding the present situation of the German asylum procedure.

In June 2005 10 NGO's (amnesty international, charitable institutions, Caritas, Diakonie and legal associations) presented a Memorandum regarding the present situation of the German Asylum procedure [Memorandum zur derzeitigen Situation des deutschen Asylverfahrens]. They take note of a general social climate of an institutional suspicion of asylum seekers and refugees. This had caused that people who need protection would not be knowledged as such in asylum proceedings and they would part of the large heterogeneous crowd of unsuccessful asylum seekers waiting for their removal. There would be a lack of "good faith in the legitimacy of flight reasons". The Federal Office for Migration and Refugees would be more interested in the new tasks of the law of integration than in the traditional core area of the law of asylum. The practice of revoke would be incompatible with international recognized principles. – The Memorandum presents a number of concrete proposals to improve the situation. V.a. it challenges: In time before the personal hearing sufficient opportunity should be given to the asylum seekers, to get advice on their rights and obligations of participation by independent and legal knowing persons and organisations or an attorney of his own choice respectively. In the whole the procedural duty in respect of care would not be fulfilled.

On this Memorandum the Federal Ministry of Interior has the following position:

The criticism contained in the Memorandum is not new and has been voiced on other occasions before. The alleged shortcomings of the asylum system are mostly based on speculation rather than fact. The Memorandum ignores the current state of affairs and belittles the efforts that have been made in recent years in order to enhance the efficiency and fairness of the asylum system. For example: Contrary to what the Memorandum alleges, every asylum seeker receives comprehensive information on his rights and obligations and the course of proceedings prior to his/her hearing. In recent years, the Federal Office paid particular attention to the needs of traumatized and other asylum seekers with special needs. Traumatised individuals, women who invoke gender specific persecution, victims of torture and unaccompanied minors are being interviewed by specially trained eligibility officers.

The Federal Office for Migration and Refugees has refuted the allegations contained in the Memorandum point by point in a position paper published in October 2005 (Einzelentscheiderbrief, October 2005.

Positive aspects

Notwithstanding the mentioned and other problems, the new law in the whole is a welcome progress.

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

The new Residence Act 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 para 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. This will be an important improvement for the protection of refugees, which UNHCR had repeatedly demanded.

Section 60 para 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. … " In these cases the foreigner according to Section 25 para 2 shall be granted a residence permit.

UNHCR had 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 state to protect. This interpretation is accepted by the vast majority of the Convention's State parties.[73] 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.

Positive aspects

[73] 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.

Section 60 para 1 Residence Act indeed is one of the positive aspects of the new law to be emphasized.

Other relevant developments

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.
Some Länder have used this possibility, for instance Berlin, North Rhine-Westphalia, Meclenburg-Western Pomerania and Schleswig-Holstein.

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

Collective expulsions

Legislative initiatives, national case law and practices of national authorities

Under this scope has to be reported on the return of minorities to Kosovo, according to an "Agreed Note" of 26 April 2005 on talks between a German delegation and representatives of UNMIK (United Nations Interim Administration Mission in Kosovo) relating the return of minorities to Kosovo.[74] The Note recognizes the positive development of the security situation in Kosovo and both parties agreed to develop the return process, beginning with members of Ashkali and Egyptien communities. It describes the number and the time, starting in May, Germany will practice forced return. Regarding Roma, in view of expected improvements of the situation of Roma in Kosovo, UNMIK agrees to the possibility of allowing the return of criminal offenders of the Roma community who have been sentenced to longer imprisonment.

In this context the European Roma Rights Centre points to the press release of 24 June 2005 of the Standing Conference of Interior Ministers and Senators of the German Länder. According to this the Federal Interior Minister, with UNMIK, would have been requested without delay to expand efforts concerning return possibilities to Kosovo for minorities required to leave Germany.

The Federal Government Commissioner for Immigration, Refugees and Integration in her Sixth Report (see footnote) also mentions the positive development of the security situation for the minority groups of Ashkakli and Egyptien people. The UNHCR too, would deny a general need of protection for this group.

ECRE, however, points out to the critic of PRO ASYL, especially regarding the return of Roma. A Memorandum of the European Roma Rights Centre of 27 June 2005[75] gives its view on the continued persecution of Roma, Ashkalis, Egyptians and others considered as "Gypsies" in Kosovo. There still would be failure to provide just remedy for gross violations of fundamental human rights, continuing violence, intimidation, and harassment and a vacuum of protection against discrimination.

[74] See European Council on Refugees and Exiles (ECRE) – Country Report 2004 – Germany of October 2005, n° 4.17 (Specific Refugee Groups).
See also Sixth Report of the Federal Government Commissioner for Immigration, Refugees and ntegration on the Situation of Foreigners in Germany of 22 June 2005 Bundestags-Drucksache 15/5826, page 211 f..
[75] In the Aftermath of Ethnic Cleansing: Continued Persecution of Roma, Ashkalis, Egyptians and Others Perceived as "Gypsies" in Kosovo.

Subsidiary protection and prohibition of removals of foreigners to countries were they face a real and serious risk of being killed or being subjected to torture or to other cruel, inhuman and degrading treatments

Legislative initiatives, national case law and practices of national authorities

Section 60 of the new Residence Act rules the prohibition of removals. See for paragraph 1 with Article 18 (recognition of the status of refugee). According to paragraph 2 a foreigner may not be deported to a state in which a concrete danger exists of the said foreigner being subject to torture. Paragraph 7 reads: A foreigner should not be deported to another state in which a substantial concrete danger to his or her life and limb or liberty applies. Dangers in this state to which the population or the segment of the population to which the foreigners belongs are generally exposed shall receive due consideration in decisions pursuant to Section 60a para 1 sentence 1. (That means temporary suspension of deportation by order of the supreme Land authority.)

Section 25 rules the grant of a residence permit in those cases. Paragraph 3 reads: A foreigner should be granted a residence permit if the conditions for a suspension of deportation are fulfilled in accordance with Section 60 para 2, 3, 5 or 7. Pursuant to paragraph 4 a foreigner may be granted a residence permit for a temporary stay if his or her continued presence in the Federal territory is necessary on urgent humanitarian or personal grounds or due to substantial public interests. …..

Positive aspects

As a rule beneficiaries of subsidiary protection (Section 60 para. 2 – 7 of the Residence Act) are now granted a residence permit instead of a "Duldung" (suspension of removal) under the previous law. This is an important improvement.

