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**REPORT BY**

**THE COMMISSIONER FOR HUMAN RIGHTS**  
**MR THOMAS HAMMARBERG**

**ON HIS VISIT TO GERMANY**

**9 – 11 and 15 – 20 October 2006**

For the attention of the Committee of Ministers  
and the Parliamentary Assembly

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## **Introduction**

### **Outline and purpose of the visit**

1. The Commissioner for Human Rights Thomas Hammarberg visited the Federal Republic of Germany from 9 to 11 and from 15 to 20 October 2006 at the invitation of the Federal Minister of Foreign Affairs Frank-Walter Steinmeier. The visit was part of a series of the Commissioner's regular country missions to all member states of the Council of Europe to assess their effective respect for human rights.<sup>1</sup> The Commissioner was accompanied by Mr. Lauri Sivonen, Ms. Birgit Weyss and Ms. Irene Kitsou-Milonas, members of his Office.<sup>2</sup>

2. In the course of his visit, the Commissioner met with Federal Minister of Labour and Social Affairs and Deputy Chancellor Franz Müntefering, Federal Minister of Foreign Affairs Frank-Walter Steinmeier, Federal Minister of the Interior Wolfgang Schäuble, Federal Minister of Justice Brigitte Zypries and Federal Minister of Health Ulla Schmidt. He also met with members of the Governments of the Länder of Berlin, Bavaria and Saxony. The Commissioner visited Berlin, Munich, Karlsruhe and Dresden and met with representatives of federal, Länder and local authorities, members of the judiciary, federal and Länder parliamentarians, as well as civil society representatives. He also made several institutional visits to facilities and sites with human rights relevance.<sup>3</sup>

3. The Commissioner expresses his great appreciation for the generous co-operation of the German authorities at all levels and wishes to thank in particular the Minister and the Ministry of Foreign Affairs for their shared commitment to the objectives of the mission. He extends his gratitude to all people he met during the visit for their open and constructive attitude and frank exchange of views. The Commissioner is especially pleased about the great number of civil society representatives who came to meet him to share their expertise and valuable information on the human rights challenges they have encountered.

4. The purpose of this report is to identify opportunities for improving the protection and promotion of human rights in Germany. The Commissioner considers that it should serve as a tool for future co-operation and follow-up. He calls upon the authorities and institutions concerned to contribute their accumulated expertise for further strengthening human rights protection in Germany. The Commissioner is of the firm opinion that continuous efforts are required in every country to uphold human rights to a high standard and that such work can only be efficient when it is carried out in permanent dialogue with all stakeholders.

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<sup>1</sup> See the Commissioner's mandate – Article 3 (e) of the Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights.

<sup>2</sup> The members of the Commissioner's Office also made a separate visit to the Land of Saxony on 12 October 2006 to meet representatives of the Sorbian minority as well as Bautzen II prison.

<sup>3</sup> A list of the people, institutions and facilities visited can be found as an appendix to the report.

## Note on methodology

5. The report begins with a brief assessment of the national system of human rights protection in Germany and is followed by chapters dealing with specific human rights concerns. Due to Germany's federal structure, the Commissioner often felt the need to assess sixteen Länder rather than one single country. However, it is not feasible to arrive at such a level of detail within the confines of the present report. Rather, the report points at the shared responsibility of the federation (*Bund*) and the Länder for upholding and promoting human rights while also taking into account the obvious differences in competences between the federation and the Länder as regards certain policy areas.

6. The report is based on information acquired during the visit as well as written statements and reports by authorities and civil society organisations in addition to reports from international human rights monitoring mechanisms. The report does not provide an exhaustive analysis of human rights challenges in Germany but rather reflects the Commissioner's priorities in protecting human rights at the national level. Occasionally, the report refers to a further need for data collection and analysis and therefore can only offer preliminary considerations.

## 1. National system for human rights protection

### 1.1. Status of international human rights standards

7. Germany was among the first countries to ratify the European Convention on Human Rights in 1952 which is currently transposed in the domestic law as a federal act. Germany has ratified most of the Council of Europe's human rights instruments and has made continuous efforts to guarantee a high level of respect for human rights. Moreover, Germany has long played an active role in promoting the development of international human rights standards. Germany reiterated its commitment to the domestic and international protection of human rights upon its election, last year, to the UN Human Rights Council for a full three-year mandate.

8. The Commissioner welcomes the signing by Germany of the Council of Europe Convention on the Prevention of Terrorism as well as the recent decision between the Federation and the Länder to ratify the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. During his visit, the German authorities also assured the Commissioner that Germany was committed to the early ratification of the Council of Europe Convention on Action against Trafficking in Human Beings and the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

9. Among those international treaties not yet ratified by Germany, the Commissioner calls on Germany to ratify Protocol No. 12 on the general prohibition of discrimination to the European Convention on Human Rights and the revised European Social Charter along with its Additional Protocols providing for additional rights and a collective complaints mechanism.<sup>4</sup> Both treaties are core Council of Europe standards which would

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<sup>4</sup> The Commissioner welcomes the signing by Germany, on 29 June 2007, of the revised European Social Charter.

strengthen the enforcement of the right not to be discriminated against as well as of economic, social and cultural rights in Germany. In view of the concerns expressed by the German authorities that Protocol No. 12 would interfere with German legislation differentiating between German citizens and non-nationals, the Commissioner recalls that certain distinctions based on nationality can be legitimate as long as they are objectively and reasonably justified in line with the jurisprudence of the European Court of Human Rights.

10. The execution of judgments of the European Court of Human Rights by Germany is generally carried out in a satisfactory manner. However, the case of *Görgülü* is the first German case pending in the Committee of Ministers of the Council of Europe for more than two years without being resolved.<sup>5</sup> The Commissioner is aware of recent progress made and hopes that the case will be fully executed without further delay. In regard to the case of *Sürmeli*, the Commissioner looks forward to the speedy adoption of draft legislation on legal remedy against the excessive length of pending civil proceedings.<sup>6</sup> He also underlines that the adequate allocation of resources to the functioning of courts should be taken into consideration as part of the remedy for excessive length of proceedings. Finally, he welcomes the country-wide prohibition of the forceful administration of emetics in response to the Court's judgement on the case of *Jalloh*.<sup>7</sup>

## **1.2. Complaints bodies and human rights structures**

### *1.2.1. Parliamentary Petition Committees*

11. Germany has a highly developed petition system at federal, Länder and municipal levels. The right to file a petition to the responsible parliamentary body has a long history and is articulated in Article 17 of the Federal Constitution (Basic Law). The Bundestag as well as all Länder Parliaments have special petition committees which are proportionally composed of members from all parties represented in the relevant parliament. In the Länder of Mecklenburg-Western Pomerania, Schleswig-Holstein, Rhineland-Palatinate and Thuringia, there also are parliamentary ombudspersons who either work as auxiliary organs to the petition committee or provide an alternative complaints procedure. At municipal level, there is no unified petition mechanism in place. In some municipalities or cities petitions can be made to the mayor, in others to the district council or the council of the city or the municipality.

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<sup>5</sup> The case concerns a biological and legally recognized father of a son born out of wedlock in 1999, who since 2000 is fighting for custody and visitation rights in Sachsen-Anhalt. The father appealed to the Court claiming that his right to family life had been violated by having been refused access to and custody of his son. In its decision of 26 May 2004 the Court found a violation of Article 8.

<sup>6</sup> The applicant, who was involved in an accident in 1982 for which he sought damages and a monthly pension, lodged an application with the Court in 1999 complaining of the length of the proceedings before national courts which have lasted more than 16 years. He further complained that lodging a constitutional complaint with the Federal Constitutional Court was not an effective remedy against excessive length of court proceedings. In its decision of 8 June 2006 the Court found a violation of Art 13 as the applicant had no effective remedy which could have expedited the court proceedings.

<sup>7</sup> The case concerns the forceful administration of emetics against a minor drug dealer and the use of the obtained evidence in court. In its decision of 11 July 2006 the Court held that the applicant had been subjected to inhuman and degrading treatment contrary to Article 3 and that the use of obtained evidence was in breach with the right to a fair trial according to Article 6.

12. The petition committees divide their responsibilities in accordance with the competences of the federal and Länder levels and deal with written complaints and requests concerning acts or omissions by public authorities or legal deficiencies. Petitions can be lodged free of charge and in an easily accessible manner in written form or, increasingly, through the internet. The committees are entitled to hear witnesses and to carry out site visits. The Petition Committees of Berlin, Brandenburg and Saxony are explicitly entitled to make unannounced visits to places of detention such as prisons or psychiatric institutions. Public authorities are obliged to provide access to relevant information and records to petition committees. However, with the exception of the Petition Committee in Berlin, the committees cannot oblige private companies fulfilling public services to respond to their inquiries or to provide access to relevant documents. In addition, most petition committees cannot become active on their own initiative although, as individual parliamentarians, members of the petition committees are free to take up issues in the plenary or in other parliamentary committees.

13. The petition committees usually succeed in resolving petitions by contacting the concerned authority and reaching an amicable solution. For other cases, the committee submits recommendations to the parliamentary plenary on how to deal with the petition. The parliamentary plenary can close a petition or forward a recommendation to the responsible body of the executive branch. The petition committees cannot change administrative or judicial decisions nor do they have a direct influence on governmental activities.

14. In the course of his visit, the Commissioner met with representatives of Petitions Committees of the Länder Parliaments of Berlin, the Free State of Bavaria, and the Free State of Saxony as well as the Petition Committee of the Bundestag. The Commissioner is impressed by their work and considers the petition system as a central mechanism for drawing attention to malpractice within the administration and identifying deficiencies or loopholes in legal provisions. He welcomes that petitions can often be filed through the internet and that committees organise or participate in public events to increase awareness of the complaints mechanism. The new possibility to launch public petitions of general interest is another element which demonstrates that the petition system is a living mechanism subject to constant development. With regard to privatised companies which fulfil public duties and remain to a certain extent under state supervision, such as postal, telecommunication and transport services, the Commissioner encourages the extension of the petition committees' mandates to cover them.

15. The Commissioner points out that such a highly developed petition system with a complex division of responsibilities may run the risk of petitioners being repeatedly transferred from one complaints body to another. He therefore emphasises the importance of close co-operation among petition committees on all levels and the swift transmission of petitions to the responsible body.

16. The Commissioner appreciates that the petition system provides a direct link between parliamentarians and the population regarding problems in the implementation of laws and the conduct of state authorities. Although petition committees may not be considered politically independent in the sense of classical ombudsperson institutions, their particular strength also lies in their composition. As parliamentarians, the members of the petition

committees have a direct influence on the legislative amendments which may be needed in order to respond to the problems brought into light through the petitions received.

### *1.2.2. Committee on Human Rights and Humanitarian Aid of the Bundestag*

17. In 1998, the Committee on Human Rights and Humanitarian Aid was upgraded from a sub-committee restricted to foreign affairs to a fully fledged and permanent committee of the Bundestag responsible for human rights in internal and external affairs. The members of the Committee, currently 16 in number, are nominated by their political parties according to the number of their seats in the Bundestag. The Committee discusses draft laws and motions put forward by parliamentary groups, the Federal Council or the Federal Government. It gives recommendations and opinions on a wide spectrum of human rights issues related to foreign, development and security policy as well as domestic affairs such as asylum legislation and counter-terrorism measures. Furthermore, the Committee has an important role in overseeing Government activities in regard to human rights by exercising its right to table specific questions to members of the Federal Government.

18. During the visit, the Commissioner met with representatives of the Committee. He welcomes the Committee's ability to take up domestic and international human rights issues in a comprehensive manner, cutting across all relevant policy areas. Furthermore, the Commissioner appreciates the Committee's close dialogue with NGOs and independent experts and highlights the central role the Committee took in the establishment of the German Institute for Human Rights. He encourages the Committee to hold public sessions in order to increase public participation in and awareness of human rights issues. The Commissioner considers that the Committee could make a particularly valuable contribution in the further development of the national action plan for human rights which was first published in the seventh governmental report on human rights.

19. Given the important role of Länder in implementing human rights standards, the Commissioner encourages the Länder parliaments to take up human rights issues in their work in a more systematic manner. The Länder parliaments may wish to consider the establishment of dedicated human rights committees or the regular inclusion of human rights questions in the work of existing committees in order to review government policy and provide recommendations in this field.

### *1.2.3. Commissioners*

20. On the federal level there are numerous commissioners who deal with human rights issues. Their mandate, appointment procedure and structural independence vary considerably. Whereas some of them have an advisory role to the Government and act as policy co-ordinators others have independent ombudsperson functions with an explicit mandate to receive complaints.

21. Among those having ombudsperson functions are the Federal Commissioner for Data Protection and Freedom of Information and the Defence Commissioner of the Bundestag responsible for complaints emanating from the military. Both are elected by the German Bundestag for a period of five years. Whereas the Data Protection Commissioner and his Office is administratively attached to the Federal Ministry of the Interior, the Defence

Commissioner is directly attached to the Bundestag carrying out parliamentary control

functions in regard to the armed forces. Both commissioners can receive complaints on the basis of clear procedural rules. They have investigative powers and can request access to authorities' records and files.

22. In addition, there are commissioners of the Federal Government who are mainly responsible for advising the Federal Government on relevant policy areas and for giving opinions on related draft legislation. Moreover, they have an important role as policy coordinators among different ministries and act as contact points for government authorities as well as non-governmental interest groups. They are appointed by the Federal Government for the term of each Bundestag. The number of commissioners varies in each legislative period depending on the policy focus of the government in power.

23. The Commissioner for Human Rights at the Ministry of Justice is the government agent who represents Germany before of the European Court of Human Rights, monitors the national execution of the Court's judgments and sits on the Council of Europe Steering Committee for Human Rights. At the Ministry of Foreign Affairs, the Commissioner for Human Rights Policy and Humanitarian Aid follows international human rights developments and sits on the UN Human Rights Council, provides policy advice to the Government and informs the general public about Germany's human rights policy in foreign affairs.

24. The federal government commissioners dealing with issues of specific human rights relevance include the Commissioner for Patient's Affairs, the Commissioner for Disability Affairs, the Commissioner for Emigrants and National Minorities and the Commissioner for Immigration, Refugees and Integration. These commissioners also have an advocacy role to support the concerns of the relevant groups as regards government policies. In contrast to the Data Protection Commissioner and the Defence Commissioner, their mandates do not include a specific complaints mechanism with the exception of the Commissioner for Immigration, Refugees and Integration whose mandate also includes receipt of individual complaints against public authorities. Public bodies of the Federation are required by law to supply information to and answer the questions of the Commissioner for Immigration, Refugees and Integration. Although the other three commissioners responsible for the interests of patients, persons with disabilities and national minorities, in practice, receive complaints by individuals, their mandates do not provide for special investigative powers nor is there an individual right of complaint to these institutions. By way of exception, federal authorities and other federal bodies are required to supply information to the Commissioner for Disability Affairs and to permit the latter to have access to files.<sup>8</sup>

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<sup>8</sup> In addition to the Federal Commissioners mentioned above, there also is a Federal Commissioner for Civilian Service who constitutes the point of contact for persons refusing to perform military service, persons required to perform civilian service and persons engaged in civilian service. The Commissioner for Civilian Service is incorporated within the organisational structure of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth and the Administration for Civilian Service and assists in ensuring respect for the fundamental right to refuse to perform military service for reasons of conscience.

25. The Commissioner met with several of these federal commissioners during his visit.<sup>9</sup> There also are many commissioners at the Länder level who deal with issues such as integration, data protection, disabilities and discrimination, and the Commissioner was able to meet with some of them as well. The Commissioner is impressed by the number of institutions dealing with specific or more general human rights issues at federal and Länder levels. However, taking into account the great variety of mandates and responsibilities concerned, the Commissioner finds it rather difficult to distinguish between those commissioners who have independent ombudsperson functions and those who have predominantly a policy advisory and co-ordinating role.

26. The Commissioner stresses that any institution dealing with complaints about public authorities should preferably be independent and respond to complaints on the basis of clear procedures. The functions and independence of such an institution should also be evident to the potential complainant. The Commissioner believes that the complexity of the system of complaints bodies in Germany necessitates an active information strategy to clearly explain their functioning to the general public. Information on the available extrajudicial complaints bodies at federal and Länder levels, including about their mandates, status and procedures, should be made available in an easily accessible format to the public at large. The Commissioner further encourages the German authorities to make a clear distinction between independent complaints bodies and government institutions appointed to deal with policies and issues of specific human rights relevance.

#### *1.2.4. German Institute for Human Rights*

27. Following a unanimous decision by the Bundestag, the German Institute for Human Rights was established with reference to the UN Paris Principles on national human rights institutions in 2001. The mandate of the institute includes the provision of information and documentation, research, policy advice and human rights education in Germany. The institute also acts as an open communication platform on human rights issues and therefore performs an important bridging function between state authorities and non-governmental stakeholders.

28. In order to ensure the institute's independence from governmental influence, its statute contains detailed regulations on decision-making and management procedures. The board of trustees, which approves the overall work plan of the institute and its budget, is intended to represent the political and societal pluralism in Germany. The board is composed of representatives of civil society, academia and media as well as parliamentarians and government representatives. The government representatives, however, do not have voting rights. The core funding of the institute is provided by the Federal Ministries of Justice, Foreign Affairs and Economic Co-operation and Development in a sustainable manner. The institute endeavours to address specific or less visible human rights issues and to draw attention to possibilities for improvement.

29. The Commissioner visited the institute in Berlin and held talks with the executive board and staff members. He was impressed by the institute's wide area of activities and numerous expert publications. In the opinion of the Commissioner, the institute has an

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<sup>9</sup> Members of the Commissioner's Office also visited the Office of the Federal Commissioner for Data Protection and Freedom of Information in Bonn prior to the visit of the Commissioner to Germany.

essential role in complementing existing human rights protection mechanisms in Germany. The independence of the institute is its central asset. This puts the institute in the unique position of being able to take up those human rights concerns which lack sufficient public awareness or political will for change.

30. The Commissioner recommends the strengthening of the institute's monitoring functions, which are currently very limited. The institute should be authorised to carry out structural and factual monitoring. The Commissioner also recommends that the institute's consultative role in the process of drafting legislation which impacts on human rights is enhanced. The institute should be able to issue opinions and recommendations on proposed legislation in a timely and informed manner.