Other relevant developments

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

The **Committee against Torture** had examined the third periodic report of the Federal Republic of Germany (CAT/C49/Add.4) at its 600th and 603rd meetings (CAT/C/SR.600 and 603), which were held on 7 and 10 May 2004, and adopted its conclusions and recommendations on 11 June 2004. In paragraph 6 of the conclusions and recommendations the Committee requested that the Federal Republic of Germany provide information in response to the recommendations in paragraph 5 (a), (b), (e), and (f) within one year.

In section D paragraph 5 (e) the Committee recommends that the Federal Republic of Germany, " ... provide the Committee with details on how many cases of extradition or removal subject to receipt of diplomatic assurances or guarantees have occurred since 11 September 2001, what the State party's minimum requirements are for the content of such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases."

The Federal government in its statement of 5 August 2005 first declared that a retrospective ascertainment of diplomatic assurances or guarantees in all extradition cases since 11 September 2001 is not possible based upon the large number of extradition cases. This is because several hundred extradition cases in regard to non-EU states alone are handled each year by the Federal Ministry of the Justice. Of these, in each of 2002 and 2003 between and 80 and 90 extraditions to non-EU states were approved. However, no significant statistical anomalies have been observed in comparison to the years prior to 11 September 2001.

In order to provide the Committee with a current picture of the Federal Republic of Germany's approach in regard to the minimum requirements for diplomatic assurances or guarantees as to extraditions, the Government described April and May 2005 as examples.

In principle, there would be a distinction between extraditions to Member States of the European Union and extraditions to non-EU states.
As to extraditions to Member States of the European Union, no particular guarantees are required.
If a specific extradition treaty exists with a non-EU state, some guarantees are already generally established, so that additional assurances are required or conditions applied only in exceptional cases. Germany has concluded specific extradition treaties with 4 non-EU states. In dealings with other states, the European Convention on Extradition from 1957 or the German-British Treaty on Extradition from 1872 apply. As to extradition matters with non-EU states without a treaty, the Federal Republic of Germany requires concrete assurances when appropriate in the individual case.

The approach taken by the Federal Republic of Germany in regard to the minimum requirements for diplomatic assurances or guarantees in extradition matters is described below on the basis. During this time period of April and May 2005a total of 18 extradition authorizations were granted to non-EU states.

Of those, in 10 extradition cases assurances were obtained regarding detention conditions. The contents of the assurances differed depending on whether or not the requesting state had signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In the first case, it is required that the extradited person be housed in a detention facility that comports with the requirements of the ECHR and the European prison rules/minimum rules for the treatment of prisoners dated 12 February 1987. Otherwise, Germany requires an assurance that after his transfer the person is housed in a detention facility that meets or exceeds the United Nations "Standard Minimum Rules for the Treatment of Prisoners." To the extent necessary, an assurance is demanded that German consular officials can visit the extradited person in the detention facility.

To the extent necessary in an individual case, the Federal Republic of Germany insists on the assurance that the death penalty will not be imposed on the person after the extradition or, in the event it was imposed, that it will not be carried out.
The Federal Republic of Germany requires the assurance in written form as an official statement of the government of the requesting state.

The Federal Republic of Germany is in a position to ensure these assurances through embassy and consular personnel. Possibilities include, for example, participation in court hearings as an observer and visits to the detention facilities.

As to *deportations*, assurances and guarantees of treatment comporting with human rights only come under consideration in connection with the removal of impediments to deportation and only in certain combinations. The requirements of such diplomatic assurances in cases of deportation are not abstractly established, but rather, depend upon the individual matter. With one exception, since 11 September 2001 there have not been any cases of deportation in which diplomatic assurances were required.

Legislative initiatives, national case law and practices of national authorities

According to the established jurisdiction of the Federal Constitutional Court[76], the courts have to examine in extradition procedures whether the extradition is in conformity with indispensable constitutional principles of the German legal system. This includes the principle of proportionality (for instance no unbearable hard, inadequate or inhuman, humiliating punishment). In the period of scrutiny, the Federal Constitutional Court had to deal with two different extradition cases.

In one of these cases, the Higher Regional Court [*Oberlandesgericht*] had declared an extradition request to the United States based on "serious murder" admissible. The complainant in the USA could be sentenced to life-long prison without the possibility to get suspended execution of punishment and probation. The Federal Constitutional Court[77] rejected the constitutional complaint. Human dignity would demand that a person convicted to a life-long prison sentence will have the chance to regain freedom some time. Details of the proceeding, however, which in Germany strengthen and guarantee the practical chance of regaining freedom, are not part of the inalienable principles of the German constitutional order which also the requesting state has to fulfil. It would rely on the practical chance given by the other legal system. According to Section 4801 Penal Code in California the "Board of Prison Terms" would have the possibility, to recommend a granting of pardon or a commutation. The Constitutional Court therefore declared the extradition admissible.

The second case regarded the **Europäisches Haftbefehlsgesetz [European Arrest Warrant Act]** of 21 July 2004[78]. It had considerable practical effects and found wide attention.

In its judgment of 18 July 2005, the Second Senate of the Federal Constitutional Court declared the European Arrest Warrant Act void. According to the Court, the Act encroaches upon the freedom from extradition (Article 16 paragraph 2 of the Basic Law (*Grundgesetz*)) in a disproportionate manner because the legislature has not exhausted the margins afforded to it by the Framework Decision on the European arrest warrant in such a way that the implementation of the Framework Decision for incorporation into national law shows the highest possible consideration in respect of the fundamental right concerned. Moreover, the European Arrest Warrant Act infringes the guarantee of recourse to a court (Article 19.4 of the Basic Law) because there is no possibility of challenging the judicial decision that grants extradition.

The decision is essentially based on the following considerations:

(1**)** The European Arrest Warrant Act infringes Article 16 para 2 sentence 1 of the Basic Law[79] (ban on extradition) because the legislature has not complied with the prerequisites of the qualified proviso of legality under Article 16 para 2 sentence 2 of the Basic Law when implementing the Framework Decision on the European arrest warrant.

The fundamental right that is enshrined in Article 16 para 2 sentence 1 of the Basic Law guarantees the citizens' special association to the legal system that is established by them. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association. The protection of German citizens from extradition, can, however, be restricted by law subject to certain prerequisites pursuant to Article 16 para 2 sentence 2 Basic Law. The cooperation that is put into practice in the "Third Pillar" of the European Union (police and judicial cooperation in criminal matters) in the

[76] BVerfGE 63, 332, 337 f.; 75, 1, 19.
[77] Decision of 6 July 2005 – 2 BvR 2259/04 –.
[78] German Federal Law Gazette BGBl. 2004 part I p. 1748.
[79] Article 16 paragraph 2 Basic Law reads as follows: "No German may be extradited to a foreign country. A different regulation to cover extradition to a Member Country of the European Union or to an international Court of law my be laid down by law, provided that constitutional principles are observed.".

shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, in particular with a view to the principle of subsidiarity.

When adopting the Act Implementing the Framework Decision on the European Arrest Warrant[80], the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental right to freedom from extradition is proportionate. In particular, the legislature had to see to it that the encroachment upon the scope of protection provided by Article 16 para 2 of the Basic Law is considerate. The ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition. The confidence in one's own legal system is protected in a particular manner where the act on which the request for extradition is based has a significant domestic connecting factor. Whoever, as a German, commits a criminal offence in his or her own legal area need, in principle, not fear extradition to another state power. The result of the assessment is different, however, where a significant connecting factor to a foreign country exists as regards the alleged offence. Whoever acts within another legal system must reckon with his or her being held responsible there as well.

The European Arrest Warrant Act does not come up to this standard. It encroaches upon the freedom from extradition in a disproportionate manner. When implementing the Framework Decision, the legislature has failed to take sufficient account of the especially protected interests of German citizens; in particular, the legislature has not exhausted the scope afforded to it by the framework legislation. It could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of the Framework Decision. The Framework Decision permits, for instance, the executing judicial authorities to refuse to execute the European arrest warrant if it relates to offences that have been committed in the territory of the requested Member State. As regards such offences with a significant domestic connecting factor, the legislature would have had to create the possibility of refusing the extradition of Germans. Apart from this, the Arrest Warrant Act shows a gap of protection concerning the possibility of refusing extradition due to criminal proceedings that have been instituted in the same matter in the domestic territory or because proceedings in the domestic territory have been dismissed or because the institution of proceedings has been refused.

(2) By excluding recourse to a court against the grant of extradition to a European Union Member State, the European Arrest Warrant Act infringes Article 19 para 4 Basic Law (guarantee of recourse to a court).

The European Arrest Warrant Act partly incorporates the grounds for optional non-execution of the European Arrest Warrant that are provided in the Framework Decision. In doing so, the German legislature has essentially opted for a discretionary solution. The decision to be made, which is based on the weighing up of facts and circumstances, serves to protect the prosecuted person's fundamental rights and may not be removed from judicial review.

(3**)** The European Arrest Warrant Act is void. The legislature will have to revise the grounds for the inadmissibility of the extradition of Germans and will draft the case-by-case decision on extradition in such a way that it is an act of application of the law which is based on weighing up. As long as the legislature does not adopt a new Act implementing Article 16 para 2 sentence 2 Basic Law, the extradition of a German citizen to an European Union Member State is not possible.

One Judge has delivered a concurring opinion. Two Judges have each appended a dissenting opinion to the Federal Constitutional Court decision:

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[80] Framework Decision of 13 June 2002, L 190 of 18 July 2002

Judge Lübbe-Wolff shares the Senate majority's opinion that the European Arrest Warrant Act does not take sufficient account of the fundamental rights of persons potentially affected by it, but does not agree with parts of the grounds and with the dictum on the legal consequences. She states that to rule out violations of the constitution, it would have been sufficient to establish that as regards certain specified cases, extraditions on the basis of the Act are inadmissible until the entry into force of a new regulation that is in conformity with the constitution. The declaration of nullity of the law, however, rules out extradition on account of a European arrest warrant also in cases that pose no constitutional problems whatsoever – even, for instance, the extradition of citizens of the requesting state on account of offences committed in this state. The Federal Republic of Germany is thus forced to infringe European Union law, a situation which could have been avoided without infringing the constitution.

Judge Gerhardt takes the view that the constitutional complaint would have had to be rejected as unfounded. He states that the declaration of nullity of the European Arrest Warrant Act is not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible. With its decision, the Senate contradicts the case-law of the Court of Justice of the European Communities, which, in its Pupino judgment[81] of 16 June 2005, emphasised that the principle of the Member States' loyal cooperation in the area of police and judicial cooperation in criminal matters also, and particularly, applies as regards the implementation of Framework Decisions.

[81] Case C-105/03 *Pupino* [2005] (judgment of 16 June 2005).

CHAPTER III EQUALITY

Article 20. Equality before the law

Article 21. Non-discrimination

Protection against discrimination

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. The German Bundestag on 17 June 2005 had adopted a Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlienen [Act regarding the implantation of European Antidiscrimination Directives][82]. But the Bundesrat states its view on the bill and demanded that the Mediation Committee be convened. Because of the early elections (see above Preliminary Remarks, n° IV) the proceeding could not be finished.
The Federal Government now will have to introduce a new bill.

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

Legislative initiatives, national case law and practices of national authorities

(1) Convention on Cybercrime of the Council of Europe of 23 November 2001 and first additional Protocol to this convention:
Germany has signed both, but not yet ratified them. The ratification is intended and at time in preparation. Parallel to this the Federal Ministry of Justice prepares the implementation by relevant laws.

(2) For general aspects of this fight see Report Germany 2004. There is no new development apart from special criminal law (see below). Some aspects should be mentioned:

a) 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][83] 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.

In Germany is no systematic and structured approach, in a narrower sense, to the issue of racism and xenophobia. The Federal Government, however, has launched many different measures and activities against xenophobia, racism and anti-Semitism. Therewith the Government pursues a ”Four-Pillar-Strategy” with the elements: human rights policy/human rights education, strengthening of civil society/courage of one’s convictions, encouragement of the integration of foreigners and measures which aim at the offenders and their environment.[84]

[82] Bundesrats-Drucksache 445/05.
[83] Bundestags-Drucksache 14/9519 of 14 May 2002.
[84] See *Siebter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen* of 17 June 2005, Bundestags-Drucksache 15/5800, A 4, 4.4 (page 54).

Each Federal Ministry considers the themes of racism and xenophobia within the scope of its sphere of authority. It exists, however, a procedure to coordinate measures in this field and to make them more effective in the whole: Twice or three times a year the Federal Ministry of Interior organizes a meeting with all other ministries which are (these are a lot) interested in these themes, for discussion of the issue and useful measures.

Further the Federal Government within the scope of the "Forum against Racism" discusses with representatives of the NGO's and also coordinates measures to combat racism. This Forum was established in 1998 in order to improve the cooperation between the Federal Government and the civil society. It acts as a platform for the exchange of experience and information between state authorities and institutions of the science and representatives of the civil society. It has about 75 members.