### **1.3. Judicial system**

31. In response to the abuse of the principle of rule of law during the National Socialist Regime, Germany has developed, in the after-war period, an extremely elaborate system of legal complaints and appeals which gives the possibility of legal protection in court to everyone whose rights are violated by public authorities. The catalogue of fundamental rights included in the German Federal Constitution is to a certain extent considered part of its unalterable core. These rights are directly binding on the legislative, executive and judicial branches at federal and Länder levels.

32. The independence of the judiciary is enshrined in the Constitution. The ordinary judicial branch handling civil and criminal cases comprises four levels of courts, the highest level being the Federal Court of Justice (*Bundesgerichtshof*). Separate judicial branches are in place for general administrative, finance, labour and social jurisdictions, each consisting of at least one level of appeal.

33. Whereas federal law delineates the structure of the judiciary, the administration of justice falls generally in the competence of the Länder. To ensure that laws are equally interpreted and applied in all Länder, the highest courts of each branch are established at the federal level. Although all courts are responsible for reviewing the constitutionality of government action and legislation within their jurisdiction, only the Federal Constitutional Court may declare legislation unconstitutional. The Federal Constitutional Court can thus be regarded as the highest judicial body, which is responsible for ensuring that all state institutions comply with the fundamental rights enshrined in the Federal Constitution. Even constitutional amendments passed by a qualified majority of the parliament are subject to the Court's judicial review with regard to the unalterable basic principles of the constitution. It should also be noted that all Länder, with the exception of Schleswig-Holstein, have their own constitutional courts which may take up cases with reference to the Länder constitutions.

34. The Federal Constitutional Court has an essential role in securing the protection of constitutionally guaranteed rights. Anyone who claims that his/her fundamental rights have been infringed by an administrative body, a verdict of a court or a law may lodge a constitutional complaint. In general, such complaints are admissible only after all other legal remedies have been exhausted. A constitutional complaint must be admitted for decision if it is of fundamental constitutional importance, if the claimed infringement of fundamental rights is of special severity or if the complainant would suffer particularly

severe injury from the failure to decide the issue. Despite the fact that the great majority of complaints are not admitted, it should be underlined that decisions on individual cases can have repercussions which reach far beyond the individual case by obliging the executive or legislative branches to make far-reaching changes.

35. During the visit, the Commissioner met with the Presidents of the Federal Constitutional Court and of the Federal Court of Justice as well as with several other judges at the federal and Länder levels. The Commissioner was assured that the federal courts take due note of the European Convention on Human Rights and of the decisions of the European Court of Human Rights in their jurisprudence. However, the Commissioner observes that due to differences in the formulation of certain rights in the German Federal Constitution and the European Convention, for example as regards the freedom of expression, the simultaneously concordant interpretation of these two instruments may occasionally require particular effort. The Commissioner also stresses the importance of training judges and prosecutors working in courts at Länder and local levels on the European Convention on Human Rights in order to strengthen its direct national implementation. The Commissioner is aware of the involvement of the Federal Ministry of Justice in the development of the new Council of Europe Programme for Human Rights Education for Legal Professionals (HELP) and he encourages German authorities to take an active part in its implementation. With regard to legal studies at universities, the Commissioner notes with regret that international human rights law appears to be often taught as an optional part alone. He encourages the German universities to integrate human rights in the core curricula of legal studies.

36. The provision of legal aid to people who cannot afford litigation costs is essential to ensure effective access to justice. The Commissioner notes with concern certain amendments proposed by several Länder in May 2006 to restrict access to legal aid although he understands that measures may have to be taken against clearly abusive recourse to legal aid. In the Commissioner's view, nobody should be forced to use his/her minimum living wage in order to have effective access to justice. The grounds for refusing legal aid should, in the main, be restricted to inadmissibility, manifestly insufficient prospects of success, or to cases in which the granting of legal aid is not necessary in the interest of justice.<sup>10</sup>

#### **1.4. Police**

37. The Commissioner attaches great importance to the role of police authorities in protecting human rights. The police authorities the Commissioner met with during his visit assured him that human rights played a prominent role in police pre- and in-service training and that such training had been intensified during recent years. The latest government report on human rights policy confirms this commitment and acknowledges human rights as a fundamental part of police training. Information provided on various training measures demonstrates that human rights are being taught in a practical and comprehensive manner.

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<sup>10</sup> Cf. Recommendation No. R(93)1 on Effective access to the law and to justice for the very poor, adopted by the Committee of Ministers on 8 January 1993.

38. The division of police authorities at federal and Länder levels has resulted in a highly variable and scattered system of police training facilities and curricula, making an overall assessment or evaluation difficult. A recent study commissioned by the German Institute for Human Rights points out possibilities for improving the human rights training of the police. Through an analysis of curricula and seminar programmes, the study has identified weaknesses with regard to further education. It draws the conclusion that human rights training specifically targeted to all ranks should become a compulsory component of further education for the police. The Commissioner considers that it is important that human rights values are also reflected in the management and organisational structures of the police, thus promoting an open and constructive spirit of co-operation that would allow for critical reflection and exchange across hierarchies. The Commissioner encourages police authorities to periodically assess the extent to which police practices adhere to and promote human rights standards.<sup>11</sup>

39. In the Commissioner's view, policing in a democratic society requires that police authorities are willing to be monitored and held accountable for their actions. Although there are internal mechanisms established to deal with alleged incidents of police malpractice in Germany, the Commissioner calls on the German authorities to set up independent monitoring and complaints bodies for this purpose. The independence of such monitoring bodies can only be ensured effectively if they are placed outside police and ministry structures. Germany's decision to ratify the Optional Protocol to the UN Convention against Torture could provide a good opportunity to review monitoring and control structures of the police and to develop independent monitoring and complaints bodies for police conduct (see also chapters 1.1. and 8.3.). Another important element of effective monitoring is the collection of data regarding allegations of ill-treatment or misconduct by the police as well as counter charges filed by accused police officers.<sup>12</sup> The Commissioner is aware of previous recommendations in this field by UN treaty monitoring bodies and the CPT and urges the German authorities to follow up these recommendations.<sup>13</sup>

## **1.5. Civil society**

40. Germany has a vibrant civil society culture which is active at the local as well as the regional and federal levels. The Human Rights Forum is a network of more than 40 German non-governmental organisations committed to improving the protection of human rights within and outside Germany. The Commissioner met with numerous NGO representatives during the visit and is very grateful for having been able to share their expertise and valuable information on the human rights challenges they have encountered.

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<sup>11</sup> For this purpose see, for example, Council of Europe manual 'Policing in a democratic society – Is your police service a human rights champion': [http://www.coe.int/T/E/Human\\_Rights/Police/](http://www.coe.int/T/E/Human_Rights/Police/).

<sup>12</sup> Such data should be collected in a centralised way and include the number of allegations, the initiation of disciplinary, criminal or civil law proceedings and their outcome as well as the number of counter charges of resistance to state authority or libel.

<sup>13</sup> Conclusions and recommendations of the Committee against Torture: Germany 11/06/2004, CAT/C/CR/32/7; Concluding observations of the Human Rights Committee: Germany 04/05/2004, CCPR/CO/80/DEU; CPT Report on Germany CPT/Inf (2003) 20.

41. The civil society representatives informed the Commissioner that the co-operation of federal authorities with NGOs was subjected to a great deal of variation depending on the government body concerned. This also applied to civil society consultations regarding draft legislation with human rights relevance. No systematic consultation procedure with human rights organisations appeared to be followed on such matters.

42. Civil society organisations possess valuable information about the actual human rights problems people are facing in Germany. They are often the first contact point to which people turn with regard to their human rights concerns. The Commissioner encourages the German authorities at all levels to view NGOs as critical partners in the work to improve human rights protection and to make the best use of their expertise. He recommends that the authorities organise regular round tables or other forms of institutionalised dialogue and consultations with civil society representatives. Current policies and draft legislation with human rights relevance as well as the development of strategies for improvement are central themes for such a dialogue.

### **1.6. Human rights education**

43. Human rights education is an essential part of national human rights policy. It empowers individuals to make use of their rights, promotes critical thinking and encourages people to stand up for the human rights concerns of others.

44. The Commissioner welcomes that human rights are included in the framework school curricula of all Länder. He is pleased to note that the Compass Training Manual on human rights developed by the Council of Europe has been well received by teachers as well as pupils. The Human Rights Forum and the German Institute for Human Rights, however, have raised concerns that human rights education in schools is not provided in a coherent manner but it is rather left on the initiative of individual teachers. The Commissioner is convinced that a more coherent integration of human rights teaching methods in the pre- and in-service training of teachers would significantly increase the inclusion of human rights issues in school lessons.

45. Human rights education, however, is not a matter for schools only but should reach the entire population. Currently, only the German Institute for Human Rights and the UNESCO chair at the University of Magdeburg have a clear mandate to advance human rights education in Germany. Despite the variety of projects and civil society activities on human rights education, the current infrastructure with its limited resources cannot match the country-wide demand nor provide services and workshops across Germany. The Commissioner recommends strengthening the institutionalisation of human rights education with a clear mandate on co-ordination, training, development of teaching tools and tailor-made programmes for specific professions. Public information campaigns on human rights as well as general lectures or discussion fora are additional methods for general human rights education that should be used more widely.

46. Extending the infrastructure of human rights education would further strengthen the integration of human rights into professional career tracks. The Commissioner encourages the incorporation of human rights as a core component in professional

training in law enforcement, for teachers as well as practitioners in the social and health sectors. In addition, government officials in general, as well as parliamentarians on federal and state levels, would benefit from human rights training adapted to their area of work.

47. Although Germany has taken many initiatives in relation to the UN Decade for Human Rights Education, so far it has not developed a comprehensive, effective and sustainable national action plan for human rights education. The Commissioner encourages Germany to follow the example of other countries in developing an action plan which would also provide for the establishment of a national committee for human rights education. The committee should comprise a broad coalition of governmental and non-governmental actors and be responsible for developing and implementing the national action plan.

### **1.7. National co-ordination of human rights issues**

48. In Germany, there is already a great variety of institutions and mechanisms for identifying and addressing human rights concerns. The federal state structure renders this network even more complex while the complainant seeking a responsible body for remedying shortcomings may be daunted by the labyrinthine possibilities offered. The system of human rights protection in Germany has been the object of continuous development over the last decades which also mirrors progress made within the body of international human rights standards and mechanisms. The Commissioner is aware that there may be a degree of weariness among certain authorities and parliamentarians to keep on developing the system through the establishment of new institutions. Nevertheless, today may be the right moment for a thorough review of the current system with a view of improving its accessibility and efficiency as well as developing the complementarity and co-ordination of the institutions and bodies concerned.

49. The Commissioner welcomes that the seventh governmental report on Germany's human rights policy includes, for the first time, a national action plan on human rights. The purpose of such an action plan should be to improve the protection and promotion of human rights at the national level through a comprehensive and coherent approach to human rights policy and planning. A thorough baseline study, as described in the UN Handbook on national human rights plans of action, could be the best starting point to analyse the current human rights structures and policy.<sup>14</sup> This would include a forthright assessment of national challenges regarding the observance of human rights. The Commissioner is convinced that such an analysis would be particularly useful for reviewing the institutional framework of human rights protection in Germany. The identification of areas of possible protection gaps as well as overlap should enable targeted measures to improve co-ordination and strengthen or streamline institutions in a coherent manner.

50. The current national action plan focuses primarily on Germany's involvement in human rights activities at the international level including international monitoring of the respect for human rights in Germany. Yet, in order to be efficient, a national human rights plan should be anchored on domestic policy and set out clear aims and strategies on

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<sup>14</sup> UN Handbook on National Human Rights Plans of Action (2002), <http://www.unhchr.ch/pdf/nhrap.pdf>.

how to reach them. In order to provide for effective monitoring, the action plan should also include specific and realistic benchmarks, structured along the lines of policy sectors and responsibilities. The Commissioner stresses that the process of drawing up a national action plan for human rights should include meaningful consultations with all stakeholders concerned, including NGOs. The identification and involvement of all the partners in the preparatory work will also help clarify the respective responsibilities of different authorities and institutions at federal, Länder and local levels as well as the needs for co-ordination and co-operation for the implementation of the plan.

51. In order to enhance the systematic implementation by Germany of international human rights standards, the action plan should also include a checklist of those international standards which have not yet been signed or ratified or to which reservations remain. Such a tool can be used for reconsidering opportunities for further progress and for maintaining those standards which Germany has not yet adhered to on the political agenda. Finally, the Commissioner recommends that the national human rights action plan integrates already existing action plans on specific areas to avoid duplication.

52. Accordingly, the Commissioner strongly encourages the German authorities to further develop the national action plan on human rights as a co-ordinated process for the continuous improvement of human rights protection in Germany. The current biennial reports on human rights policy issued by the Federal Government are an important tool to describe and inform about the Government's human rights policy. However, they cannot substitute the more analytical and structural approach provided by a comprehensive national human rights action plan as envisaged by the 1993 UN World Conference on Human Rights in Vienna.

## **2. Prevention of discrimination**

### **2.1. General Equal Treatment Act**

#### *2.1.1. Legal framework*

53. With the transposition of altogether four EU anti-discrimination directives, Germany has taken a significant step towards improving legal protection against discrimination by non-state actors, in particular outside the labour market.<sup>15</sup> The transposition process took longer than in any other EU member state and was followed by an intensive public and political debate. The Commissioner notes that the difficult drafting process was partly due to Germany's ambition to create more comprehensive legislation than required by the directives' minimum standards.

54. The General Equal Treatment Act, which entered into force in August 2006, prohibits discrimination on the grounds of race and ethnic origin, gender, religion and belief, disability, age and sexual orientation. The Commissioner welcomes that the new act largely avoids any ranking among the different grounds for discrimination. In contrast to the EU directives, the prohibition of discrimination in the non-employment related sector not only applies to racial and ethnic discrimination but is extended to all other grounds of

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<sup>15</sup> 2000/43/EC of 29 June 2000, 2000/78/EC of 27 November 2000, 2002/73/EC of 23 September 2002 and 2004/113/EC of 13 December 2004.

discrimination as far as bulk transactions (*Massengeschäfte*) or private insurance contracts are concerned. However, with reference to private contractual relationships, discrimination on the basis of belief has not been included in the scope of the Act.

55. The Commissioner expresses his concern about the possible negative impact of the exception to the principle of equal treatment as regards access to rental housing. According to the Act, different treatment based on the enlisted criteria can be justified if it serves the purpose of “establishing or maintaining socially stable inhabitant structures, balanced housing structures and balanced economical, social and cultural circumstances”.<sup>16</sup> This rather broad and indefinite exception may give way to abuse that could instigate further segregation instead of avoiding it. The quest for stable inhabitant structures should not qualify as a positive measure promoting diversity within a housing area if it can be used to exclude those persons who are particularly disadvantaged. Civil society organisations informed the Commissioner that this provision had already led to segregation of families with a migration background within residential areas when they have been prevented from renting flats in apartment blocks inhabited by ethnic Germans only. The German authorities have informed the Commissioner that the practice described by the representatives of civil society is not in conformity with the exception concerned. According to the authorities, the provision applies to very narrow circumstances and can only be justified when used to enhance integration. Another aspect which significantly limits protection against discrimination in the housing sector is the fact that the equal treatment obligation is only binding for those who let out more than 50 flats with the exception of discrimination based on ethnic origin.

56. The Commissioner is also of the opinion that limiting discrimination claims to two months could have negative consequences on the effective protection against discrimination. According to the authorities, this provision aims at protecting, in particular, employers from having to store large amounts of documents related to job applications. The authorities have also informed the Commissioner that the time-limit does not apply directly for bringing proceedings before a court but rather for raising the claim with the other party. Nevertheless, considering that many victims of discrimination are reluctant to take immediate legal action because they fear further victimisation or simply because they are not aware of their rights, this short time limit may reduce their chances of bringing a claim and thereby reduces their access to justice.

57. The EU directives further oblige Germany to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished. The Commissioner encourages the federal state as well as the Länder and municipalities to screen relevant legal and administrative provisions to establish whether they comply with the new Act. This is particularly relevant when it concerns access criteria to certain professions on the grounds of age, disability, religion and belief or moral factors that

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<sup>16</sup> Unofficial translation of para 19 sec 3 General Equal Treatment Act: „Bei der Vermietung von Wohnraum ist eine unterschiedliche Behandlung im Hinblick auf die Schaffung und Erhaltung sozial stabiler Bewohnerstrukturen und ausgewogener Siedlungsstrukturen sowie ausgeglichener wirtschaftlicher, sozialer und kultureller Verhältnisse zulässig.“

include sexual orientation. The Commissioner stresses that since unjustified differentiation on the basis of citizenship can amount to indirect ethnic discrimination, particular attention should be given to the justification of citizenship criteria restricting access to certain professions.

### *2.1.2. Anti-Discrimination Office*

58. The adoption of the General Equal Treatment Act led to the setting up of an Anti-Discrimination Office within the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. This Office certainly marks an important step in providing institutional support to victims of discrimination. The Commissioner considers that the independence, accessibility and staffing of this Office as well as public awareness of its functions are fundamental aspects for the effective fulfilment of its mandate.

59. The independence of the head of the Office is similar to that of judges, except for that his/her term of office is connected to the legislative period of the Bundestag and that he/she is appointed by the Federal Minister for Family Affairs, Senior Citizens, Women and Youth. Given that the mandate of the Office is not a political one, the Commissioner is of the opinion that the term of its head should not coincide with the parliamentary term but should be fixed to a certain number of years. A different appointment procedure, for example by the Bundestag or the Federal President, should also be considered as a means of strengthening the Office's independence.

60. According to the Equal Treatment Act, the Office is mandated to independently support people who turn to the Office in enforcing their right to non-discrimination. In particular, the Office is expected to inform individuals about their rights and legal procedures. Within its area of competence, the Office may provide legal advice to persons who claim to have been victims of discrimination. The Office can request information on alleged discrimination cases from private and public actors. However, it lacks authority for further inquiries or the possibility of sanction if necessary information is withheld.

61. In order to ensure that victims of discrimination can receive counselling everywhere in Germany it will be essential that the new body co-operates closely with other counselling and complaints bodies as well as civil society organisations. The Commissioner welcomes the establishment of an advisory body composed of independent experts and representatives of civil society organisations active in the field of non-discrimination. He underlines that the process of appointing individual members to the advisory body should be transparent and based on objective criteria to ensure a sufficiently representative composition.

## **2.2. Equal treatment of women and men**

### *2.2.1. Equal pay for work of equal value*

62. Although the principle of equal pay for women and men has been embodied in the German legislation for decades, the gender related wage gap continues to be one of the highest among EU Member States. The first governmental Data Report on Equal Opportunities for Women and Men of 2005 indicated that women earn about 20 percent less than men with approximately the same working hours. The reasons for gender-

related inequalities are manifold and include gender-related segregation in the labour market, different career choices related to child-raising and higher representation of women in part-time and low paid jobs.

63. Considering that the majority of employees' salaries are determined by collective agreements, social partners bear an important share of responsibility when it comes to narrowing the income gap between women and men. The high overrepresentation of women in lower paid employment sectors contributes to the persisting wage gap. In this context it has been pointed out that salaries in social and health services, where the vast majority of employees are women, are generally too low compared to other sectors.

64. The Commissioner believes that the stagnating high pay gap between women and men in Germany requires additional or more innovative policy measures in order to fight this major imbalance. This is particularly important as low income for women has a multiplying factor in relation to unemployment and pension payments. Even though the state's role in influencing collective bargaining among social partners is limited, the state bears overall responsibility for the framework within which negotiations are possible. In order to ensure gender neutral job evaluation and grading systems, the Commissioner encourages the Federal Government to specify the rules of procedure for applying the principle of equal pay for work of equal value between different sectors of employment. Social partners would be bound by these more explicit regulations when negotiating collective agreements.

65. Another important way to close the gender gap would be the introduction of the right to collective claims or class actions. Groups of plaintiffs can challenge sector-related wage differences more easily than individual employees. Although trade unions can currently challenge collective agreements, they normally refrain from doing so as they are the ones who negotiated the collective agreements in the first place. The Commissioner also reiterates his recommendation that Germany should join the collective complaints mechanism of the European Social Charter which not only allows organisations of employers and trade unions but also certain NGOs to make submissions to the European Committee of Social Rights.

### *2.2.2. Violence against women*

66. Violence against women can be viewed as an extreme form of discrimination reflecting unbalanced power structures, suppression and humiliation. In Germany, there is considerable public and political awareness of the problem of domestic violence and violence against migrant women. In 1999, the Federal Government adopted a comprehensive Action Plan to combat violence against women. A follow-up Action Plan is currently being developed and is supposed to enter into force in the course of 2007.

67. The Commissioner welcomes that interventions against domestic violence increasingly include perpetrator programs providing targeted training courses for men who are violent against their partners. Nearly all Länder have enacted legal provisions that allow for the use of restraining orders which restrict perpetrators of domestic violence from coming near to the victim's residence. The Commissioner encourages those Länder which have not yet adopted such standards to do so.

68. Several organisations representing people with disabilities drew the Commissioner's attention to the high number of girls and women with disabilities who become victims of sexual violence. The Commissioner expresses his concern over this phenomenon and calls for more research to be carried out to identify the extent and mechanisms of such abuse so that targeted policy strategies can be developed to offer more effective protection. Victim support and counselling services should ensure that they can adequately cater for women and girls with disabilities as well. The German authorities have informed the Commissioner that the second Action Plan to combat violence against women, to be published in summer 2007, will highlight the situation with regard to women with disabilities.

69. Members of the Commissioner's Office visited a women's shelter in Berlin. The shelter provided a wide range of support measures to victims of domestic violence, forced marriage and trafficking. A particularly positive aspect of this shelter was that women were able bring in their children who were taken care of by especially trained staff members. One out of the 24 rooms had also been made accessible to women with physical disabilities. The Commissioner highlights the importance of the availability of support services to women victims of violence and calls on the German authorities to review the current situation in view of providing access to an adequate level of service in all Länder and every municipality.

### **2.3. Inclusion of people with disabilities**

#### *2.3.1. Employment*

70. The adoption of Book 9 on the Social Code and the Disability Equal Treatment Act in 2001 and 2002 marked a change of paradigm in German disability law. Instead of focusing on the provision of care and welfare, the new legislation seeks to ensure self-determination through entitlements aiming at full participation in all areas of society. The newly adopted General Equal Treatment Act offers persons with disabilities greater protection in employment matters while also strengthening their position in fundamental everyday transactions, especially as regards the conclusion of private contracts and insurance agreements. Germany provides a wide range of different benefits devoted to the inclusion of persons with disabilities into the labour market. However, disability associations claim that the reality does not meet the standards foreseen by legislation.

71. People with disabilities are particularly affected by the difficult situation on the German labour market. Although only incomplete data on the overall unemployment rate of people with disabilities is currently collected<sup>17</sup>, disability interest groups claim that the specific unemployment rate of people with disabilities is considerably higher compared to the rest of the population and that the Federal Employment Agency has so far not reacted appropriately to this particularly disadvantaged population group. Furthermore, representatives of people with disabilities have pointed out that, in general, Hartz IV<sup>18</sup>

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<sup>17</sup> The districts where responsibility for unemployed people is under municipal authority do not provide labour market data.

<sup>18</sup> Hartz IV - the latest major welfare reform of the German government – led to deep cuts in benefits for unemployed workers and transferred long-term unemployed into the generally less generous social welfare system.

and other related acts have worsened the situation of persons with disabilities as they have brought about more restrictive provisions on benefits, training opportunities and placements. The Commissioner stresses that policy measures entailing cuts in social welfare which disproportionately affect persons with disabilities can result in indirect discrimination. He suggests that such measures are screened in advance regarding their impact on people with disabilities. The German authorities have informed the Commissioner that, under the EU Lisbon Strategy, Germany is committed to reducing the gap between the rate of unemployment among people with severe disabilities and the general rate of unemployment.

72. Employers in the public as well as the private sector bear an important responsibility for providing training and employment opportunities for persons with disabilities. German legislation requires private and public employers with a workforce of over 20 employees to fill 5 percent of their jobs with people with severe disabilities.<sup>19</sup> Even though many private employers opt for paying a monthly compensation penalty instead of fulfilling the 5 percent quota, this legal requirement has become an important instrument for the inclusion of people with severe disabilities. However, the unemployment rate for this particular group remains above average compared to the rest of the population. Disability related discrimination regarding access to employment can often be connected to limited awareness of the applicants' abilities and special skills. The Commissioner considers that targeted awareness-raising measures should help to reduce reservations on employing persons with disabilities. He believes that employers' organisations and trade unions can make an essential contribution towards this aim.

### *2.3.2. Education*

73. Full inclusion into society also means access to mainstream education for children with disabilities. The Council of Europe Disability Action plan calls for equal access to education as a fundamental requirement for ensuring social inclusion as well as independence for people with disabilities.<sup>20</sup> The education of children with disabilities falls under the responsibility of the Länder which makes them the main actors for implementing equal access to regular school education for all children.

74. The integration rate of children with disabilities into mainstream education varies considerably among the sixteen Länder. Latest statistics show that only 12 percent of all children who need special assistance because of their disabilities attend integrated classes in regular schools. Bearing in mind that education in special facilities for children with disabilities should be the exception rather than the rule this low integration rate strikes the Commissioner as particularly unfortunate. Although, in general, the trend of inclusion into mainstream education is upwards, experts fear that budgetary concerns might slow down or even stop this positive development.

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<sup>19</sup> Book IX of the Social Code defines severely disabled persons as persons whose level of disability is at least 50 percent or persons whose level of disability is between 30 and 50 percent and who are unable to find or keep employment without assistance.

<sup>20</sup> Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, adopted on 5 April 2006, [http://www.coe.int/T/E/Social\\_Cohesion/soc-sp/Integration/](http://www.coe.int/T/E/Social_Cohesion/soc-sp/Integration/).

75. The Commissioner stresses that children with disabilities should have the opportunity to obtain adequate support measures in order to participate in mainstream education. Only in cases where professionally assessed needs for special education cannot be met within mainstream education, despite the provision of support measures, should recourse be made to alternative special schools.

76. Currently, children with disabilities do not have a legal right to inclusive schooling. Enrolment of children with disabilities at mainstream schools is subject to the condition that it is practically possible and financially reasonable to do so. On many occasions that condition results in children and young people with disabilities being allocated to special schools because, for example, barrier-free access and the financial means to provide specific support measures are lacking. Compared to the detailed regulations concerning financing and bearing of costs for special schools, no similar general regulations are in place for integration measures into mainstream education.

77. In 1997, the Federal Constitutional Court ruled that separate but equal education of children with disabilities does not itself amount to unfavourable treatment according to the Constitution. Such unfavourable treatment is considered by the Federal Constitutional Court to arise only if schooling at a regular school with special needs support is both possible and financially feasible. Germany, however, has to ensure that separate education in fact provides equal and adequate education opportunities. The fact that 80 percent of pupils attending special education facilities leave schools without taking the relevant school examination points at serious deficiencies in this regard.<sup>21</sup> The administrative procedure of identifying pupils with special educational needs (*sonderpädagogischer Förderbedarf*)<sup>22</sup> should take into account whether the special needs of pupils can be met by less segregative measures within mainstream education. The vast over-representation in special schools of children from a migration background and of children from families living under poverty also indicates inequalities in the selection procedures. The Commissioner is not convinced that the specific needs of these pupils are best accommodated through special school education. He further stresses that public and private schools should be made accessible to pupils with limited mobility skills including those using wheelchairs.

78. The Commissioner believes that equal education is in fact best provided by a unified education system where the special needs of some children are accommodated through specific assistance or pedagogical means. The full inclusion into the education system, of course, does not only imply compulsory education but also includes pre-school as well as professional training and higher education. The Commissioner stresses that inclusive education systems with sufficient and adequately trained teachers are the best way of promoting a society in which people with disabilities can fully participate.

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<sup>21</sup> Zwölfter Kinder- und Jugendbericht, Deutscher Bundestag Drucksache 15/6014, 10. 10. 2005: <http://www.bmfsfj.de/doku/kjb/>.

<sup>22</sup> The term *sonderpädagogischer Förderbedarf* is explained by the recommendation of the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder of May 1994 as special needs education for children and juveniles whose possibilities for education, development and learning are limited to an extent which would prevent them from receiving sufficient support in regular schools without specific pedagogical assistance.

### **3. Measures against racism and xenophobia**

#### **3.1. General policy measures**

79. In 2005, the number of registered extreme right-wing crimes was the highest it has been since the introduction of the new data collection system in 2001 amounting to 15,361 incidents.<sup>23</sup> The number of violent crimes within this category reached a peak of 1,034 cases in the same year. Also, preliminary data on 2006 indicate a clear rise of right-wing extremist and xenophobic crimes.<sup>24</sup> It is of particular concern that compared to 2005, the number of violent xenophobic crimes seems to have increased by around 32 per cent.

80. A recent study on right-wing extremist attitudes in Germany points out that racism, xenophobia and Anti-Semitism should not be dismissed as problems only affecting right wing extremist groups like skinheads or neo-Nazis<sup>25</sup>. These phenomena should rather be understood as social problems which affect all parts of society. Whereas crime statistics point at young males as main perpetrators of racist crimes, the study draws attention to the high percentage of pensioners and pre-pensioners holding racist attitudes.

81. Accordingly, the Commissioner considers that it is essential to develop policy responses to xenophobia, racism and Anti-Semitism which have a broad outreach and which address all parts of society. Such policy measures may include human rights and democracy training, promotion of civil society activities against anti-democratic tendencies and, in particular, considered political discourse on issues such as migration, asylum, counter-terrorism and integration. Human rights and democracy education in schools and adult education as well as in vocational training for civil servants, the police, social workers and health care professionals is an important tool for promoting tolerance and respect for a pluralistic society.

82. The Commissioner regards local civil society organisations as central actors when it comes to identifying anti-democratic tendencies within a community in order to develop targeted responses. The Alliance for Democracy and Tolerance<sup>26</sup> was set up by the Federal Government in 2000 for promoting the co-ordination and funding of civil society initiatives against violence and intolerance. Since then, 1,300 initiatives have participated in this network resulting in a wide range of activities such as victim support centres<sup>27</sup> and mobile counselling teams advising municipalities as well as youth groups or other active stakeholders in developing responses to racist and xenophobic tendencies in local communities<sup>28</sup>.

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<sup>23</sup> 2005 Annual Report on the Protection of the Constitution.

<sup>24</sup> Information provided by the German RAXEN Focal Point of the EUMC based on preliminary statistics of the Federal Ministry of the Interior.

<sup>25</sup> Vom Rand zur Mitte. Rechtsextreme Einstellungen und ihre Einflussfaktoren in Deutschland; Oliver Decker, Elbmar Brähler et al., Friedrich Ebert Stiftung, 2006, Berlin:  
[http://www.fes.de/rechtsextremismus/pdf/Vom\\_Rand\\_zur\\_Mitte.pdf](http://www.fes.de/rechtsextremismus/pdf/Vom_Rand_zur_Mitte.pdf)

<sup>26</sup> Bündnis für Demokratie und Toleranz, <http://www.buendnis-toleranz.de>

<sup>27</sup> <http://www.opferperspektive.de/>

<sup>28</sup> <http://www.jugendstiftung-civitas.org/content/mobileberatung.htm>

83. The priority of the Federal Government to combat right-wing extremism has been applied through the action programme “Youth for tolerance and democracy – against right-wing extremism, xenophobia and anti-Semitism” which was carried out from 2001 to 2006.<sup>29</sup> The programme was primarily of preventive and pedagogical nature while aiming at promoting and supporting democratic behaviour, civil commitment, tolerance and liberal-mindedness among young people. It included over 4,500 projects, initiatives and measures with a budget of about EUR 192 million made available by the Federal Government. A permanent follow-up project “Youth for diversity, tolerance and democracy” intended to enhance the prevention strategies developed in the previous programme was begun in January 2007 with an annual budget of EUR 19 million. Priorities for the new programme include the promotion of local action plans and selected model projects focusing on the examination of historical and current anti-Semitism, work with young people at the risk of becoming right-wing extremists, prevention and education measures for immigrant communities and early-stage prevention. A further programme, with annual funds of EUR 5 million voted by the Bundestag, will commence in July 2007 for the establishment of counselling networks which can provide mobile intervention teams at a short notice to tackle right-wing extremist crisis situations.

84. The Commissioner welcomes the initiatives of the Federal Government to fight right-wing extremism. In this context, the Commissioner highlights the important contribution of grass-root initiatives that identify and respond to anti-democratic tendencies in local communities. He therefore strongly encourages the Federal Government to continue financing victim support organisations and mobile advisory teams. In many cases, these organisations are better equipped to reach different parts of society than official bodies. Of course, not only the federation but also the Länder and municipalities bear responsibility to adequately address racist and xenophobic movements as well as single incidents.

85. The new government programme intends to strengthen the municipalities’ involvement in combating right-wing extremism at the local level by providing them with a possibility to apply for specific funds. Given the fact that some municipalities might not be aware of or even might not be willing to address problems related to racism and xenophobia in their communities it is important that funds are reserved for civil society initiatives that aim at drawing attention to such dangerous social developments.

86. The Commissioner welcomes the initiative by the Federal Minister of the Interior to set up an Islam conference which brings together key representatives of the 3.2 million Muslims living in Germany and German authorities for the purpose of a continuous dialogue. The conference can also serve as a forum to address Islamophobic tendencies and discuss relevant policy responses. The Commissioner emphasises that such a forum should be inclusive and sufficiently representative of the Muslim communities living in Germany in order to facilitate meaningful exchange of views.

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<sup>29</sup> The programme included three sub-programmes: “Entimon – United against violence and right-wing extremism”, “Civitas – Initiative against right-wing extremism in the new Länder” and “Xenos – Living and working in diversity” (funded through the European Social Fund).

### **3.2. Legislative provisions against racially motivated crimes**

87. The German Penal Code prohibits incitement to hatred and violence against segments of the population including through dissemination of publications or broadcasts. It further penalises the approval, denial or playing down of the genocide committed under the National Socialist regime. The dissemination of propaganda of unconstitutional organisations as well as the use of their symbols is equally prohibited. However, ECRI has repeatedly pointed out that Germany still lacks a legal provision which would explicitly refer to racist motivation as an aggravating factor when determining sentences.<sup>30</sup> It is true that the Penal Code includes a general provision stipulating that the motives and aims of the offender and the state of mind reflected in the act must be taken into account in determining punishment. During his visit, several judges and prosecutors assured the Commissioner that the racist motivation of crime was often taken into account in the sentencing practice in accordance with the general provision. The Commissioner is nevertheless of the opinion that an explicit reference to racist motivation as an aggravating factor would promote a more systematic and consistent use of stricter sanctions for racially motivated crimes.

88. The newly adopted General Equal Treatment Act bears an important symbolic message that racial discrimination is not only prohibited in relations between the state and the individual but also between individuals. The public debate during the four-year drafting process, which often focused on the question whether the prohibition of discrimination should limit the individual's free choice of his/her contract partner, clearly demonstrated the importance of enacting the non-discrimination legislation.

### **3.3. Data collection on racism, xenophobia and other forms of group-based hatred**

89. The collection of official data on racist or xenophobic crimes was considerably improved in 2001 with the introduction of a special notification system on politically motivated crimes. Although these police statistics are of great value when it comes to analysing and monitoring racist crimes they fail to cover the grey area of unreported incidents or those acts which have a clear racist background but do not qualify as criminal acts.

90. Accordingly, the Commissioner considers that data collected by NGOs and counselling centres are of particular relevance in extending the scope of information on racist and xenophobic incidents. However, Germany does not yet have a centralised data base which would record racist or xenophobic incidents reported by victims or witnesses to counselling institutions. The Commissioner suggests that the newly established Anti-Discrimination Office could provide a platform for collecting qualitative and quantitative data on discrimination cases, including information on victims and perpetrators as well as on circumstances under which discrimination takes place.

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<sup>30</sup> European Commission against Racism and Intolerance, Third Report on Germany adopted on 5 December 2003, CRI(2004)23; Second Report on Germany adopted on 15 December 2000, CRI (2001) 36.