Important elements of the Government's policy are the action program "Youth for Tolerance and Democracy – against Right-wing Extremism, Xenophobia and Anti-Semitism" [*Aktionsprogramm "Jugend für Toleranz und Demokratie – gegen Rechtsextremismus, Fremdenfeindlichkeit und Antisemitismus*][85] and the "Alliance for Democracy and Tolerance – against Extremism and Violence" [*Bündnis für Demokratie und Toleranz – gegen Extremismus und Gewalt]*. This Alliance 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 organizes actions against racism and xenophobia and brings together and supports engagement of the civil society.[86]

b) As development in the criminal sphere the Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuchs[87] [Act amending the Assembly Act and the Criminal Code], amending Section 130 Criminal Code (for the amendment of the Assembly Act see above with Article 12), has to be mentioned.

aa) It stands in the following context:
The German Criminal Code in Section 130 (Agitation of the People), Section 86 (Dissemination of Means of Propaganda of Unconstitutional Organizations) and Section 86a (Use of Symbols of Unconstitutional Organizations) sets out a number of provisions of which types of crime comprise racist and xenophobe acts. (In German law, however, a specific type of crime "Racism / Xenophobia" does not exist.)
According to Section 130 paragraph 1 Criminal Code is punishable whoever, in a manner that is capable of disturbing the public peace, incites hatred against segments of the population or calls for violent or arbitrary measures against them (Section 130 paragraph 1 no. 1) or assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population (Section 130 paragraph 1 no. 2).

This provision has the aim to protect peaceful living together of groups of the population in the country. Protected types of legal interest therewith are not only public security and public peace, but also the protection of the individual rights of persons who are affected by inciting comments. These may be individual persons or groups, that are different from the other segments of the population by nationality, religion or ethnic descent.
The dissemination of writings, audio or visual recording media, data storage media, illustrations and other images that incite hatred against segments of the population or against specific groups which differentiate from the other population, is punishable as well according to Section 130 paragraph 2 no. 1 (in connection with Section 11 paragraph 3) Criminal Code. The provision indicates that, besides the incitement to hatred, the calling for violent or arbitrary measures or the insulting, maliciously maligning or defaming of groups concerned are punishable as well.

[85] See for further information www.bmfsfj.de/Politikbereiche/kinder-und-jugend,did=4732.html
[86] (See for further information www.buendnis-toleranz.de)
[87] Act of 24 March 2005 (BGBl. 2005 I p. 969)

To the dissemination (paragraph 2 no.1, lit. a) as further actions are equivalent the public display, posting, presentation or otherwise making them accessible (lit. b), the offering, the giving or making accessible to a person under eighteen years (lit. c) and specific acts preparatory to the commission of acts referred to (producing, obtaining, supplying, stocking, offering, announcing commending, undertaking to import or export) (lit. d).When the presentation of the content, indicated in paragraph 2 no.1, is disseminated by radio, media or teleservices, it is a criminal offence as well.

According to Section 130 paragraph 3 is punishable, whoever publicly or at a meeting, expresses approval of, denies or minimizes an act committed under the rule of National Socialism of the type indicated in section 6 paragraph 1 of the German Code of Crimes against International Criminal Law, and does so in a manner capable of disturbing the public peace. Criminal offences in the sense of Section 6 paragraph 1 of the Code of Crimes against International Criminal Law are, for instance, genocide and dangerous bodily injury with the intent of destroying, in whole or in part, a national, racial, religious or ethnic group as such.

bb) The new paragraph 4 of Section 130 Criminal Code set into force at 1 April 2005. By the new Law, now, Section 130 Criminal Code has been intensified in order to improve further the protection of the dignity of the victims of the National Socialism in Germany. A new paragraph 4 was added. According to this is punishable whoever, publicly or at a meeting, disturbs the public peace by expressing approval of, glorifying or justifying the acts of violence and tyranny committed under the National Socialist regime in a manner which violates the dignity of the victims thereof.

The reason for this amendment of the criminal law was the legal policy need for a criminal sanction of glorifying or minimizing the heavy acts of injustice committed under the National Socialist regime of violence and tyranny – also under the threshold of genocide. The public glorifying of National Socialist violent and arbitrary measures or public mark of esteem of persons, who have been responsible or jointly responsible for equivalent actions, disturb public peace and deride the victims and the degrading treatment of them.

This new provision is controversial in public discussion because of a potential limitation of freedom of expression and freedom of assembly. At the moment, the Federal Constitutional Court is proving the constitutionality of this provision with regard to its reconcilability with the freedom of assembly (see with Article 12).

Protection of Gypsies / Roms

Legislative initiatives, national case law and practices of national authorities

As a practise has to be mentioned the „Rahmenvereinbarung zwischen der rheinland-pfälzischen Landesregierung und dem Verband Deutscher Sinti und Roma Landesverband Rheinland-Pfalz e.V.“ [Framework Agreement between the Government of des Land Rhineland-Palatinate and the Association of German Sinti and Rome Land Association Rhineland-Palatinate] of 25 July 2005.

In this Framework Agreement the Land Government acknowledges explicitly that the German Sinti and Roma as an acknowledged and traditional in Germany living minority stands under the special protection of the Council of Europe’s Framework Convention for the protection of National Minorities. The Agreement regard, v. a., financial supports by the Government in vocational training, and in the promotion of artistic talents. Both parts of the Agreement shall make an effort to combat any discrimination of members of the Minority.

Good practices

This Framework Agreement may be recommended as a good practice.

Article 22. Cultural, religious and linguistic diversity

Protection of linguistic minorities

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

In December 2004 the Federal Government presented the "Second Report submitted by the Federal Republic of Germany under Article 25, paragraph 2, of the Council of Europe's Framework Convention for the protection of National Minorities". – The first Report had been submitted in 1999.

The Report reflects the status as of 21 September 2004. It informs on 246 pages (with an annex) informs on in which manner the requests of the Framework Convention are fulfilled. In addition to generally updating the First State Report, it covers the specific comments in response to the observations and information requests contained in the Monitoring Report of the CoE Advisory Committee (ACFC) 2002 and to the recommendations of the Committee of Ministers with regard to the further implementation of the Convention in Germany.

Legislative initiatives, national case law and practices of national authorities

Regarding these issues no special developments.