### 3.4. Victims of racism, xenophobia and other forms of group-based hatred

91. ECRI has identified members of the Jewish, Muslim and Roma/Sinti communities as well as visible minorities as particularly vulnerable to Anti-Semitic, xenophobic and racially motivated violence and discrimination in Germany.<sup>31</sup> Surveys and NGO documentation also demonstrate that asylum seekers are among the most vulnerable groups as regards racist attacks. It is of particular concern that such incidents appear to be higher in those areas where right-wing extremist parties are represented in local parliaments. According to victim support centres perpetrators in these regions would act with greater confidence than elsewhere.<sup>32</sup>

92. Political debates on naturalisation and integration laws and, in particular, on asylum procedures can have a decisive impact on the public perception of migrants and asylum seekers. For example, the emphasis on the prevention of abusive asylum claims in the context of asylum legislation helps promote mistrust and suspicion among the population against this group. The current debate on counter-terrorism measures is another sensitive topic that has the potential to negatively influence public perception of Muslims living in Germany. The Commissioner calls upon all decision-makers and politicians to avoid the stigmatisation of minority communities irrespective whether they are Muslims, asylum seekers, undocumented migrants or other religious or ethnic minorities living in Germany.

93. In a recent survey on right-extremist attitudes, it was reported that 34.9 percent of respondents agreed with the statement that foreigners should be sent home if jobs became scarce in Germany.<sup>33</sup> The survey demonstrates that the awareness of positive aspects of a pluralistic and inclusive society has not yet reached significant parts of the population. The Commissioner highlights the need to address Germany's role as a country of immigration and to explicitly acknowledge the positive contribution of immigrants to German society. Racism and xenophobia constitute severe integration barriers which require multi-dimensional measures and good co-operation among federal, regional and local authorities as well as civil society initiatives. The Commissioner considers that the fact that nearly a fifth of the population living in Germany has a migration background should also be reflected in the composition of public services including the police. The promotion of cultural and ethnic diversity among the public sector can have an important positive impact on the public perception of immigrants and ethnic minorities.

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<sup>31</sup> European Commission against Racism and Intolerance, Third Report on Germany adopted on 5 December 2003, CRI(2004)23.

<sup>32</sup> Halbjahresstatistik der Beratungsstellen für Opfer rechtsextremer Straf- und Gewalttaten in Ostdeutschland, [www.opferperspektive.de](http://www.opferperspektive.de).

<sup>33</sup> Vom Rand zur Mitte. Rechtsextreme Einstellungen und ihre Einflussfaktoren in Deutschland; Oliver Decker, Elbmar Brähler et al., Friedrich Ebert Stiftung, 2006, Berlin: [http://www.fes.de/rechtsextremismus/pdf/Vom\\_Rand\\_zur\\_Mitte.pdf](http://www.fes.de/rechtsextremismus/pdf/Vom_Rand_zur_Mitte.pdf)

## **4. Protection of national minorities**

94. Germany is a state party to the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages. Under federal law and the Framework Convention, Germany recognises Danes, Frisians, Sorbs and Roma/Sinti as national or ethnic minorities. It is also stipulated that members of these national minorities must be German nationals and traditionally resident in Germany in their settlement areas. Only in the case of Roma/Sinti, who live in most federal states, the requirement of residence in a particular settlement area is not applied. Under the Charter, Germany promotes the use of Danish, North and Saterland Friesian, Lower and Upper Sorbian, Romany as well as the regional language Low German. Due to its limited geographical scope and in view of the monitoring activities of the Advisory Committee on the FCNM,<sup>34</sup> the Commissioner's visit focused on the situation of the Roma/Sinti and Sorbian minorities.

### **4.1. Personal scope**

95. The Advisory Committee of the FCNM has repeatedly recommended that the German authorities consider the possibility of including other groups that do not meet the stipulated criteria of citizenship and traditional residence among the scope of the Convention on an article-by-article basis. While the Committee of Ministers has deemed it desirable to pursue further dialogue on the possibilities to expand the scope of application, the Venice Commission has encouraged member states, where necessary, to consider the possibility of extending on an article-by-article basis the scope of protection of the rights and facilities concerned to non-citizens.<sup>35</sup> During the visit, the German authorities pointed out that they did not intend to reconsider their declaration on the personal scope of the application of the FCNM. They emphasised that a clear difference had to be made between national minorities traditionally resident in Germany, on the one hand, and recently arrived migrants, on the other.

96. The Commissioner considers that such a division between traditional minorities and migrants may pose difficulties in actual practice. Especially Roma/Sinti are a case in point. Since residence in a traditional settlement area is not required of them, it would appear unreasonable that the specific services available to Roma/Sinti in different Länder could not be availed by long-term Roma/Sinti residents who do not hold German citizenship. For example, the opportunities for additional classes or activities given in Romany in certain schools in Germany should be equally open to Roma/Sinti children of German and non-German citizenship.<sup>36</sup> The same applies to the special advisory services

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<sup>34</sup> See, Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on Germany, Adopted on 1 March 2006. ACFC/INF/OP/II(2006)001. The opinion was published on 7 February 2007.

<sup>35</sup> European Commission for Democracy through Law (Venice Commission), Report on non-citizens and minority rights, adopted at its 69<sup>th</sup> plenary session (Venice, 15-16 December 2006), Study no. 294/2004.

<sup>36</sup> Such activities are referred to in the Second Report submitted by Germany pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, received on 13 April 2005, ACFC/SR/II(2005)002.

provided to Roma in many Länder. Accordingly, the Commissioner calls on the German authorities to apply the criteria for the personal scope of national minorities in a pragmatic and reasonable fashion in order not to create unnecessary inequalities.

#### **4.2. Duties of the federal and Länder authorities**

97. The protection of national minorities has been recognized in both federal and relevant Länder legislation. Due to the division of competences between the federation and the Länder, the Länder are often responsible for protecting and promoting national minorities in practice. For example, as a result of the current federalism reform, education falls entirely under the competence of the Länder. The federal authorities informed the Commissioner that this makes it impossible for the federation to support the education of people belonging to national minorities.

98. The Commissioner underscores the fact that irrespective of the division of competences between the federal and Länder levels, the German federal and Länder authorities are responsible for carrying out their obligations for the protection of national minorities under international instruments. As the Roma/Sinti minority is dispersed along most Länder, the Commissioner calls on the federal authorities, in co-operation with the Länder authorities, to take particular care to ensure that the rights of Roma/Sinti are protected in equal measure throughout Germany.

#### **4.3. Data collection on the situation of national minorities**

99. Partly due to historical reasons, Germany has taken a very restrictive approach towards the collection of data on the situation of national minorities, in particular as regards official statistics. While the Commissioner naturally supports the protection of sensitive individual data, he also finds it necessary that measures to protect and promote national minorities are based on reliable data on their socio-economic situation. This is particularly important for the prevention of discrimination on ethnic or racial grounds and the furtherance of equal opportunities of people belonging to minorities. Furthermore, the EU racial equality directive (2000/43/EC) obliges member states to ensure that independent surveys are carried out concerning discrimination.

100. The Commissioner is convinced that data on the situation of minorities can be collected with due respect for the protection of privacy and the freedom of individuals to choose whether they wish to be considered as members of a national minority. The EU Directive on data protection (95/46/EC) specifically exempts data that has been made anonymous. Official statistics should not be regarded as the only means of collecting such data. The Commissioner emphasises that the organisations representing national minorities should be involved in finding suitable methodologies for collecting data on the respective minorities. During the visit, the German federal authorities acknowledged that alternative means of data collection could be envisaged in this field.

#### **4.4. Situation of Roma and Sinti**

101. It is estimated that about 70 000 German Roma and Sinti live in Germany. Roma and Sinti in Germany do not live in a specific settlement area but are dispersed across most Länder. Many Roma with foreign citizenship also live in Germany, often on a tolerance status (“*Duldung*” – see under chapter 6.1.3).

102. Both the Advisory Committee of FCNM and ECRI have reported that Roma and Sinti in Germany face discrimination, especially in the fields of education, employment and housing as well as through biased reporting by the media.<sup>37</sup> Organisations representing Roma/Sinti have carried out studies to document such discrimination while they also provide counselling services to victims of discrimination. In the field of the media, the Central Council of German Sinti and Roma has collected 553 articles published between 1995 and 2006 which specifically refer to Roma/Sinti individuals in a negative manner although their ethnicity would not appear to have any relevance to the substance of the reporting. The Central Council has also reported incidents of public hate speech against Roma/Sinti during sports events and on the internet.

103. The Commissioner considers that the new Equal Treatment Act is a significant step forward in addressing the discrimination of Roma/Sinti in Germany. However, the Commissioner calls on the German authorities, both at federal and Länder levels, to take special measures to improve the situation of Roma and Sinti to overcome the disadvantages brought about persistent discrimination. The framework agreement for the protection of Roma and Sinti signed between the Land of Rhineland-Palatinate and the respective Land association of the Central Council of German Sinti and Roma in 2005 serves as a promising example of special measures which could be taken at the Länder level. A federal strategy for the improvement of the situation of Roma/Sinti should also be considered.

104. The Commissioner urges particular vigilance against the propagation of negative stereotypes of Roma/Sinti in the media. While media professionals should follow the ethical guidelines and self-regulatory frameworks in their reporting, federal and Länder authorities should ensure that the authorities, and especially the police, do not make discriminatory statements to the press. It is also important to raise public awareness of the history and culture of Roma/Sinti to counter prejudices against them.

#### **4.5. Situation of Sorbs**

105. It is estimated that about 60 000 Sorbs live in Germany – two thirds of them in the Land of Saxony and one third in the Land of Brandenburg. In both Länder, the protection of Sorb language and culture is inscribed in the Länder Constitutions. The culture of Sorbs is promoted by the Foundation of the Sorbian People which is supported by the federation and the Länder of Saxony and Brandenburg. In both Länder, Sorbs are officially represented by a Council for Sorbian Affairs elected by the respective Länder parliaments on the nomination of the Sorbian communities.

106. During the visit, representatives of the Sorbian minority raised particular concerns regarding the availability of education in Sorbian as well as the use of Sorbian with authorities. The minority representatives emphasised that although the dwindling number of Sorbian pupils could be considered to warrant the closure of secondary schools in the traditional settlement areas, the views of the minority were not sufficiently taken into account regarding the manner of operating cuts in the school network. This was in

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<sup>37</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on Germany, Adopted on 1 March 2006. ACFC/INF/OP/II(2006)001 and European Commission against Racism and Intolerance (ECRI), Third Report on Germany, Adopted on 5 December 2003 and made public on 8 June 2004, CRI (2004) 23.

contrast to the cultural activities carried out by the Foundation of the Sorbian People on the board of which Sorbs were clearly represented. The educational authorities of Saxony pointed out that Sorbian schools were already exempted from the ordinary minimum quotas for students. However, they stressed that the closure of Sorbian secondary schools would have to take place when the number of pupils dropped so low that a sufficiently varied curriculum could no longer be maintained.

107. As regards the use of Sorbian with the authorities in settlement areas, the minority representatives regretted that few authorities, apart from the local Commissioners for Sorbian Affairs, were actually fluent in Sorbian. Although the right to contact authorities in Sorbian in writing was ensured in principle, it had become especially difficult to address letters to authorities in Sorbian since the postal catalogue used by the German postal service no longer listed place names in Sorbian.

108. The Commissioner considers that the preservation of a viable Sorbian school network, including secondary schools, is essential for the preservation of Sorbian language and culture. While socio-economic factors may justifiably prompt cuts in the school network, it is important that the Sorbian communities can take an active part in decision-making regarding education provided in Sorbian. The Commissioner invites the authorities of the Länder of Saxony and Brandenburg to consider means of strengthening the involvement of the Sorbian minority in decision-making in this field. The Commissioner also urges the federal and Länder authorities to ensure that postal mail can continue to be processed when place names in the traditional settlement area are given in Sorbian. When public services are privatised, it is important that their possible impact on human rights obligations is screened and, when necessary, alternative means are found to fulfil such obligations.

## **5. Poverty**

### **5.1. Groups particularly affected by poverty**

109. In 2005, the Federal Government published the second official report on poverty and wealth in Germany. It describes the social situations of people living in Germany on the basis of statistical data on income, property, employment and education.<sup>38</sup> These comprehensive reports, which are released once in every legislative period, provide an important tool for analysing poverty factors and for developing adequate policy responses. According to the report, 13.5 % of people were living below the poverty line in 2003 compared to 12.8 % in 1998. Data used in the report date back to 2004 and therefore do not cover the consequences of the latest social reforms of Hartz IV. Representatives of social welfare organisations estimate that the actual poverty situation in Germany may in fact be much worse.

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<sup>38</sup> <http://www.bmas.bund.de/BMAS/Navigation/Soziale-Sicherung/berichte.html>. The report uses the EU definition of relative poverty according to which people are living in relative poverty if their income is below the at-risk-of-poverty line fixed at 60 % of the national median equivalised disposable income. In Germany the official relative poverty line for a single adult person in 2003 was 938 Euros per month.

110. The groups most vulnerable to poverty include migrants, single parents, families with more than two children, long-term unemployed and children. A recent study by the Friedrich Ebert Stiftung comes to the conclusion that around 8 percent of the whole population is living in a precarious situation due to difficult housing conditions, low income, limited education or frequent unemployment.<sup>39</sup> According to the study, the people affected by poverty suffer from resignation and lack of perspective to escape poverty.

111. The Commissioner is particularly concerned by the fact that the risk of poverty faced by children is higher than the average faced by the rest of the population.<sup>40</sup> According to latest information by UNICEF, the risk of poverty encountered by children in Germany has considerably increased since the beginning of the 1990s. Children in single parent households or migrant families have a significantly higher risk of being affected by poverty. Currently, around 2.2 million minors live in families receiving minimum subsistence benefits, that is to say, they are only able to attain society's minimum standards by claiming benefits designed to guarantee a minimum subsistence level. Notwithstanding that support, the figure is an indicator on the lack of available opportunities for participation and achievement.

112. Poverty not only limits children's possibilities to participate in social and cultural life but, according to recent studies, seriously impacts their education opportunities. Children originating from poor families perform worse in schools, have a higher drop-out rate and are significantly under-represented in higher secondary education. The latest international comparative studies PISA and IGLU demonstrate that in Germany there is a particularly strong link between the social background of pupils and their educational opportunities. The principle of equal education opportunities for all children is so far not translated into reality.<sup>41</sup>

113. Lower educational levels limit the opportunities in the employment sector and thereby perpetuate poverty from one generation to the next. The Commissioner considers that policy measures to improve the educational opportunities of children living in poverty are of paramount importance in breaking the circle of poverty. In this respect the sixteen Länder bear the main responsibility for offering specific educational measures targeted to improve the school performance of socially disadvantaged children.

114. Child poverty cannot be seen separately from the living situation of poor families and therefore necessitates broad and multifaceted policy responses. The Commissioner welcomes the adoption of the National Action Plan for a Germany fit for children

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<sup>39</sup> Gesellschaft im Reformprozess, Friedrich Ebert Stiftung, 2006: [www.fes.de](http://www.fes.de). The study is based on information provided by 3,500 interviewees and based on their own perception of the situation they are living in.

<sup>40</sup> M. Corak, M. Fertig et al., A portrait of child poverty in Germany, UNICEF, Innocenti Working Paper, 2005: <http://www.unicef-icdc.org/cgi-bin/unicef/Lunga.sql?ProductID=377>. UNICEF works with a poverty threshold of 50 % of the national median equivalised disposable income.

<sup>41</sup> PISA 2003, PISA-Konsortium Deutschland: [http://pisa.ipn.uni-kiel.de/Ergebnisse\\_PISA\\_2003.pdf](http://pisa.ipn.uni-kiel.de/Ergebnisse_PISA_2003.pdf). PISA-2003. Bildungsstand der Jugendlichen in, Deutschland. Ergebnisse des zweiten internationalen Vergleichs, PISA-Konsortium Deutschland (eds.), Münster 2004. Bos, W., Lankes E.M., et al. (eds.), Erste Ergebnisse aus IGLU. Schülerleistungen am Ende der vierten Jahrgangsstufe im internationalen Vergleich, Münster 2003.

covering the period 2005-2010. Among other issues, the action plan aims at improving the living conditions of children through joint policy measures by the federation, Länder and municipalities. As has been pointed out by the European Anti Poverty Network, child poverty is not inevitable or unchangeable but it is ultimately a reflection of national policy choices.<sup>42</sup>

115. Although still below the EU average, the phenomenon of working poor is growing in Germany, in particular in the East.<sup>43</sup> Low-skilled workers as well as migrants are the biggest groups of those who cannot meet their minimum living costs despite their full time employment. Social welfare organisations as well as independent experts have called for the introduction of a minimum wage to avoid employees' dependence on minimum subsistence benefits.

116. The Commissioner underlines that policy measures aimed at tackling poverty should be developed and evaluated in co-operation with people who are affected by poverty and the organisations representing them. The first poverty summit, which was organised by the German Anti Poverty Conference in November 2006, was a significant initiative giving voice to those who experience poverty and social exclusion.<sup>44</sup>

117. There is a growing public awareness on poverty and its causes and consequences in Germany. However, people living below the poverty line often face stigmatisation by the media and the public discourse. The Commissioner highlights the importance of acknowledging that poverty is a deprivation of rights. Instead of blaming individuals for their situation it is necessary to draw awareness to structures and social dynamics that increase the risk of poverty. Anti-poverty policies ultimately mean promoting access to rights, including the right to education, training and employment, decent housing, social services and health care.

## **5.2. Access to health and social services for socially disadvantaged or otherwise vulnerable groups**

118. People living below the poverty threshold have a 50% higher risk of falling ill and their life expectancy is up to 10 years lower compared to the rest of the population.<sup>45</sup> About 20 % of people living at risk of poverty refrain from seeing a doctor due to costs related to medical consultations and medication. Changes on the labour market with increasing numbers of self-employed or marginally employed people have led to an increase of people without health insurance. The Commissioner welcomes initiatives to exchange good practice models regarding the promotion of health status of socially disadvantaged people. He acknowledges the general awareness of the problem among stakeholders in the health sector and views the organisation of annual conferences on poverty and health as an important forum for networking and exchange.

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<sup>42</sup> EAPN, Network news, nr 120: Nov-Dec 2006: [www.eapn.org](http://www.eapn.org).

<sup>43</sup> Alexandra Wagner: Grundsicherung trotz Erwerbstätigkeit, Monitor Arbeitsmarktpolitik, 2006; Grundsicherung für Arbeitsuchende: Anrechenbare Einkommen und Erwerbstätigkeit, Bericht der Statistik der BA, März 2006.

<sup>44</sup> <http://www.nationale-armutskonferenz.de>

<sup>45</sup> Cf. Basisinfo gesundheitliche Chancengleichheit: <http://www.gesundheitliche-chancengleichheit.de>.

119. The situation of people living at the risk of poverty becomes particularly difficult when they reach an age when they are in need of continuous medical treatment and care. Experts also estimate that socially disadvantaged or marginalised older people are at higher risk of becoming victims of domestic violence. Equally, care facilities for older people bear a risk of abuse and violence due to the sometimes extremely vulnerable situations of those living in such facilities. The Commissioner deems it is essential that older people in such vulnerable situations as well as their relatives have easy access to counselling facilities including telephone hotlines or contact points. Counselling services should also reach out and go into care facilities to provide information on the rights of patients and care recipients. In addition, it is necessary that independent monitoring and quality controls are carried out in a regular manner to detect structural deficiencies and to reach those older people who are not able to enforce their right to care in dignity.

120. The Commissioner believes that the Charter of the Rights of people in need of help and care<sup>46</sup>, which compiles and specifies rights of care recipients, provides an important basis for improving quality standards and control mechanisms in care facilities. The charter could be further developed to include specific guidelines on the provision of care and a set of benchmarks that would allow for effective monitoring and evaluation. Care in dignity not only includes adequate standards regarding the provision of care but also refers to a process that is governed by transparency, participation and non-discrimination. Article 23 of the Revised European Social Charter requires states to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution. The Commissioner reiterates his call on Germany to ratify the revised Charter.

121. As a consequence of the recent federalism reform the Länder are entitled to adopt legislation applicable to care facilities. The Commissioner considers that this shift of responsibility bears both opportunities and risks. In order to avoid any deterioration of standards in care facilities the Länder should agree on country-wide minimum standards and mechanisms that ensure their implementation.

## **6. Asylum and Immigration**

### **6.1. Situation of refugees and asylum-seekers**

122. Germany is one of the main recipient countries of refugees in the world currently hosting about 700 000 people in need of international protection. The number of people seeking asylum in Germany, however, has diminished considerably in recent years. In 2006, 21 029 people sought asylum in Germany while this number was 88 287 in 2001. The Immigration Act 2004, which entered into force on 1 January 2005, clarified migration and asylum law in Germany and aligned it closer with international asylum standards. Germany is also in the process of implementing 11 EU Directives on asylum

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<sup>46</sup> Charta der Rechte hilfe- und pflegebedürftiger Menschen: <http://www.bmfsfj.de/Politikbereiche/aeltere-menschen,did=16124.html>.

and related issues which may bring about further changes to the German asylum practice in the near future.<sup>47</sup> The Commissioner stresses that the EU Directives concerned only set minimum standards and encourages Germany to implement the directives in the spirit of improving the protection of refugees. The implementation of the directives must also be in line with the Geneva Convention relating to the status of refugees as well as the European Convention on Human Rights.

#### 6.1.1. *Grounds for granting refugee status*

123. The German interpretation of international asylum law, as reflected in its national legislation, has been particularly restrictive as regards the grounds for granting asylum status. For example, in the past, persecution emanating from non-state actors as well as persecution for gender-specific reasons was not considered a relevant protection ground in German asylum law. The new Immigration Act includes these grounds together with an explicit reference to the 1951 Geneva Convention relating to the status of refugees.<sup>48</sup> While the Commissioner welcomes this important step towards aligning German asylum law with prevailing international practice he considers that further progress is still desirable.

124. Protection gaps may still exist especially as regards religion and membership of a particular social group with reference to the Geneva Convention. The German interpretation of religion as a protection ground appears to be limited to the persecution of *forum internum* when practicing one's religion without including public manifestations. Yet international and European law on the freedom of religion and conscience clearly include the freedom to manifest one's religion in public. As concerns persecution on account of membership of a particular social group, grounds other than gender should also be taken into consideration such as sexual orientation in line with the EU Council Directive 2004/83/EC. While persecution on the ground of homosexuality can be taken into account under German asylum law, it has also been argued that protection would only be necessary if the persecution encroached on the practice of homosexuality in the *forum internum*.<sup>49</sup>

125. In addition to criteria for granting refugee status, the Immigration Act also lays the grounds for subsidiary protection.<sup>50</sup> In light of the former German practice of not including non-state persecution as a protection ground, the Commissioner underlines that

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<sup>47</sup> These directives include, among others, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status.

<sup>48</sup> Section 60 (1) of Residence Act which is part of the Immigration Act 2005. In addition to the Immigration Act, refugee status in Germany can also be granted according to Article 16 of the German Basic Law (Constitution). The latter, however, is limited to political asylum alone and has, since 1993, been subject to further restrictions.

<sup>49</sup> See the decision of the Düsseldorf Administrative Court 5 K 6084.04.A of 5 September 2005.

<sup>50</sup> Section 60 (2), (3), (5) and (7) of Residence Act.

dangers emanating from non-state actors must also be taken into account when subsidiary protection is considered in accordance with the interpretation of the European Court of Human Rights of Article 3 of the European Convention.<sup>51</sup>

#### 6.1.2. *Revocation of refugee status*

126. During recent years, Germany has revoked or withdrawn refugee status from an unusually high number of refugees resident in Germany.<sup>52</sup> The practice has especially affected refugees from Iraq, Montenegro and Serbia, including Kosovo. The new Immigration Act has also created an obligation for the Federal Office for Migration and Refugees to automatically review within a period of three years the initial decision on the granting of refugee status before a decision on permanent residence permit is made by Länder authorities.<sup>53</sup>

127. The Commissioner is concerned by the apparent shift in German policy on revocation of refugee status and invites the German authorities to review it in line with international asylum law. While the circumstances in connection with which a person has been recognised as a refugee may indeed change over time to warrant a revocation in line with the Geneva Convention, these changes should be of fundamental nature so as to clearly remove the basis of the fear of persecution. A thorough assessment of the general situation in the country of origin is necessary to determine whether the changed circumstances can be sustained. Furthermore, international protection afforded to refugees is intended to provide a sense of security to refugees that should not be endangered through a frequent review of their status.

#### 6.1.3. *Toleration (“Duldung”) permit*

128. Toleration (“*Duldung*”) permit can be granted to rejected asylum-seekers who cannot be returned to their country of origin for legal, technical or humanitarian reasons (e.g. family unity, an illness preventing travel, pregnancy, danger of suicide and the unavailability of transport). It does not amount to right of residence as it simply suspends deportation on a temporary basis for the maximum period of six months at a time. Accordingly, persons with a toleration permit have restricted access to health care, education and work while their right of movement is also severely limited. In 2006, there were 186 000 people living in Germany on a toleration permit. More than 100 000 of them had already stayed longer than 6 years and almost 54 000 over a decade. The largest groups of people living on a toleration permit originate from former Serbia and Montenegro including Kosovo, Turkey and Iraq. A significant part of the group originating from Kosovo are Roma.

129. The Commissioner considers that the use of toleration permits for short periods of time to deal with technical impediments to returns may well be justified. However, when they are applied for several years, not to mention over a decade, such an insecure status can become an affront to human dignity. This so-called chain tolerance (“*Kettenduldung*”) means that permit holders and their families are put under immense

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<sup>51</sup> See *T.I. against the United Kingdom*, Application No. 43844/98.

<sup>52</sup> The number of revocations and withdrawals was 10 579 in 2005, 16 831 in 2004, 9611 in 2003. In 2002 this number was 2317 and in 2001 only 780.

<sup>53</sup> Section 26 (3) of Residence Act in conjunction with Section 73 (2a) of Asylum Procedures Act.

pressure as the permit can be revoked without notice leading to immediate deportation. A major concern in this context are the children of these families who are often born in Germany, go to school and have friends there and whose primary social language is German. They are intimately attached to Germany where they have lived their whole lives. The Commissioner emphasises the importance of considering the best interests of the child regarding this question.

130. According to the Migration Act 2004 a residence permit should be issued if deportation has been suspended for 18 months. However, a residence permit may only be granted if the foreigner is prevented from leaving Germany through no fault of his or her own. The faults concerned may include false information given by the foreigner, deception of authorities with regard to one's identity or nationality or the failure to meet reasonable demands to eliminate the obstacles to departure.<sup>54</sup> The German authorities have informed the Commissioner that such faults have been the primary reason for the continuation of toleration permits beyond 18 months. The Standing Conference of the Ministers of the Interior reached a decision in Nuremberg on 17 November 2006 whereby people, especially those with families, who had stayed in Germany on a toleration permit for at least 6 or 8 years would qualify for a residence permit under certain conditions. The condition of being employed is applied, although a ten-month period until September 2007 of finding work with a facilitated access to work permits has been granted under the decision. However, due to all the conditions attached, it is possible that only 10-15 per cent of the people on a toleration status would be able to obtain a residence permit through this measure.

131. The Commissioner welcomes the Nuremberg decision as a step towards the right direction. However, the Commissioner urges the German authorities to lower the required length of stay and review the conditions attached to this measure so that more people have access to residence status under it. In this context, the Commissioner recalls the particularly restrictive interpretation of grounds for granting refugee status in Germany in the past which may have barred many of the people currently living on a toleration permit from access to refugee status and a residence permit. This could, for example, apply to Roma originating from Kosovo who, according to the UNHCR, should still be afforded international protection today.<sup>55</sup>

#### *6.1.4. Asylum procedures*

132. Asylum procedures in Germany are conducted with reference to the Asylum Procedures Act and the EU Dublin II regulation<sup>56</sup>. The Federal Office for Migration and Refugees (BAMF) is responsible for carrying out interviews with asylum-seekers and for decisions on granting and revoking refugee status. Residence permits are granted by Länder authorities. Decisions of the Federal Office can be appealed to administrative

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<sup>54</sup> Section 25(5) of the Residence Act.

<sup>55</sup> UNHCR's Position on the Continued International Protection Needs of Individuals from Kosovo (June 2006).

<sup>56</sup> EU Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. This regulation applies directly without a specific national implementation instrument.

courts. In 2005, 61 % of failed asylum applications were appealed to administrative courts. Further appeals to higher administrative courts are subjected to limitations. For applications deemed manifestly unfounded by the Federal Office, an appeal does not have a suspensive effect, but an application for an injunction can be filed at an administrative court. In special cases of hardship, Länder authorities may also issue residence permits to failed asylum-seekers on petition from Hardship Commissions which have been recently set up in many Länder in accordance with the Residence Act (Section 23a).

133. Civil society representatives reported to the Commissioner that interviews conducted by the Federal Office were not always adapted to the specific needs of traumatised asylum seekers, for example of asylum seekers with a post-traumatic stress disorder. The German authorities informed the Commissioner that the Federal Office had organised two training sessions in this field in 2006. The Commissioner considers that employees of the Federal Office as well as interpreters carrying out interviews with asylum-seekers should receive specific training for recognising and interviewing particularly vulnerable asylum-seekers. Such training should also take gender-specific factors into account especially as regards victims of sexual abuse.

134. According to the Asylum Procedures Act, minor asylum-seekers between 16 and 18 years are treated like adult asylum seekers. The German authorities justify this legal provision on the grounds of the German Declaration upon the ratification of the UN Convention on the Rights of the Child. This Declaration would appear to provide for certain exemptions from the provisions of the Convention as regards German legislation on the entry of aliens and the conditions of their stay. However, in October 2005 an amendment to the German Youth Welfare Act entered into force which (Section 42) obliges youth welfare authorities to provide age-appropriate accommodation and appoint guardians for all unaccompanied minors up to the age of 18. EU directives on asylum also define unaccompanied minors as children under 18 years of age. The Commissioner urges the German authorities to treat asylum-seekers between 16 and 18 years as minors and to withdraw their Declaration to the Convention on the Rights of the Child in line with UN recommendations.<sup>57</sup> The best interests of the child should be taken into account in the asylum procedure regarding minors.

135. Access to remedy on the authorities' decisions on asylum is also affected by the availability of free legal aid. While free legal counselling is provided for asylum-seekers subjected to the airport procedure before their legal entry into Germany, there is no systematic access to procedural counselling and legal aid at other stages of the procedure. Even if asylum-seekers may have the possibility to apply for free legal aid when appealing decisions to courts, the granting of such aid is usually subjected to a screening to determine that the appeal is likely to succeed. Furthermore, effective access to remedy has been put into question in the Dublin II procedure as there have been administrative court decisions which rule against the admissibility of appeals against a deportation order.<sup>58</sup> The German authorities have informed the Commissioner that a court appeal from abroad is possible in such cases even if injunctive protection is not always granted.

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<sup>57</sup> See Concluding Observations on Germany of the UN Committee on the Rights of the Child of 26 February 2004, CRC/C/15/Add.226.

<sup>58</sup> Judgments of the Berlin Administrative Court of 17 and 23 May 2005 (33 X 74.05 and 33 X 75.05).

136. The Commissioner recommends that asylum seekers are systemically given free legal advice from the outset of the application process. In addition to improving the legal protection of asylum-seekers, such an arrangement would probably diminish the significant number of appeals to courts as it would put on a more solid ground the initial interviews with the authorities and the subsequent applications. The Commissioner also considers that before the transfer of rejected applicants under the Dublin II procedure they should have the possibility to request the suspension of the implementation of their transfer before an administrative court in line with Articles 19 (2) and 20 (1.e) of the Council Regulation No 343/2003 and the obligations under the European Convention of Human Rights (especially Articles 3 and 13).

#### 6.1.5. Reception conditions

137. In Germany, the Länder are responsible for receiving asylum-seekers in accordance with the Asylum Procedures Act (Parts 3 and 4) and the Asylum Seekers Benefits Act following a quota system (*Königsteiner Schlüssel*). During the first three months, asylum-seekers are accommodated in first reception centres (*Erstanlaufstellen*) after which they are transferred to accommodation centres (*Gemeinschaftsunterkunft*). Many Länder have also enacted specific legislation on reception conditions. Accordingly, the conditions in reception and accommodation centres vary between different Länder while there may also be significant differences between different centres within a Land. The free movement of asylum seekers is restricted to the district they are assigned to, although permission to leave the district may be granted on compelling grounds according to the law. Visits to courts and meetings with authorities requiring individual presence do not require a specific authorisation while permission to leave the district to meet with attorneys or representatives of the UN High Commissioner for Refugees and other organisations taking care of refugees are to be granted without delay.<sup>59</sup>

138. Benefits to asylum-seekers are limited to approximately 80 % of the welfare support available to foreigners with full residence status. Food and clothing are provided in kind or through vouchers or allowances depending on the Land. Applicants are usually eligible to 40 Euros of pocket money per month. Access to health care is in principle limited to the treatment of acute illness or pain and maternity care, although exceptions for individual needs, especially for the treatment of traumatised asylum-seekers and children, can be granted.<sup>60</sup> After three years in receipt of limited benefits in Germany, access to health care and benefits is regularised with reference to general social benefits legislation. Work permits can only be granted after the first year and other job seekers will usually have priority over asylum-seekers in obtaining jobs. Depending on the Land, the children of asylum-seekers are either obliged to attend compulsory education or they merely have the right to attend school. If they simply have the right to education, they are not always provided with school material, their transportation fees may not be refunded and the school can have the right to refuse admission in contrast to other pupils. Family reunification is not normally available to asylum-seekers apart from the provisions of Dublin II Regulation.

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<sup>59</sup> Asylum Procedures Act, Part 4, Article 57.

<sup>60</sup> Asylum Seekers Benefits Act, Sections 4 and 6.

139. The Commissioner visited an accommodation centre in Munich at Rosenheimer Strasse in the Land of Bavaria. The centre consisted of two two-floor containers with a capacity for about 290 people, originally built in 1992 for an automobile club in the immediate vicinity of a motor way. The rooms in the containers measured 12.92 square metres accommodating from two to four asylum-seekers each. 189 persons were accommodated in the centre during the time of the visit. Communal kitchens, toilets and showers were situated at one end of the central corridor. There was a small play ground on the grounds next to the road. The centre accommodated singles, families and unaccompanied minors between 16-18 years. The centre was kept by regional social authorities while an NGO provided special care and activities for the unaccompanied minors. Residents received food packages twice a week and clothing twice a year while vouchers were given for visiting health services for the treatment of acute illness.

140. The Commissioner considers that the long-term residence of asylum-seekers in dormitory-styled accommodation centres in shared rooms is not conducive to their well-being. When, in addition, food and clothing are provided in kind severely restricting personal choice, the respect for the privacy of asylum-seekers is seriously put into question. The Commissioner urges the German authorities to consider alternative ways of accommodating asylum-seekers after their initial stay in the first reception centres. For families, separate apartments should be made available. As for the provision of food and clothing, vouchers or cash allowances are the preferred option. The Commissioner is of the strong opinion that reception conditions should not lead to the institutionalisation and marginalisation of asylum-seekers. Instead, asylum-seekers should be able to retain a substantial degree of personal autonomy throughout the process.

141. The Commissioner is also concerned that the obligatory residence of asylum-seekers in accommodation centres and the severe restrictions placed on their freedom of movement, when continued over several years, may not be in full conformity with the relevant provisions of the European Convention on Human Rights (especially Article 8 and Article 2 of Protocol No. 4). Accordingly, the Commissioner invites the German authorities to review the proportionality of such restrictions. Furthermore, the Commissioner urges all Länder to provide compulsory education to the children of asylum-seekers on an equal basis with other pupils.

142. As regards the provision of health care to asylum-seekers, the Commissioner recommends that earlier access to full health care is granted to asylum-seekers. It should also be noted that the EU Council Directive 2003/9/EC (Article 15) requires EU member states to ensure that all applicants receive health care for the essential treatment of illness.

143. Finally, the Commissioner is aware that the living conditions in the German accommodation centres may vary between different Länder and between different centres within a Land. Since the Commissioner only visited one accommodation centre, he is not able to judge the quality of the accommodation centres in general. Nevertheless, the Commissioner considers that the living conditions encountered at the accommodation centre in Rosenheimer Strasse in Munich were hardly satisfactory. It is questionable whether the decrepit containers surrounded by major roads offering cramped accommodation in shared rooms on different floors for singles, families and

unaccompanied minors qualify under the EU Council Directive 2003/9/EC<sup>61</sup> for an accommodation centre which guarantees an adequate standard of living. The Commissioner recommends that the German authorities prepare guidelines on minimum standards for accommodating asylum-seekers in order to ensure that all asylum-seekers are offered an adequate standard of living.