The „Rahmenvereinbarung zwischen der rheinland-pfälzischen Landesregierung und dem Verband Deutscher Sinti und Roma Landesverband Rheinland-Pfalz e.V." [Framework Agreement between the Government of des Land Rhineland-Palatinate and the Association of German Sinti and Rome Land Association Rhineland-Palatinate] of 25 July 2005 has been already mentioned with Article 21.

Article 23. Equality between man and women

Gender discrimination in work and employment
Positive actions seeking to promote the professional integration of women

The Report 2004 on Germany has extensive reported on the situation in Germany. There are no many *new* developments. "The number of employed women is increasing; equal opportunity, however, is still lack." So a headline of the Frankfurter Allgemeine Zeitung[88].

An answer of the Federal Government on a Minor Interpellation on 37 pages
takes a wide and interesting survey on the situation of women in science and research[89].

As a new law has to be mentioned the Gesetz zur Durchsetzung der Gleichstellung von Soldatinnen und Soldaten der Bundeswehr [Act for Implemetation the Equalization of women soldiers and soldiers of the Federal Army] of 27 December 2004, taken into force on 1 January 2005.[90]

[88] Of 17 September 2005, economic part.
[89] Situation der Frauen in Wissenschaft und Forschung, Bundestagsdrucksache 15/5907 of 12 July 2005.
[90] Act of 27 December 2004 (BGBl. 2004 Part I p. 3822). See for this also Jahresbericht 2004 des Wehrbeauftragten, BT-15/5000, of 15 March 2005, n° 2.1.4.4, page 23 f.

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 had appreciated that women's participation in political life had exceeded the threshold of 30 %. New Figures were not available.

A significant positive sign is that Germany since November 2005 is reigned by a "Bundeskanzlerin" (a female Chancellor)[91].

Article 24. The rights of the child

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Three important reports should be mentioned:

Nationaler Aktionsplan für ein kindergerechtes Deutschland 2005 bis 2010[92];

Answer of the Federal Government on a Major interpellation "Jugend in Deutschland"[93],

Bericht über die Lebenssituation junger Menschen und die Leistungen der Kinder- und Jugendhilfe in Deutschland – Zwölfter Kinder- und Jugendbericht – [Report on the Life-situation of young people and the contributions of the childrens- and Youth support – 12th Report on Children and Youth -], including the remarks of the Federal Government.[94] This Report was elaborated by a Commission of seven experts under the chairmanship of the head of the Deutsche Jugendinstitut. It was presented in August 2005 and contains a number of recommendations for education, care and training before the beginning of and besides school.

Article 25. The rights of the elderly

Specific measures of protection for the elderly

Legislative initiatives, national case law and practices of national authorities

As new developments should be mentioned first the Nationaler Strategiebericht Alterssicherung 2005 of the Federal Government.[95] It contains a survey on the policy of the Government regarding security of the elderly.

A more practical aspect has the "Charta der Rechte hilfe- und pflegebedürftiger Menschen, presented in September 2005 by the Deutsches Zentrum für Altersfragen.

Article 26. Integration of persons with disabilities

Protection against discrimination on the grounds of health or disability

Legislative initiatives, national case law and practices of national authorities

[91] See Preliminary Remarks IV.
[92] Bundestags-Drucksache 15/4970 of 18 February 2005.
[93] Bundestags-Drucksache of 9 March 2005.
[94] Bundesrats-Drucksache 747/05 of 12 October 2005.
[95] Bundestags-Drucksache 15/5571 of 27 May 2005.

No real developments to be reported. But there was presented the „Bericht der Bundesregierung über die Lage behinderter Menschen und die Entwicklung ihrer Teilhabe“ [Report of the Federal Government on the situation of persons with disabilities and the development of their Participation].[96]
It analyses the whole problematic and gives an very informative survey,

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

Legislative initiatives, national case law and practices of national authorities

Important is the Gesetz zur Förderung der Ausbildung und Beschäftigung schwerbehinderter Menschen [Act on Promotion of the Training and Employment of severely handicapped persons][97]. It contains a lot of measures for the promotion of handicapped youths.

In July 2005 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][98]. According to the report, the offices of the Federal had a part of 7.1 % of employed severely handicapped persons in 2003.

A further Report of the Federal Government regards the “Situation behinderter und schwerbehinderter Frauen und Männer auf dem Ausbildungsstellenmarkt”[99].

On the development of the unemployment of disabled people informs the 23rd Report submitted by the Government of the Federal Republic of Germany for the period from 1 January to 31 December 2004 in accordance with the provisions of Article 21 of the European Social Charter” (page 9/10).

Reasonable accommodations

Legislative initiatives, national case law and practices of national authorities

The Federal Government in an answer to a Minor Interpellation has reported on the development of the help for the integration for persons with disabilities.[100]

[96] Bundestags-Drucksache 15/4575 of 16 December 2004.
[97] Act of 23 April 2005 (BGBl. 2005 I p. 606).
[98] Bundstags-Drucksache 15/2734 of 18 March 2004.
[99] Bundestags-Drucksache 15 5922 of 14 July 2005.
[100] Bundestags-Drucksache 15/4372 of 30 November 2004.

CHAPTER IV SOLIDARITY

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

Article 28. Right of collective bargaining and action

Social dialogue

Legislative initiatives, national case law and practices of national authorities

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

The right of collective actions (right to strike) and the freedom of the enterprise or the right to property and the issue of the intervention of the judiciary into collective actions

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.

There were no collective actions in 2005.

Article 29. Right of access to placement services

Access to placement services

Legislative initiatives, national case law and practices of national authorities

See with Article 15.

Article 30. Protection in the event of unjustified dismissal

Remedies against the decision of dismissal and compensation due in the event of an unjustified dismissal

Legislative initiatives, national case law and practices of national authorities

No developments under the legal aspect. Regarding the practice 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 2004 the Federal Government presented the "Bericht der Bundesregierung über den Stand von Sicherheit und Gesundheit bei der Arbeit und über das Unfall- und Berufskrankheitengeschehen in der Bundesrepublik Deutschland im Jahre 2003 [Report on the status of security and health at work and on accident victims and occupational diseases in the Federal Republic of Germany in 2003][101].
It is an interesting and informative survey on the stand of security and health at work.

Sexual and moral harassment at work

Legislative initiatives, national case law and practices of national authorities

A decision of the Higher Labour Court Düsseldorf of 14 November 2005[102] regarding the German place of business of the American trading trust *Wal-Mart* attracted large attention as the issue itself. The governance codex contains rules on love-relations within the firm, especially between a superior and a subordinate. The Court noted that employers are not allowed to give internal rules regarding love relations within the staff.