#### 6.1.6. *Pre-deportation detention*

144. Detention pending deportation may be ordered for up to six months by regular first-instance courts (*Amtsgericht*) for rejected asylum-seekers who have evaded or are likely to evade deportation or to whom a deportation order has been issued on security grounds in order to avert a specific threat to the security of the Federal Republic of Germany or a threat of terrorism.<sup>62</sup> Pre-deportation detention can also be ordered for a maximum period of two weeks if the deadline for a voluntary departure has elapsed and it is certain that the deportation can be enforced. Detention is not permissible if it will be impossible to carry out the deportation within the following three months for reasons for which the foreigner is not responsible. However, if the rejected asylum-seeker prevents the deportation through his or her own actions, the detention may be extended by a maximum of 12 months. Accordingly, the maximum length of pre-deportation detention before obligatory release is 18 months.

145. Rejected asylum-seekers in pre-deportation detention usually follow a normal prison regime, although some Länder have also set up specific centres for pre-deportation detention. In principle, detainees are held liable for the costs of detention as well as other costs related to deportation in accordance with the Immigration Act.<sup>63</sup> Detainees can contest their detention before the district courts although free legal aid is not usually available as it is subjected to a screening to determine that the appeal is likely to succeed. Civil society representatives reported to the Commissioner that the “well-founded suspicion” that a rejected asylum-seeker would evade deportation was probably used in too wide a sense as a ground for placing foreigners in pre-deportation detention. They also pointed out that the conditions of detention tended to be quite harsh with limited opportunities for communicating with the outside world and that the mental pressure the detainees were under had also lead to attempted suicides.

146. A number of Länder have also set up specific departure facilities for foreigners who are obliged to leave Germany without a further possibility for appeal.<sup>64</sup> According to the Immigration Act<sup>65</sup> such facilities should promote the willingness of the foreigners to leave Germany through support and counselling. Civil society representatives reported to the Commissioner that the foreigners kept in these facilities often had a toleration permit since their deportation could not be carried out due to the lack of travel documents.

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<sup>61</sup> Article 14, 1. (b).

<sup>62</sup> Pre-deportation detention is regulated by the Immigration Act - Section 62 of the Residence Act.

<sup>63</sup> Residence Act, Chapter 6.

<sup>64</sup> In German, these facilities are often called *Ausreisezentren* – “departure centres”.

<sup>65</sup> Residence Act; Section 61(2).

NGOs also pointed out that the foreigners living in these facilities were under significant psychological pressure because of repeated searches of their private effects, interviews regarding their identity and willingness to return as well as the basic living conditions of the facilities. Many foreigners have also disappeared from such facilities.

147. The Commissioner visited the Köpenick Centre for pre-deportation detention in the Land of Berlin and the wing for pre-deportation detainees at the Stadelheim Prison in Munich in the Land of Bavaria. The Köpenick Centre was run by the Berlin police force with a capacity of 214 places. At the time of the visit, there were 129 detainees in the facility. Minors between 16 and 18 years old could also be held at the centre. According to the Berlin authorities, the average stay of detainees was 21 days and did not currently exceed three months, although the length of detention had been higher in the past. The number of detainees was also declining. The detainees had an access to a public telephone and could keep mobile phones without cameras. The number of people visiting detainees totalled about 1100 per month for the entire facility. The detainees had access to outdoors 90 minutes per day.

148. At the pre-deportation wing in Stadelheim Prison, there were about 50 detainees at the time of the visit. Minors between 14 to 18 could also be held in the juvenile ward. According to the prison authorities, the length of average stay was 40 days but it could run up to 18 months especially when identity papers could not be obtained for a detainee. The number of pre-deportation detainees in Bavaria was in the decline. Apart from a telephone call at the beginning and the end of detention, there was no free access to a telephone, although access could be granted on special application. Visits to detainees were allowed twice a month for 30 minutes. The detainees had access to outdoors for 60 minutes per day. The prison staff informed the Commissioner that some detainees were under considerable psychological strain and that a group of detainees had recently been on a hunger strike.

149. The Commissioner is of the strong opinion that pre-deportation detention should only be applied when it is thoroughly justified and when it is clear that the deportation can in fact take place in the immediate future. It cannot be used with the intention to bring pressure on the rejected asylum-seeker to co-operate with authorities to facilitate the deportation process. The authorities should take great care in justifying the grounds for detention and determining the concrete likelihood of the actual deportation before proposing an application for pre-deportation detention to the courts. The Commissioner urges the German authorities to restrict the use of pre-deportation detention, whenever possible, within a few weeks rather than several months. The use of pre-deportation detention for minors under 18 years should be kept to the absolute minimum in line with the provisions of the Convention on the Rights of the Child.

150. The Commissioner is also concerned that the detainees may find it very difficult to contest their pre-deportation detention before the courts since their access to legal aid appears to be quite limited either through the lack of financial means or the lack of means to communicate with the outside world. The Commissioner recommends to the German authorities that free legal counselling is made available to pre-deportation detainees. Furthermore, the Commissioner expresses his concern over the possibility that foreigners' removal facilities are used to bring pressure on rejected asylum-seekers to leave Germany and questions the need for such specialised departure facilities.

151. Finally, the Commissioner is aware that under the Immigration Act also transport carriers can be held liable for the deportation costs of rejected asylum-seekers if they had been transported to Germany without required documentation. The Commissioner is concerned that such a practice may lead to the transfer of duties habitually carried out by public authorities, e.g. the verification of travel documents, to private transport providers who do not usually share the same human rights obligations with public authorities. As regards asylum-seekers, there may be valid reasons, recognised under the Geneva Convention, for their lack of proper travel documents.

## **6.2. Integration of resident foreigners and access to German citizenship**

152. In 2005, there were about 6.8 million foreigners living in Germany – that is 8.2 percent of the total resident population. The majority was composed of nationals of the following countries: Turkey (26.1 %), Italy (8 %), Serbia and Montenegro (7.3 %), Poland (4.8 %), Greece (4.6 %) and Croatia (3.4 %). Among all foreign residents, 62 percent had lived in Germany for longer than 10 years while this figure was 75 percent among the Turkish nationals.

153. The new Immigration Act has brought about integration courses for permanent foreign residents which are co-ordinated by the Federal Office for Migration and Refugees (Chapter 3 of the Residence Act). The course covers measures to acquaint migrants with the German language, legal system, culture and history. In principle, the courses are obligatory for those migrants who are not able to communicate in German. The German authorities informed the Commissioner during the visit that the further development of the integration programme was under way.

154. The Commissioner welcomes the new provision of integration courses to resident foreigners. Such courses should improve the mutual integration process of migrants and Germans. The Commissioner stresses that when such a course is offered on a compulsory basis, it should be free of charge to those participants who are not in a position to contribute to the costs of the course.

155. Family reunification with family members from abroad is another measure to promote the integration of migrants. During the visit, the Commissioner was informed that family reunification in Germany was usually only available to members of the core family while it was also subjected to restrictions regarding sufficient living space and financial means. Such restrictions also apply to refugees although exceptions can be granted by authorities on a discretionary basis. The Commissioner observes that, in accordance with EU Council Directive 2003/86/EC, refugees should receive more favourable conditions for the exercise of their right to family reunification without restrictions regarding available accommodation or financial resources.<sup>66</sup>

156. Currently, only EU citizens have the right to vote in local elections in Germany. The Commissioner is of the opinion that the integration of foreign residents would be significantly enhanced if they were able to participate effectively in local decision-making. Accordingly, the Commissioner invites the German authorities to reconsider German accession to the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level. The rights of migrants would also be enhanced

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<sup>66</sup> EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; Article 12.

by the German accession to the European Convention on the Legal Status of Migrant Workers and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

157. Since 2000, it has been possible for foreign residents to become German citizens after a continuous residence of 8 years. The Commissioner welcomes this significant shift in naturalisation procedure. However, it is normally required that former citizenship is renounced upon acquisition of the German citizenship. Since the majority of foreigners living in Germany would appear to qualify for German citizenship on the ground of their length of residence, the Commissioner considers that the restriction of double citizenship may constitute a significant barrier to the acquisition of German citizenship and consequently the durable integration of foreigners. The Commissioner invites the German authorities to review citizenship legislation in view of permitting double citizenship.

158. The Länder are responsible for carrying out citizenship procedures. In the course of the procedure, the authorities may carry out interviews to clarify the applicant's eligibility for citizenship. In some Länder, the authorities have prepared questionnaires for specific groups of applicants to facilitate the process. Civil society representatives have reported to the Commissioner that the content and use of such questionnaires may be discriminatory towards certain groups of applicants. In particular, they have alleged that the questions would appear to target Muslims. During the visit, the Commissioner was informed that the Federal Office for Migration and Refugees was in the process of preparing a questionnaire for citizenship procedures which would be made available to all Länder. The Commissioner points out that naturalisation procedures should be carried out with due respect to the freedom from discrimination. He recommends that the German authorities use a uniform questionnaire, without discriminatory content, for all applicants.

### **6.3. Situation of undocumented migrants**

159. The estimates on the number of undocumented migrants living in Germany vary between 100 000 to one million. Due to their irregular residence status, they find themselves in a vulnerable position regarding access to basic services, for example health care and education. Under the provisions of the Immigration Act, public bodies are under the obligation to inform on irregular migrants to foreigners authorities (Section 87 of the Residence Act). The support of undocumented migrants is also an offence under the Immigration Act (Section 96 of the Residence Act). According to the German authorities, such support is considered an offence if it is repeated or aimed at procuring a financial advantage and intended at prolonging the illegal stay. Civil society representatives informed the Commissioner that the actual practice of informing on undocumented migrants varies significantly within Germany. While schools could be made to actively inform on children of irregular migrants according to the legislation, this was less clear regarding the public health services.

160. The Commissioner affirms that irregular migrants also have rights under international human rights instruments.<sup>67</sup> For example, undocumented migrants have the right to access health care in the event of illness and their children have the right to education without discrimination. The Commissioner calls on the German authorities to ensure that irregular migrants can effectively access their rights regarding health care and education.

#### **6.4. Responses to trafficking in human beings**

161. During his visit, the German authorities assured the Commissioner that Germany was committed to the early ratification of the Council of Europe Convention on Action against Trafficking in Human Beings. The Convention aims to strengthen the rights of victims and prevents public authorities from treating them as illegal migrants or criminals. Under the convention, the victims of trafficking are also entitled to a minimum of 30 days of reflection period to recover and to take a decision regarding their possible cooperation with competent authorities. The EU Directive 2004/81/EC also introduces a residence permit for victims of trafficking to give them a reflection period. The transposition of this EU Directive is currently under way in Germany.

162. Under the current German practice, the Länder authorities have the discretionary power to grant the victims of trafficking a minimum period of four weeks for recovery and rehabilitation. Germany has not yet enacted a federal law provision that would set out the criteria, duration and conditions of stay for the victims of trafficking. The Commissioner encourages the federal authorities to establish a minimum period of residence for all victims of trafficking during which they should have access to medical care, including psychotherapeutical treatment, and free legal aid. It should further be ensured that those who do not have sufficient resources are granted access to shelters. Considering the traumatic experience of trafficked victims, the Commissioner calls on the authorities to go beyond this minimum period if victims are in need of additional time to recover for taking a decision based on informed consent.

163. The Commissioner highlights the importance of efficient support measures for the prevention of re-trafficking of victims. He encourages Germany to continue funding specialised non-governmental support facilities which provide low-threshold access to the victims of trafficking. Counsellors and support staff of such organisations play a fundamental role in the recovery process.

164. The Commissioner emphasises that people who have been trafficked and exploited should first and foremost be seen as victims of serious human rights violations. Their role in prosecuting organised trafficking crimes, though important, should be seen as secondary during the preliminary assistance and support phase. Germany has developed a

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<sup>67</sup> The rights enshrined in the International Covenant on Economic, Social and Cultural Rights apply to everyone; Articles 12 and 13 concern the rights to health care and education. The right to education is also included in the Protocol (Article 2) to the European Convention on Human Rights. The Convention on the Rights of the Child is relevant for the exercise of both rights. See also, Parliamentary Assembly of the Council of Europe, Resolution 1509 (2006) – Human rights of irregular migrants and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

broad range of policy responses against trafficking for sexual exploitation. The Commissioner is of the opinion that further strategies and measures should be adopted to tackle other forms of trafficking related to forced labour, for example, in the agricultural or construction sector, and the trafficking of organs.

## **7. Counter-terrorism measures**

### **7.1. Absolute prohibition of torture**

165. The collection of information by intelligence or police services operating abroad in the context of counter-terrorism measures has important implications with regard to the absolute prohibition of torture especially when terrorist suspects are detained without due process and when they have been subjected to inhuman or degrading treatment. The involvement of German intelligence and police officers in interviewing or interrogating terrorist suspects abroad has been under a considerable debate in Germany recently.

166. One case concerns Muhammad Haydar Zammar, a Syrian-born German national who was detained in 2001 in Morocco and subsequently transferred to Syria. Zammar is suspected of having had close contacts with the 9/11 pilots who had lived in Hamburg. Zammar was detained in Syria without criminal charges and without access to a lawyer or family member. He was reportedly subjected to torture and prolonged solitary confinement in Syria. The German press has reported that in November 2002 five agents from the Federal Criminal Police Office, the German foreign intelligence agency, and, the Office for the Protection of the Constitution - the domestic intelligence agency – travelled to Syria to interrogate Zammar who was also facing terrorist charges in Germany at the time.

167. Another case refers to Murat Kurnaz, a Bremen-born permanent German resident of Turkish nationality, who was arrested by Pakistani authorities in 2001. He was subsequently handed over to the American forces and transferred to Guantánamo. In August 2006, Kurnaz was released and returned to Germany. Kurnaz was questioned by German security authorities in Guantánamo in September 2002. At that time the American authorities were allegedly considering to release Kurnaz within the context of a release of a larger group of prisoners kept in Guantánamo. Investigations have been initiated in Germany to clarify the case and to establish whether it would have been possible to bring Kurnaz's unlawful and inhuman detention in Guantánamo to a speedier end.<sup>68</sup>

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<sup>68</sup> In its final report, the Temporary Committee of the European Parliament on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners pointed out that “according to confidential institutional information, the German Government did not accept the US offer, made in 2002, to release Murat Kurnaz from Guantánamo” (Document reference A6-0020/2007 dated 30 January 2007). The German authorities have stated that there is no evidence to allegations that there even was a US offer to German authorities to release Mr. Kurnaz. They have also informed the Commissioner that the decision to actually release Mr. Kurnaz was not taken until summer 2006 and that only a very small number of detainees was released from Guantánamo during the relevant period of time after September 2002 – among them a more than 90-year-old man and one minor.

168. Mohamedou Ould Slahi, a Mauritanian national whom the CIA regarded as a prime suspect of the 9/11 terrorist attacks, was also questioned by German intelligence officers in Guantánamo in 2002. In December 2005, the German Minister of the Interior informed the public about the questioning of two Guantánamo detainees by German officials.

169. The Parliamentary Monitoring Committee, acting as a control organ for intelligence service operations, has come to the conclusion that the interrogations of Zammar, Kurnaz and Ould Slahi were necessary due to indications about a terrorist cell in Hamburg.<sup>69</sup> These cases are currently reviewed by a Parliamentary Committee of Inquiry that was established in April 2006.<sup>70</sup>

170. The Commissioner is concerned about the questioning by German officials of terrorist suspects who have been detained without due process and allegedly tortured. Interrogation under unlawful conditions takes advantage of the detainee's extremely vulnerable situation. The prohibition of torture not only obliges state officials to abstain from any degrading or inhuman treatment or torture but also implies the obligation to provide individuals with adequate protection against such serious human rights violations.<sup>71</sup>

171. The prohibition of torture and inhuman or degrading treatment or punishment is one of the most fundamental values of democratic society. Under the European Convention on Human Rights, the prohibition of torture allows for no limitations or derogations, not even in the event of a public emergency threatening the life of the nation.

172. The Commissioner strongly encourages the development of clear guidelines for intelligence services and all police authorities regarding the interrogation of detainees abroad. People who are held in detention without due process, who are denied access to a lawyer and who are at serious risk of being subjected to inhuman or degrading treatment or torture should not be interrogated, not even for investigation purposes. The Commissioner welcomes the new interrogation guidelines issued by the German authorities in May 2006 which do not permit the federal police to participate in the questioning of terrorist suspects carried out by intelligence services abroad.

173. The case of Zammar, who faced death charges in Syria partly based on information provided by German intelligence services and was subsequently sentenced to 12 years' imprisonment by a Syrian court in February 2007, demonstrates the human rights dimension of co-operation between intelligence services. The exchange of information

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<sup>69</sup> Bewertung zum Bericht der Bundesregierung zu Vorgängen im Zusammenhang mit dem Irak-Krieg und der Bekämpfung des internationalen Terrorismus, Feb 2006:

<http://www.bundestag.de/parlament/gremien/kontrollgremien/parlkon/index.html>

<sup>70</sup> The Parliamentary Committee of Inquiry was established in accordance with Article 44 of the German Basic Law in order to clarify still unresolved questions, make assessments and draw necessary conclusions from the Parliamentary Monitoring Committee's report on events relating to the Iraq war and combating international terrorism. See: [http://www.bundestag.de/ausschuesse/ua/1\\_ua/index.html](http://www.bundestag.de/ausschuesse/ua/1_ua/index.html)

<sup>71</sup> European Court of Human Rights, *Z v. United Kingdom* judgment of 10 May; *A v. United Kingdom* judgment of 23 September 1998.

with intelligence services of countries which have no effective safeguards against torture and where the principle of fair trial is not sufficiently respected should be subjected to detailed guidance that would prevent any German complicity in such serious human rights violations.

174. Furthermore, the reliance on information provided by foreign intelligence services in court proceedings raises serious questions in regard to the absolute prohibition of using evidence extracted under torture. The Commissioner shares the concerns expressed by the UN Special Rapporteur on Torture regarding the 2005 decision of the Higher Regional Court of Hamburg on El Motassadeq case.<sup>72</sup> Mounir El Motassadeq was accused of having participated in the planning of the 09/11 attacks. The court accepted the use of full summaries of the testimonies given by three Al-Qaida suspects before the United States authorities despite the fact that these persons were held in prolonged incommunicado detention and that there was serious concern that their testimonies had been extracted under torture. It should also be noted that prolonged incommunicado detention can itself amount to torture. The Commissioner is of the opinion that the burden to prove beyond reasonable doubt that evidence has not been obtained under such unlawful conditions should be shifted to the public prosecutor and not rest upon the defendant.

## **7.2. Extraordinary renditions**

175. Extraordinary renditions may involve multiple layers of human rights violations including unlawful arrest or detention and denied access to remedy.<sup>73</sup> A person who has been illegally detained in one country and illegally transported to another may be at risk to become a victim of torture and/or enforced disappearance.

176. The case of the German national Khaled El Masri, who was detained in Macedonia in 2003 and subsequently subjected to an extraordinary rendition by CIA to Afghanistan, attracted a great deal of international attention. During his five-month unlawful incommunicado detention El Masri claimed to have been subjected to torture. After American authorities established his innocence he was released in May 2004. Senator Dick Marty's report to the Council of Europe Parliamentary Assembly on alleged secret detentions and unlawful inter-state transfers issued in June 2006 refers to the case in detail and claims that El Masri was visited and later accompanied to Europe by a German intelligence officer named in the report.<sup>74</sup> Upon his arrival in Germany El Masri's legal

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<sup>72</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly, 14 August 2006, UN Doc. A/61/259.

<sup>73</sup> The term 'rendition' refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. The term 'extraordinary rendition' is generally used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time. Cf. opinion no. 363/2005 of the Venice Commission of 17 March 2006.

<sup>74</sup> Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Draft report – Part II (Explanatory memorandum), Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Dick Marty, June 2006:  
[http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf).

counsel initiated a formal investigation by public prosecutors into his deprivation of liberty and bodily injury. In January 2007, the public prosecutor issued arrest warrants to 13 CIA operatives on suspicion of abduction and wrongful imprisonment as well as causing grievous bodily harm.

177. In February 2006, the German Parliamentary Monitoring Committee concluded in its review of the Federal Government's report on intelligence service activities in connection with the fight against terrorism that there were no indications that the German intelligence service was informed of El Masri's detention and that any of its officials accompanied him back to Europe where he was released.<sup>75</sup> The German Bundestag took up the case and set up a committee of inquiry to further investigate whether the German Federal Government, intelligence service or any state authorities were informed of El Masri's secret detention already earlier and whether a German intelligence officer visited and accompanied El Masri. In the course of the hearings conducted by the Committee of Inquiry, the claim that El Masri was visited and later accompanied to Europe by a German intelligence officer was not substantiated. At the time of writing this report, the inquiry as well as the criminal proceedings were still ongoing.

178. The Commissioner calls upon Germany to fully investigate all cases of alleged extraordinary renditions that were carried out on German territory or that involved German nationals or long-term residents. Effective measures should be adopted to prevent unlawful renditions in the future.

### **7.3. Data protection and the right to privacy**

179. In counter-terrorism activities, the extension of powers with regard to investigation and surveillance methods often interfere with the right to privacy, data protection and right of self-determination over personal information. The Commissioner points out that restrictions of the right to privacy and data protection have to be kept under constant scrutiny to determine whether the measures employed are necessary, adequate, proportional and based on law.

180. The steadily increasing number of telecommunication surveillance raises concerns whether it is always used as ultima ratio.<sup>76</sup> The Commissioner is naturally aware of the importance of telecommunications surveillance as an investigatory tool. However, the use of data collected through telecommunication surveillance or other forms of undercover investigations should be strictly limited to the purpose of investigating serious crimes while surveillance activities should be authorised by a judge and provide for ex post remedies to all individuals concerned.

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<sup>75</sup> Bewertung zum Bericht der Bundesregierung zu Vorgängen im Zusammenhang mit dem Irak-Krieg und der Bekämpfung des internationalen Terrorismus, Feb 2006:

<http://www.bundestag.de/parlament/gremien/kontrollgremien/parlkon/index.html>

<sup>76</sup> According to the German authorities, the number of telecommunication surveillance orders in Germany was 34,374 in 2004, 29,438 in 2003 and 26,177 in 2002. The authorities have informed the Commissioner that the growing use of mobile telephones and additional lines for internet connections in households may partially explain the increasing number of surveillance orders.

181. Courts and, in particular, the Federal Constitutional Court play a crucial role in reviewing the proportionality of such investigation tools in Germany. In April 2006, the Constitutional Court declared that the data screening<sup>77</sup> of Muslims following the 9/11 terrorist attacks was in breach with the fundamental right of self-determination over personal information.<sup>78</sup> According to the Court, preventive data screening was not permitted unless there was a concrete threat based on factual circumstances. A constant terrorist threat was therefore considered insufficient and too vague to justify the use of such extensive investigation powers. Altogether eight million pieces of information on approximately 300,000 people had been collected without leading to criminal charges or other meaningful investigation results. Importantly, the court further pointed out that such unspecified investigation measures had affected an extremely large number of innocent people and had led to a dangerous stigmatisation of a certain group of people; in this case the Muslim population.

182. In March 2004, the Federal Constitutional Court ruled in regard to eavesdropping operations and declared unconstitutional the acoustical surveillance of private homes which infringe the core sphere of privacy. According to the Court, such surveillance should not be carried out if it risks interfering with the absolute protection of privacy including discussions with close family members, lawyers and doctors. Hence the legislator has the obligation to ensure that not only the use of such data as evidence is prohibited but their collection itself. The Federal Government has proposed respective amendments to the legislation while emphasising that acoustical surveillance, following strict limitations, is indispensable for improving the fight against organised crime, terrorism and other serious threats to security.

183. In both decisions the Federal Constitutional Court did not prohibit the relevant investigation techniques as such but limited their use on the ground of protecting the fundamental right to privacy. The Commissioner stresses that human rights should not be perceived as hindering police operations but rather rendering them more professional. Human rights standards oblige police authorities to be precise in data profiling and abstain from inefficient and excessive data collection. In other cases due respect for human rights might require more resources or detailed safeguards as in the case of acoustic surveillance.

184. Preventive investigation measures can have a negative impact on the public perception of a particular population group placing its individual members in an increasingly vulnerable position. The Commissioner was informed by Muslim representatives living in Germany that police and security services have raided mosques in search of information and data files on members of the religious communities concerned. The Commissioner stresses that such highly sensitive operations need to be

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<sup>77</sup> Data screening is a special method of profiling using electronic data processing. Police authorities collect individual-related data sets from private or public places, which were not recorded for investigation purposes. The purpose of data screening is to detect a group of people to which a certain profile can be applied.

<sup>78</sup> Decision by the Federal Constitutional Court of 4 April 2006. In this case data profiling by the police aimed at detecting terrorist sleepers by screening data on the basis of following criteria: male, aged 18 to 40, (ex-)student, Islamic religious affiliation, native country or nationality with predominantly Islamic population.

conducted under the strict rules of proportionality and by avoiding general profiling on the basis of religious belief or ethnic origin. Whilst strong measures may prove necessary to counter serious terrorist threats every effort must be made to avoid collective stigmatisation of any ethnic or religious group.

185. The Commissioner welcomes the Federal Government's plans to raise the threshold for telecommunication surveillance and to strengthen the legal protection of people concerned. The new draft legislation, which was presented in November 2006, aims at reorganising telecommunication surveillance in criminal proceedings and at incorporating requirements and restrictions set out by the Constitutional Court.

#### **7.4. Counter-terrorism legislation**

186. The adoption of counter-terrorism legislation in Germany dates back to the late 1960s. The German legal provisions are multi-sectorial and include specific regulations related to immigration, asylum, policing and intelligence services, telecommunications and prosecution of crimes in general.

187. Following the 9/11 terrorist attacks, which were partly planned and prepared in Germany, the Federal Parliament adopted the so-called Security Package I and II in late 2001 and early 2002. In order to better detect terrorist activities the new legislation widened the scope of co-operation between the police and intelligence services and extended the powers of the Federal Police, the Federal Criminal Office and the Intelligence Services.

188. Due to the introduction of new investigation powers and other forms of interference with constitutionally guaranteed rights, the Counter-Terrorism Act<sup>79</sup> foresaw a sunset clause with an expiration date of January 2007. It further required the evaluation of single provisions before this deadline. The requirement to review new security legislation is an important safeguard to assess its impact on human rights in view of modifying the legislation when necessary. The Act itself, however, is silent on the procedure and the criteria of the required review.

189. In May 2005, the Federal Government presented a report on the new legislation and concluded that the extended investigation powers provided by the Counter-Terrorism Act were adequate, necessary and proportionate in regard to their interference with the right to privacy and equality. With a few exceptions requiring minor amendments, the Government proposed to extend the legislation without a further sunset clause.

190. The Commissioner acknowledges the Federal Government's efforts in reporting on the application of the new legislation. However, in order to ensure a review process that would also consider the opinion of independent experts and human rights organisations the Commissioner encourages the legislator to determine more precisely the criteria and procedure for such a review.

191. In January 2007, further counter-terrorism legislation was adopted by the Bundestag extending the powers of the Federal Police and establishing new information systems for counter-terrorism activities to improve communication and co-operation among security

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<sup>79</sup> Gesetz zur Bekämpfung des internationalen Terrorismus, BGBl 2002 I, Nr.3, 11.01.2002: <http://217.160.60.235/BGBL/bgbl1f/bgbl102003s0361.pdf>

services and the police. The package included an Act on the Counter-Terrorism Database providing a legal basis for joint databases of police authorities and intelligence services. Under the Act, general background information on terrorist suspects such as name, sex, birth date, nationality and language will be processed in an index database that would be accessible to all police and intelligence authorities. A second, more detailed database including information on bank accounts, ethnicity, religion, ability to handle weapons and explosives, and places or regions visited will be accessible only to a restricted circle of officers or in emergency situations to determine an imminent security threat.<sup>80</sup>

192. Several data protection safeguards apply including a full record of any access to the database and possible ad-hoc controls by the Federal Commissioner for Data Protection and the data protection authorities at Länder level. Yet the same data protection bodies have raised serious concerns regarding the constitutional requirement of separation of powers between police authorities and intelligence services.<sup>81</sup> Given that the police authorities, under certain circumstances, can access intelligence data, the criteria on the persons to be included in the database should be extremely precise. This is particularly important as soft data on generally lawful activities can serve as a basis for inclusion in the anti-terrorism databases. The data protection bodies also request that the legislator should determine more precisely the authorities which are entitled to access the databases.

193. Following the aborted terrorist attack of the two Islamist suitcase bombers in August 2006, the Federal Government is planning to extend video surveillance in public places. According to the Data Protection Commissioner, the proportionality and efficiency principles would have to be applied in these cases. If video surveillance were linked to the automatic recognition of individuals in connection with databases of biometric data, their cumulative impact on the right to privacy should be assessed in order to determine their proportionality.

194. The Commissioner fully acknowledges the importance of collecting and processing data relevant to the detection and prevention of terrorist activities. However, given the high error rate in connection with preventive investigations respective legislation has to be as precise as possible in identifying the criteria on the basis of which someone becomes included in a counter-terrorism database and for determining the use of the database. The Commissioner stresses that every effort must be made to avoid the stigmatisation of the vast majority of innocent individuals. An independent review of the use and impact of such databases is highly necessary to analyse whether the measures are adequate, necessary and proportionate. The five-year expiry date of the legislation is a further safeguard which will ensure a political review of the usefulness of the legislation.

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<sup>80</sup> For more information in English by the Federal Ministry of the Interior see: [http://www.bmi.bund.de/nn\\_769658/Internet/Content/Themen/Terrorismus/DatenundFakten/Draft\\_\\_Act\\_\\_Joint\\_\\_Database.html](http://www.bmi.bund.de/nn_769658/Internet/Content/Themen/Terrorismus/DatenundFakten/Draft__Act__Joint__Database.html).

<sup>81</sup> Entschließung der 72. Konferenz der Datenschutzbeauftragten des Bundes und der Länder vom 26. bis 27. Oktober 2006 in Naumburg: Verfassungsrechtliche Grundsätze bei Antiterrordatei-Gesetz beachten.

## 8. Penal system and detention

195. After the federalism reform entered into force in September 2006, the legislative powers regarding the execution of sentences shifted from the federation to the Länder. Legal experts as well as judges' associations have expressed concerns that the transfer of responsibilities might not only lead to legal fragmentation but also to a lowering of standards if the principle of cost efficiency is given priority over the standards that have been established at the federal level. The federal law on the execution of sentences, for example, established the social reintegration of prisoners as the principal aim of the penal system. The Commissioner recommends that this priority should be equally reflected in the relevant legislation at Länder level. He also calls upon all Länder which are in the process of drafting relevant legislation to take into account the European Prison Rules adopted by the Council of Europe Committee of Ministers in January 2006.<sup>82</sup>

196. The death of a juvenile prisoner in North Rhine-Westphalia who was hung by his inmates in November 2006 after having suffered 12 hours of severe torture and rape is particularly shocking and alarming. It shows that a structural lack of personnel or insufficient supervision can in fact violate the prison authorities' obligation to protect inmates from inter-prisoner violence. One important protection measure is to provide single cells when an inmate asks for separate accommodation fearing harassment or assault by other prisoners.

### 8.1. Juvenile justice

197. In 2006, the Federal Constitutional Court ruled that in regard to juvenile justice specific legislation was missing to determine the standards for executing sentences of juvenile offenders in line with constitutional requirements. The Court set a deadline for adopting adequate legislation at the end of 2007. The German authorities have informed the Commissioner that legislative reform in this field is well under way in the Länder to meet the deadline set by the Constitutional Court.

198. The Commissioner recalls that depriving children and juveniles of their liberty tends to increase their re-offending rate. He emphasises that arrest, detention and imprisonment of young offenders should only be used as a measure of last resort and for the shortest time period reasonably possible as stipulated in the UN Children's Rights Convention.

199. The number of juvenile prisoners differs greatly among the Länder. This may be linked to differential policies regarding suspended release and sentencing practice concerning violent crimes. The Commissioner observes with concern that the number of juvenile offenders included in open prison facilities (*offener Vollzug*) has dropped

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<sup>82</sup> Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006.

considerably over the last couple of years.<sup>83</sup> Compared to adults the rate of juveniles in open prison facilities is decisively lower. This is particularly problematic as such alternative prison conditions are essential in facilitating reintegration.

200. The Commissioner welcomes that alternative sanctions including mediation between victims and offenders are provided across all Länder. Some experts and social workers have expressed concerns that such measures may be applied more restrictively due to financial cuts at the municipal level. Whatever the official sanction process looks like, there should be a possibility for the child or juvenile offender to challenge the sanction and appeal. Currently the federal Juvenile Justice Act (*Jugendgerichtsgesetz – JGG*) does not provide for the possibility of appeal against the scope of educational measures set out by a court decision even though an appeal on the question of guilt can be made. The Commissioner stresses, that the scope of educational measures too should be proportional and open to appeal or other type of independent review.

## **8.2. Secured custody**

201. Under German penal law, a criminal who has committed a serious crime such as homicide or rape may be kept under secured custody (*Sicherungsverwahrung*) after having served his/her prison term. A decision on secured custody can only be taken by the court who issued the original verdict on the basis of expert medical advice. The term of custody is indefinite but subject to court review every two years. The possibility of imposing secured custody can either be included in the original verdict itself or it can be ordered shortly before the prison term expires.

202. The purpose of keeping a person under secured custody has no punitive element but aims at protecting the general public from crimes the perpetrator concerned is likely to commit. Accordingly, prison conditions are adapted to the specific situation and unnecessary restrictions are not applied.

203. During the visit, the Commissioner discussed the issue of secured custody with several Länder authorities, judges and medical experts. The Commissioner is aware of the public pressure judges and medical experts are exposed to when they make decisions regarding the release of a person who might recommit a serious crime. It is impossible to predict with full certainty whether a person will actually re-offend. Psychiatrists regularly assess the behaviour of an imprisoned person who might act differently outside the prison. In addition, it is difficult to foresee all the conditions that wait for the offender outside the prison.

204. The Commissioner calls for an extremely considerate application of secured custody. Alternative measures should also be considered before recourse to secured custody is taken. The Commissioner is concerned about the rising number of people deprived of their liberty under secured custody. He encourages the German authorities to

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<sup>83</sup> Cf. also Frieder Dünkel, *Rechtstatsächliche Befunde zur Situation und den Besonderheiten des Jugendstrafvollzugs in Deutschland*, 2006, p. 4; *Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten nach ihrer Unterbringung auf Haftplätzen des geschlossenen und offenen Vollzuges*, Statistisches Bundesamt 2007.

commission independent studies on the implementation of secured custody in order to evaluate the measure in terms of protecting the general public and its impact on the detained individual.

205. The Commissioner is also aware of proposed amendments which would allow the ex post imposition of secured custody on juvenile offenders in extreme cases. The Commissioner urges the German authorities to reconsider such proposals due to their extreme consequences on juvenile offenders. Alternative measures should be applied in the case of juvenile offenders whenever possible.

206. Furthermore, the Commissioner was informed that persons kept under secured custody regularly experience a loss of future perspective and give up on themselves. This would appear to call for the provision of psychological or psychiatric care. The medical opinion may occasionally be divided on the efficacy of care provided to persons kept under secured custody, yet the possibility of their eventual rehabilitation and release should not be excluded. Accordingly, people held under secured custody should receive adequate medical treatment or other care that addresses their specific situation.

### **8.3. Implementation of the Optional Protocol to the Convention against Torture**

207. The Commissioner welcomes the recent decision between the federation and the Länder to ratify the Optional Protocol to the UN Convention against torture. The Protocol obliges state parties to establish, maintain or designate one or several independent visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment.<sup>84</sup> Following a consensus reached among all Länder, the current plan for establishing such a national preventive mechanism in Germany comprises a board of four experts working on an unsalaried basis. In addition to these four experts who would be responsible for detention facilities falling under Länder competence, a fifth person would be appointed to be responsible for places of detention under federal authority.

208. Given the broad mandate of this preventive body covering hundreds of different detention and custodial facilities all over Germany, the Commissioner expresses severe doubts as to the ability of the planned mechanism to carry out its task in a satisfactory manner. The Optional Protocol stipulates that the mechanism should be granted, at a minimum, the power to regularly examine the treatment of persons deprived of their liberty in places of detention. The minimalist composition of the proposed mechanism, however, would most likely have very limited preventive impact as it would not be able to conduct regular visits across Germany. During the visit, the federal authorities acknowledged the Commissioner's concerns regarding the planned visiting mechanism.