Working time

Legislative initiatives, national case law and practices of national authorities

In Germany working time in the private sector is an issue of wage agreement. There have been modifications in 2005. But statistics on that were not available.

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

Article 33. Family and professional life

Parental leaves and initiatives to facilitate the conciliation of family and professional life

Legislative initiatives, national case law and practices of national authorities

The Gesetz zum qualitätsorientierten und bedarfsgerechten Ausbau der Tagesbetreuung für Kinder (Tagesbetreuungsausbaugesetz)[103] [Act on the Quality- and Demand-Oriented Expansion of Day Care for Children (Act on the Expansion of Day Care)] is an important step and signal to promote the expansion of day care for children. Chapter three of the Social Code VIII – Help for children and youth – got the title "Promotion of children in day care facilities and of children's day care by private persons".

[101] Bundestags-Drucksache 15/4620 of 29 December 2004.
[102] See Frankfurter Allgemeine Zeitung (FAZ) of 15 November 2005 and already FAZ of 17 June 2005.
[103] Act of 27 December 2004 (BGBl. I page 3852).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

(1) In August 2005 a high-carat Commission of Experts presented the Federal Minister for Family Affairs, Senior citizens, Women and Youth with the 7th Family Report[104]. Central issue of this extensive and comprehensive work is the balance between the world of the family and the world of labour. The Report points out that family is not a private issue. It sees, however, family as a task for the whole society.

(2) In the Report 2004 it has been reported on the development of some important and successful initiatives of the Federal Minister for Family Affairs, Senior citizens, Women and Youth:
In summer 2003 the Ministry, in participation with the Bertelsmann-Foundation, had launched the "Alliance for the family" [Allianz für die Familie], in which the government, social partners NGO's and other important stakeholders work together on a sustainable policy in favour of the family. For the success of a better reconciliation of work and family it was crucial that the trade unions and the companies are involved because they hold the key for family friendly working places in their hands. The work of the alliance focuses on organisation of working time, human recourses development, a family-friendly culture within the companies and family-orientated assistant services. Various projects and studies within this alliance aim to improve the balance between work and family life.

As one of these elements the Ministry launched a federal competition in which companies that support their staff in its attempts to reconcile family life and gainful employment receive an award. 366 companies participated this time. The awarding took place in May 2005. – The project "Work-live-balance as an engine for economic growth and social stability" in which eight big German companies are engaged examines the various effects of work-live-balance measures on business, employees, economy and society. It shows how working conditions orientated by a balance between family life and work contribute to strengthen innovation, economic growth and social stability. The results of this study have been presented in June 2005 by the Minister of Family Affairs and the president of the Association of German chambers of Industry and Commerce.

The "Family Atlas 2005" by the Prognos AG gives an overview of the family-friendliness in Germany. It classifies the 439 counties and cities in eight groups with same profiles of family-friendliness. Its objective is not a ranking of the regions but to underline the positive features and to indicate fields of action in which a region should improve the situation.

The initiative "Local Alliances for Family" is somewhat as the operational substructure of the "Alliance of the Family". It was founded in early 2004. Its target is to strengthen a family-friendly atmosphere on the local level by facilitating co-operation and exchange of experiences between companies, social organisations and municipalities. Up to now more than 200 local alliances have joined the initiative.

Good practices

Without any doubt, these initiatives and their developments are a positive aspect, possibly good practices as well.

[104] Not yet published as Bundestags-Drucksache.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion

Legislative initiatives, national case law and practices of national authorities

In March 2005 the Federal Government has presented the report "Life-situations in Germany – Second Report on Poverty and Wealth" [105]. By this report the Federal Government undertakes a comprehensive stock taking of the social situation from 1998 to the end of 2004. The report describes the situation and analyses it and nominates measures for the promotion of more participation for the promotion of growth and employment.

The report is complemented by the "National Action Plan for combating poverty and social exclusion 2003 to 2005 – Implementation Report 2005". [106] It describes central trends and challenges and the conception for further development.

Social assistance for undocumented foreigners and asylum seekers

All foreigners who are lawfully and normally resident in Germany receive social assistance benefits which are necessary for subsistence (basic social assistance benefits) like a German. These include subsistence benefits, which comprise all necessary benefits a person needs for his daily life, also assistance in case of illness, pregnancy and maternity, and assistance with long-term care.[107] – Asylum seekers, according to Section 55 Asylum Procedure Act, shall be permitted to reside on the federal Territory while the procedure is pending (Aufenthaltsgestattung [Permission to Reside]). They get social assistance according to the Asylbewerberleistungsgesetz [Act on contributions for persons seeking Asylum], especially Sections 3 and 4. That means, for instance, that they get subsistence benefits not by money, but only by natural benefits. For assistance in case of illness, pregnancy and delivery the necessary treatment has to be granted.

If a foreigner who enters Germany, however, was guided by the intention of receiving social assistance, he has no entitlement to this, pursuant to Section 120 para 3 Federal Social Assistance Act. For assistance in case of illness, the entitlement is restricted to the treatment of an acute life-threatening condition or the unpostponable treatment of a serious or infectious disease if the person entered Germany to have an illness treated. The Länder are responsible for implementing Section 120 para 3 of the Act. The Federal Government has no data on the number of cases in the Länder.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Regarding the labour market reforms to improve the situation on the labour market the following can be reported:

[105] "Lebenslagen in Deutschland – Zweiter Armuts- und Reichtumsbericht", Bundestags-Drucksache of 3 March 2005.
[106] Nationaler Aktionsplan zur Bekämpfung von Armut und sozialer Ausgrenzung 2003 bis 2005 – Implementierungsbericht 2005, Bundestags-Drucksache 15/5569, of 27 May 2005.
[107] See for this also 23rd Report submitted by the Government of the Federal Republic of Germany for the period from 1 January to 31 December 2004 in accordance with the provisions of Article 21 of the European Social Charter, page 48, 52 (Article 13).

In the Job-AQTIV Act, the Acts for modern services on the labour market, the Labour Market Reform Act and other related acts, the Federal Government had implemented a comprehensive reform of the labour market and of the central provider of employment promotion, the Federal Employment Agency, in 2004. Changes by the Drittes Gesetz für moderne Dienstleistungen am Arbeitsmarkt[108] [Third Act for Modern Services on the Labour Market] took into effect in the beginning of 2005. They regard v. a. restrictions of the period of entitlement to unemployment benefit, the insurance in the unemployment insurance scheme of all people doing compulsory military or civilian alternative service, the admissibility of a restriction to part-time employment (instead of the availability to take up a reasonable full-time job) and the calculation of unemployment benefit.

Further changes took place by the Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt[109] [Forth Act for Modern Services on the Labour Market].

Article 35. Health care

Access to health care

Legislative initiatives, national case law and practices of national authorities

(1) The health reform was one of the major themes in politics in the last years. There were a lot of initiatives and laws on the field of health care. In the framework of this report it is not possible to describe the development of the complicated and controversial reforms on this field. Many of them, as, for instance, the extensive Gesetz zur Modernisierung der gesetzlichen Krankenversicherung (GKV-Modernisierungsgesetz)[110] [Statutory Health Insurance Modernisation Act], regarded problems of the reform of the statutory health insurance system, structural reforms and a re-ordering of the finances, This Act is dated of the end of 2003, substantial parts, however, came into force on 1 January 2005.

(2) According to a statistic of the Federal Statistic office, in 2003 188,000 persons were not member of a health insurance. That is 0.2 % of the population in Germany. This may have its reason in social and economical factors. Since first of January 2005 persons who get unemployment benefit II are integrated in the protection by the statuary health insurance.[111] Persons without health insurance in case of neediness my get health care in the Framework of social assistance.

Article 36. Access to services of general economic interest

Article 37. Environmental protection

Right to a healthy environment

Legislative initiatives, national case law and practices of national authorities

Under this theme two acts should be mentioned:

[108] Of 23 December 2003 (BGBl. 2003 I page 2848).
[109] Of 24 December 2003 (BGBl. 2003 I page 2954).
[110] Act of 14 Nov 2003, BGBl. I 2003 p. 2190.
[111] See answers of 3 June and 6 October 2005 on oral questions, Bundestags-Drucksache 15/5661 page 50, and 15/6009 page 27.

Gesetz zur Umsetzung der EG-Richtlinie über die Bewertung und Bekämpfung von Umgebungslärm of 22 June 2005[112] [Act Implementing the EC Directive relating to the assessment and management of environmental noise] which supplements the Federal Act for the Protection against intromission.

The Gesetz zur Kontrolle hochradioaktiver Strahlenquellen of 12 August 2005[113] [Act on the Control of high-activity radioactive sources] contains, besides modifications of the Atomgesetz, extensive supplements of the Strahlenschutzverordnung.

The right to access to information in environmental matters

Legislative initiatives, national case law and practices of national authorities

The Gesetz zur Neugestaltung des Umweltinformationsgesetzes of 22 December 2004[114] [Act on the reorganization of the Act on public access to Environmental Information] implements the new EU Directive on pubic access to Environmental Information.[115] In the interest of increased transparency it replaces the former Act on public access to Environmental Information rather than to amend it. Regarding the content it rules an increased public access to environmental information. The definition of environmental information is clarified an increased. The public authorities are obliged active to make available and disseminate environmental information to the public. Simultaneously the Federal Law is adopted to the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters (The Aarhus Convention).

Article 38. Consumer protection

Other relevant developments

Practices of national authorities

The Federal Government by the Verbraucherpolitischer Bericht 2004 [Report 2004 on consumer policy][116] informed on the objectives and focal points of its consumer policy and on measures on consumer policy.

[112] BGBl. 2005 I p.1794.
[113] BGBl. 2005 I p. 2365.
[114] BGBl. 2004 I p. 3704.
[115] Directive 2003/4/EC of the European Parliament and of the Council od 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41/26 of 14 February 2003.
[116] Report of 1 December 2004, Bundestags-Drucksache 15/4499.

CHAPTER V CITIZENS' 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 legal or practical restrictions to the right to vote and stand as candidate at elections to the European Parliament.
The Press and Information Office of the Federal Government has adopted a lot of initiatives in order to improve the electoral participation of German citizens and non national residents, for instance, publicity spots in television, advertising in written press, using the internet as well. Also an information car promoting election ("Wahlmobil") went through the country.

Despite of this, the rate of participation was 43 %. The reason for this was not too less publicity campaign but a general failure of the policy to impart the value of the Community and the importance of EU law to the citizen.

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

Participation of foreigners in public life at local level

Legislative initiatives, national case law and practices of national authorities

Germany is not party of the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level (ETS, n° 144) of February 1992. (Up to now only 8 member states have ratified this Convention.) For constitutional reasons no initiatives are taken in order to accelerate the ratification of this instrument.

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

The relevant EU-preconditions (especially the Council Directive 94/80/EC of 19 December 1994) are realized and practiced for a long time through a supplementation of Art. 28 Basic Law (new sentence 3 in § 1)[117] and through the communal election laws of the Länder.

There do not exist any surveys or statistics on the rate of participation of EU citizens who are not German nationals in municipal elections, regarding the rate of participation or to stand as a candidate. Cautious estimations assume that a 10% average takes part in municipal elections.

During the period of scrutiny in Germany municipal elections did not take place.

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

[117] Article 28 para 1 Sentence 3 reads: „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."

According to German constitutional law, only EU citizens may take part in municipal elections.

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

Legislative initiatives, national case law and practices of national authorities

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

Protection of EU citizens by diplomatic and consular representations abroad

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 July 1996 and was realized by an issuing (Runderlass) of the Foreign Office.

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

Legislative initiatives, national case law and practices of national authorities

The Decision 96/409/CSFP of 25 Jun 1996 became effective for Germany. It was realized as far as a realization was needed. The practical realization is still worked on.

CHAPTER VI JUSTICE

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

Access to a court and, in particular, the right to legal aid / judicial assistance

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.

In March 2005 the Federal Constitutional Court[118] decided on a successful constitutional complaint regarding judicial inactivity. The complainant was inmate in a prison. He had asked for the possibility to attend a correspondence course at the University in Hagen. This was refused. Then at the Regional Court he applied for a judicial decision. The Court, however, didn't decide. The Federal Constitutional Court held this a violation of the right to an effective remedy.

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.

Reasonable delay in judical proceedings

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

Three decisions of the European Court of Human Rights have sentenced the Federal Republic of Germany because the time of proceedings took too long.

Case Uhl[119]

The applicant had alleged that the length of the criminal proceedings against him had exceeded a reasonable time. The case, concerning charges of tax evasion, fraud and fraudulent breach of trust, was not particularly complex. The Eur. Court noted that the delays caused by the judicial authorities especially during the preliminary investigations lasted for approximately three years and eleven months, including some fifteen months during which the investigations were not actively pursued. The applicant was not placed in detention on remand at any time, the proceedings had considerable social implications for him, with his job as a civil servant being at stake.

In the light of the various factors, the Eur. Court fond that, even if the length of the proceedings in the respective instances could, taken alone, still be considered as reasonable, the overall duration of the proceedings, having regard to the Court's case-law concerning the notion of "reasonable time" within the meaning of Article 6 § 1 was excessive and failed to

[118] Order of 29 March 2005 – 2 BvR 1610/03 –.
[119] Eur.Ct.H.R. (3rdsect.), Uhl v. Germany (Appl. N° 64387/01) judgment of 10 February 2005

meet the "reasonable time" requirement. There had accordingly been a violation of Article 6 § 1 of the Convention.

Case Wimmer[120]

The case concerned custody. The Frankfurt/Main Court of Appeal had granted Ms W. sole custody of the children, while allowing the applicant to retain a right of access. In August 1993 the applicant launched a constitutional complaint with the Federal Constitutional Court. Towards the end of 1997, he received a telephone call from the Federal Constitutional Court informing him that the questions raised by his complaint would become obsolete with the expected entry into force of the amended Law on Family Matters of 16 December 1997 (*Kindschaftsrechtsreformgesetz*) on 1 July 1998. The applicant was asked whether he wanted to declare that his constitutional complaint had been disposed of (*Erledigterklärung*) under these circumstances. On 24 June 1998 the applicant requested the Constitutional Court to deliver a decision despite the change of law brought about by the Law on Family Matters.

On 22 December 1999 the Federal Constitutional Court, sitting as a panel of three judges, refused to admit the applicant's constitutional complaint. It found that due to the amended Law on Family Matters, the constitutional complaint no longer raised issues of general interest. The applicant's complaints could be adequately dealt with in proceedings for the amendment of a court order (*Abänderungsverfahren*) pursuant to Section 1696 § 1 of the Civil Code before the competent civil courts. In these proceedings, the new legal provisions on family matters could be taken into account.

The Eur. Court H.R. in its judgment recalled that Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. Although this obligation applies also to a Constitutional Court, when so applied it cannot be construed in the same way as for an ordinary court. Its role as guardian of the Constitution makes it particularly necessary for a Constitutional Court, sometimes, to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms. Furthermore, while Article 6 requires that judicial proceedings be expeditious, it also lays emphasis on the more general principle of the proper administration of justice (see, *inter alia*, *Süßmann v. Germany*, judgment of 16 September 1996, *Reports of Judgments and* Decisions 1996-IV, p. 1174, §§ 55-57; *Niederböster v. Germany*, no. 39547/98, § 43, ECHR 2003-IV; *Trippel v. Germany*, no. 68103/01, §§ 27 et seq., 4 December 2003).

The Court recognised, as it has already done in the case of *Niederböster* (cited above, § 44), that the Federal Constitutional Court's ability to force the legislature's hand is somewhat limited if the legislature embarks on a reform of the statutory provisions forming the subject matter of the applicant's constitutional complaint. It reiterates, however, that in order to make the reasonable time requirement laid down in Article 6 § 1 practical and effective, it is of the essence that justice be rendered without delays which might jeopardise its effectiveness and credibility (see, amongst many others, *Niederböster*, cited above, § 44). In this respect, the Court, referring to its constant case-law, recalled that it is essential, in particular, for custody cases to be dealt with speedily (see, *inter alia*, *Nuutinen*, cited above, § 110; *Niederböster*, cited above, § 39). It noted that the Federal Constitutional Court, after the time-limit for third-party observations had elapsed on 30 September 1994, apparently had not proceeded with the applicant's constitutional complaint until its phone-call to the applicant by the end of 1997, and had been awaiting the new legislation on family matters.
Given the fact that the applicant's constitutional complaint of 9 August 1993 concerning the custody of his children had already been pending for some 4 years and 3 months before the

[120] Eur. Ct.H.R. (3rd sect.) Wimmer v. Germany (Appl. N° 60534/00) judgment of 24 February 2005.

Constitutional Court in December 1997, it doubts that the above-mentioned period, during which no action was taken in the applicant's case, could still be regarded as reasonable. The Court observed in particular that, after the applicant had informed the Constitutional Court on 24 June 1998 that he still wanted a decision, it took another approximately eitheen months until the Constitutional Court notified him that it refused to admit his constitutional complaint. Given the duration of the proceedings at the time of the applicant's said submissions, this further delay appeared to be excessive. There had been a violation of Article 6 § 1 of the Convention.

Case Gisela Müller[121]

The case concerned questions of the proper administration of a partnership and raised complex questions of fact and law. Furthermore, the serious arguments between the applicant on one side and her sister and her mother on the other side led to an extremely uncompromising attitude of all parties to the law suit. The period to be taken into consideration began at the latest on 11 June 1986, when the Bremen Regional Court received the applicant's motion dated 28 March 1986, and had not yet ended. It had thus already lasted more than 19 years for four levels of jurisdiction.

In the light of the various factors, having regard to its case-law on the subject, the Court considered that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable-time" requirement. There had accordingly been a breach of Article 6 § 1.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities
Two new acts should be reported:

In October 2004 the Bundestag adopted a 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][122]. It was promulgated in December 2004.

The Gesetz über die Rechtsbehelfe bei Verletzung des Anspruchs auf rechtliches Gehör [Act on the Remedies in the case of violation of the Right to a hearing in accordance with law][123] has been awaited for a long time as a consequence of the jurisprudence of the Federal Constitutional Court. For all Codes of procedure it constitutes that, independent of the normal Recourse and remedies, the parties are entitled to a special remedy if there was a breach of the right to a hearing in accordance with the law. The new regulations prevent that in these cases, if the normal system of remedies is exhausted, a complaint of unconstitutionality has to be lodged to the Federal Constitutional Court

Article 48. Presumption of innocence and right of defence

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

[121] Eur. Ct.H.R. (3rd sect.) Gisela Müller v. Germany (Appl. N° 69584/01) judgment of 6 October 2005.
[122] Act of 15 December 2004 (BGBl. 2004 I p. 3392).
[123] Act of 9 December 2004 (BGBl. 2004 I p. 3220).

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

Germany has ratified the Convention implementing the Schengen Agreement in 1994[124]. It used of the reservation embodied in Art. 55 para 1 a).[125]

[124] Treaty act of 15 July 1993 (BGBl. 1993 II p. 1010).
[125] Announcement of 20 Apr 1994 (BGBl. 1994 II p.631.