209. The Commissioner calls on the competent authorities, and in particular the Länder, to reconsider their plans for implementing the Optional Protocol and to establish an effective preventive mechanism that would better reflect the purpose and aim of the Protocol. This could be achieved in connection with a wider reform that would also comprise an independent police monitoring function in regard to complaints about ill-treatment by the police.

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<sup>84</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

210. The establishment of the visiting mechanism could make use of already existing structures. As regards the monitoring of psychiatric institutions, nearly all Länder already have a system of visiting committees in place that could be extended to meet the requirements of the Optional Protocol. The existing committees, which operate within specified legal frameworks, have been established along federal structures and they are embedded in a system of psychiatric control institutions. For this reason, their composition and structural independence would need to be strengthened and their investigation powers extended in order to make them compatible with the requirements of the Optional Protocol.

## **9. Recommendations**

The Commissioner, in accordance with Article 3, paragraphs b, c and e and with Article 8 of Resolution (99) 50 of the Committee of Ministers, recommends that the German authorities:

### **National system for human rights protection**

1. Ratify Protocol No. 12 to the European Convention on Human Rights, the revised European Social Charter as well as the additional Protocols to the European Social Charter providing for additional rights and a collective complaint mechanism.
2. Consider the establishment of parliamentary human rights committees at Länder level.
3. Promote the independence of extrajudicial complaints bodies, when possible, and ensure that complaints are handled on the basis of clear procedures.
4. Provide to the general public easily accessible information on the available extrajudicial complaints bodies at federal and Länder levels, including about their mandates and procedures.
5. Strengthen the mandate of the German Institute for Human Rights with regard to structural and factual monitoring and in respect to its consultative role in the process of drafting legislation with human rights relevance.
6. Establish independent police monitoring and complaints mechanisms outside police and ministry structures and collect comprehensive data regarding allegations of ill-treatment or misconduct by the police in a centralised way.
7. Consult, in a systematic and regular manner, civil society organisations working in the field of human rights on legislation and policies which impact human rights.
8. Intensify and enhance the integration of human rights teaching methods in pre- and in-service training of school teachers and strengthen the institutionalisation of human rights education for other professions.

9. Develop the national action plan on human rights as a co-ordinated process for the continuous improvement of human rights protection in Germany by involving all stakeholders and setting out clear policy aims and strategies on how to reach them.

### **Prevention of discrimination**

10. Remove or clarify the exceptions to the principle of equal treatment regarding access to rental housing from the General Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz*) and consider extending the time limit for claims based on the Act.

11. Screen relevant legal and administrative provisions at federal and Länder levels to establish whether they comply with the General Equal Treatment Act.

12. Ensure that the Anti-Discrimination Office is provided with the resources and independence necessary for the effective fulfilment of its mandate and that its functions are widely known among the general public.

13. Specify rules of procedure for applying the principle of equal pay for equal work of equal value between different employment sectors.

14. Consider the introduction of collective claims or class actions allowing groups of plaintiffs to challenge sector-related wage gaps between women and men.

15. Develop policy strategies to offer more effective protection to women and girls with disabilities against sexual violence and ensure that victim support and counselling services for women victims of violence adequately cater for women and girls with disabilities.

16. Increase the integration rate of children with disabilities into mainstream education and review procedures which are applied in the selection of pupils to special schools so that they do not unnecessarily hinder integration efforts.

### **Measures against xenophobia and racism**

17. Develop policy responses to right-wing extremist and xenophobic attitudes which are targeted to address all parts of society such as human rights and democracy training as well as the promotion of civil society activities against anti-democratic tendencies.

18. Continue financing victim support organisations, mobile advisory teams and other grass-root initiatives which identify and respond to xenophobic and racist tendencies in local communities.

19. Provide for a penal law provision which would explicitly refer to racist motivation as an aggravating factor when determining sentences.

20. Consider the establishment of a centralised database on qualitative and quantitative data provided by victims or witnesses of racist or xenophobic incidents that have been reported to counselling institutions.

21. Avoid the stigmatisation of migrants, asylum-seekers and ethnic or religious groups living in Germany in the context of political discourse and the adoption of legislation related to naturalisation, immigration, asylum or counter-terrorism.

22. Address Germany's role as a country of immigration by explicitly acknowledging the positive contribution of immigrants to German society.

### **Protection of national minorities**

23. Apply criteria for the personal scope of national minorities in a pragmatic and reasonable fashion in order not to create unnecessary inequalities especially as regards Roma/Sinti with or without German citizenship.

24. Improve data collection on the socio-economic situation of national minorities with due respect for the protection of privacy and in co-operation with the minority communities concerned.

25. Take special measures, including comprehensive strategies at both federal and Länder levels, to improve the situation of Roma and Sinti to overcome the disadvantages brought about by persistent discrimination while ensuring an equal level of protection throughout the German territory.

26. Strengthen the involvement of the Sorbian minority in decision-making regarding the preservation of a viable Sorbian school network in the Länder of Saxony and Brandenburg.

### **Poverty**

27. Develop comprehensive policy measures to tackle child poverty and to improve educational opportunities for children living under poverty.

28. Adopt policy measures in response to the emerging phenomenon of working poor and consider the introduction of minimum wages.

29. Ensure that care in dignity is provided to older people irrespective of their social status and provide clear guidelines on the provision of care in dignity.

### **Asylum and immigration**

30. Implement EU Directives with relevance to asylum with the aim of improving the protection of refugees and in line with the Geneva Convention relating to the status of refugees as well as the European Convention on Human Rights.

31. Apply the grounds for providing protection to refugees to cover persecution on the account of outward manifestations of religion as well as sexual orientation.

32. Review current practice of revoking refugee status to ensure that revocations only take place when the circumstances related to the original decision to grant refugee status have undergone such a fundamental change as to clearly remove the basis for the fear of persecution in a sustainable manner.

33. Grant residence permits to rejected asylum-seekers, with special consideration to families with children, who have been subjected to a chain of tolerance permits over several years.

34. Treat asylum seekers between 16 and 18 years as minors and withdraw the German declaration to the Convention on the Rights of the Child.

35. Provide free legal aid to asylum seekers from the outset of the application process.

36. Consider alternative ways of accommodating asylum-seekers after their initial stay in the first reception centres which respect the privacy of asylum seekers and enable them to retain a substantial degree of personal autonomy.

37. Review the proportionality of the restrictions placed on the freedom of movement of asylum seekers especially in cases when they are applied over several years.

38. Provide health care for the essential treatment of illness for all asylum-seekers.

39. Prepare guidelines on minimum standards for accommodating asylum-seekers to ensure that all asylum-seekers are offered an adequate standard of living.

40. Restrict the use of pre-deportation detention to cases when it is thoroughly justified and when it is clear that the deportation can in fact take place in the immediate future so that the length of pre-deportation detention would not normally exceed a few weeks.

41. Provide free legal counselling to rejected asylum seekers who are in pre-deportation detention so that they can access a remedy to contest the grounds of their detention.

42. Review citizenship legislation in view of permitting double citizenship.

43. Grant family members of refugees the right to family reunification without restrictions regarding available accommodation or financial resources.

44. Ensure that irregular migrants can effectively access their rights to health care and education.

### **Counter-terrorism measures**

45. Develop specific guidelines for intelligence services regarding the questioning of detainees abroad.

46. Ensure that evidence obtained under inhuman or degrading treatment or torture is not admissible in court proceedings.

47. Fully investigate alleged cases of extraordinary renditions that were carried out on German territory or that involved German nationals or long-term residents and adopt effective measures to prevent future unlawful renditions.

48. Apply strict rules of proportionality with regard to preventive investigative measures in order to avoid profiling on the sole basis of religious belief or ethnic origin.

49. Carry out an independent evaluation of counter-terrorism legislation.

50. Specify the criteria on the basis of which a person can be included in the counter-terrorism database and provide clear guidelines on the use of the database including the authorities who may access the data.

### **Penal system and detention**

51. Ensure that the devolution of legislative powers in regard to prison administration does not lead to a lowering of prison standards and that the social reintegration of prisoners remains the principal aim of imprisonment.

52. Promote the accommodation of juvenile offenders in open prison facilities and continue providing adequate funding for alternative sanction measures including victim-offender mediation.

53. Provide for the possibility of appeal by juvenile offenders or other type of independent review against the scope of educational measures set out by a court decision.

54. Apply secured custody in an extremely considered manner and provide people kept under secured custody with adequate medical treatment or other care that addresses their specific situation.

55. Reconsider plans to implement the Optional Protocol to the Convention against Torture so that an effective preventive mechanism is established to regularly examine the treatment of persons deprived of their liberty in places of detention.



## A P P E N D I X I

### List of authorities, institutions and civil society organisations met or consulted

#### A. National Authorities

##### 1. Federal Authorities

###### *Federal Ministers*

Mr. Franz Müntefering, Federal Minister of Labour and Social Affairs and Deputy Chancellor

Mr. Frank-Walter Steinmeier, Minister of Foreign Affairs

Mr. Wolfgang Schäuble, Minister of the Interior

Ms. Brigitte Zypries, Minister of Justice

Ms. Ulla Schmidt, Minister of Health

###### *Bundestag*

Ms Herta Däubler-Gmelin, Chair of the Bundestag Committee on Human Rights and Humanitarian Aid

Mr. Volker Beck, Member of the Committee on Human Rights and Humanitarian Aid

Ms. Angelika Graf, Member of the Committee on Human Rights and Humanitarian Aid

Ms. Gabriele Lösekrug-Möller, Member of the Petition Committee

Ms. Erika Steinbach, Member of the Committee on Human Rights and Humanitarian Aid

Mr. Florian Toncar, Member of the Committee on Human Rights and Humanitarian Aid

###### *Federal Chancellery*

Ms. Maria Böhmer, Minister of State in the Federal Chancellery and Federal Government Commissioner for Migration, Refugees, and Integration

###### *Federal Foreign Office*

Mr. Günter Nooke, Commissioner for Human Rights Policy and Humanitarian Aid

Mr. Ulrich Brandenburg, Deputy Director-General for Political Affairs

Mr. Johann Adolf Cohausz, Head of Division for the Council of Europe

Mr. Christophe Eick, Head of Division for Public International Law

Mr. Peter Franz Josef Rothen, Head of Division for Human Rights

Iceland, Switzerland, Liechtenstein

Mr. Thomas Schultze, Deputy Head of Division for the Council of Europe

###### *Federal Ministry of Labour and Social Affairs*

Mr. Franz Thönnies, Parliamentary State Secretary

***Federal Ministry of the Interior***

Mr. Christoph Bergner, Commissioner for Matters related to Repatriates and National Minorities and Parliamentary State Secretary

Mr. Lothar Freischlader, Diplomatic Adviser to Mr. Schäuble

Mr. Reinhard Peters, Deputy Director-General for Migration, Integration and Asylum Policy

Ms. Cornelia Rogall-Grothe, Director-General for Constitutional, Administrative and European Law

***Federal Ministry of Justice***

Ms. Almut Wittling-Vogel, Federal Government Commissioner for Human Rights Issues

Mr. Hans-Jörg Behrens, Permanent Representative of the Commissioner for Human Rights Issues

***Federal Ministry for Family Affairs, Senior Citizens, Women and Youth***

Mr. Herman Kues, Parliamentary State Secretary

Ms. Renate Augstein, Head of the Anti-Discrimination Office

***Federal Ministry of Health***

Ms. Helga Kühn-Mengel, Commissioner for Patient's Affairs

***Commissioner for Matters related to Disabled Persons***

Ms. Karin Evers-Meyer

***Federal Constitutional Court***

Mr. Hans-Jürgen Papier, President

Ms. Elke Luise Barnstedt, Director

Mr. Klaus Löffelbein, Personal Secretary to Mr. Papier

***Federal Court of Justice***

Mr. Günter Hirsch, President

Ms. Gerda Müller, Vice-President

Mr. Klaus Tolksdorf, Presiding Judge

Mr. Gregor Galke, Judge

Ms. Katrin Rieke, Judge, Higher Regional Court

***Federal Public Prosecutor's Office***

Ms. Monika Harms, Federal Public Prosecutor General

Mr. Rainer Griesbaum, Federal Republic Prosecutor

Mr. Rolf Hannich, Federal Republic Prosecutor

Ms. Annette Böringer, Personal Secretary to Ms. Harms

## **2. Länder Authorities**

### **Land of Berlin**

Mr. Klaus Wowereit, Governing Mayor of Berlin

Ms. Karin Schubert, Mayor and Senator for Justice

Mr. Ehrhart Körting, Senator for the Interior

Mr. Ulrich Freise, Secretary of State, Senator for the Interior

Ms. Heidje Köller, Member of the Office of the Senator for Health, Social Affairs and Consumer Protection

Ms. Kroker-Stille, Head of the Coordinating Centre for Discrimination based on Ethnic Origin, Belief and Religion

Ms. Maier, Member of the Office of the Senator for Health, Social Affairs and Consumer Protection

Mr. Günter Piening, Commissioner for Migration and Integration

Ms. Witt, Group Leader, Health Care Section

Ms. von Zweydorff, Representative of the Senator for Economy, Labour and Women

Mr. Ralf Hillenberg, Chair of the Petitions Committee of the Parliament

Mr. Günter Krug, President of the German Delegation to the Congress of Local and Regional Authorities of the Council of Europe

Mr. Jürgen Kipp, President of the Higher Administrative Court Berlin-Brandenburg

### **Free State of Saxony**

Mr. Erich Iltgen, President of the Parliament

Mr. Albrecht Buttolo, Minister of the Interior

Mr. Albert Hauser, Secretary of State at the Ministry for Social Affairs

Ms. Gabriele Hauser, Secretary of State at the Ministry of Justice

Mr. Hansjörg König, Secretary of State at the Ministry of Cultural Affairs

Ms. Friederike de Haas, Commissioner for Aliens

Mr. Lessmann, Head of Office, Ministry of the Interior

Mr. Harald Preusker, Director-General responsible for the enforcement of sentences and for social services and estates in the justice system, Ministry of Justice

Mr. Reuter, Desk Officer, Ministry of Justice

Mr. Klaus Budewig, President of the Higher Regional Court, Dresden

Mr. Jörg Schwalm, Prosecutor General for the Free State of Saxony

Ms. Angelika Pfeiffer, Deputy Chair of the Petitions Committee of the Parliament

Mr. Peter Schowtka, Member of the German Delegation to the Congress of Local and Regional Authorities of the Council of Europe

Mr. Ihrcke, Deputy Director-General for Principle Policy Affairs

Mr. Hubert Heilemann, Chief physician of the Hospital for Psychiatry and Neurology in Arnsdorf

Mr. Burghart Jäckel, Director-General of the correctional facilities in Bautzen

Ms. Beatrix Klupp, Director of operational services at the correctional facilities in Bautzen

Mr. Frank Ritter, Director of the working units at the correctional facilities in Bautzen

*Sorb Region (including representatives of the Sorb Minority)*

Mr. Vinzent Baberschke, Mayor of Radibor

Mr. Christian Baumgärtel, Chair of the Board of the Foundation for the Sorb People

Ms. Budar, Chair of the Association for Sorb schools

Mr. Bernd Deutschmann, Director of the regional school authorities Bautzen

Ms. Maria Michalk, Chair of the Council for Sorbian Affairs, Member of the Bundestag

Mr. Jan Nuk, Chair of the Federal Board of Domowina – Union of the Lusatian Sorbs

Mr. Marko Suchy, Director of the Foundation for the Sorb People

Mr. Bernhard Zeisch, Managing Director of Domowina

*District of Bautzen*

Mr. Christian Schramm, Mayor, Member of the German Delegation to the Congress of Local and Regional Authorities of the Council of Europe

Ms. Ute Gläser, Director General for urban redevelopment at the building authority

Mr. Peter Hesse, Deputy Mayor

Mr. Hans Eberhard Kaulfürst, Member of the City Council and member of the Council for Sorbian Affairs

Mr. Wolfram Leunert, Councillor for Culture, Education, Building and Environmental Affairs, Ministry of Cultural Affairs

**Free State of Bavaria**

Mr. Günther Beckstein, Minister of the Interior and Deputy of the Minister President

Ms. Beate Merk, Minister of Justice

Mr. Alexander König, Chair of the Petitions Committee, Parliament

Mr. Alfons Zeller, Member of the German Delegation to the Congress of Local and Regional Authorities of the Council of Europe

Mr. Stefan Frey, Desk Officer, Ministry of the Interior

Mr. Karl Huber, President of the Munich Higher Regional Court

Mr. Christoph Strötz, Prosecutor General for Munich

Mr. Wilhelm Schmidbauer, President of Munich Police

**B. Visited Institutions**

Centre for pre-deportation detention in Köpenick, Berlin

Frauenhaus Bora, womens' shelter in Berlin

Sorb secondary school in Radibor

Bautzen Prison

Inspectorate of the Federal Police at Munich Airport

Community accommodation centre for refugees at Rosenheimer Str., Munich

Stadelheim Prison, Munich

Hospital for psychiatry and neurology, Arnisdorf

Pflegeheim im Sunpark, home for older people in Berlin

**C. National Human Rights Institution**

German Institute for Human Rights

**D. Civil society organisations (non-exhaustive list)**

Aktion Courage

Aidshilfe Dresden

AMAL – Opferberatung für Opfer rechtsextremer Gewalt

Amnesty International

Antidiskriminierungsbüro Leipzig

Antidiskriminierungsnetzwerk Berlin

Ausländerbeirat München

Ausländerrat Dresden

Bayrischer Flüchtlingsrat

Bayrisches Aktionsbündnis gegen Abschiebehaft

Bundesfachverband Unbegleiteter Minderjähriger Flüchtlinge

Cabana, Ökumenisches Informationszentrum Dresden

Deutsche Beamtenbund

Deutscher Gewerkschaftsbund

Deutscher Behindertenrat

Deutscher Frauenrat

Deutsches Institut für Menschenrechte

Flüchtlingsrat Berlin

Flüchtlingsrat Leipzig

Forum Menschenrechte

Forum zur Verbesserung der Situation pflegebedürftiger alter Menschen in Deutschland  
Gemeinschaft für Menschenrechte im Freistaat Sachsen  
German National Focal Point of the EUMC, European Forum for Migration Studies  
Gesellschaft für Datenschutz und Datensicherung  
Gesicht zeigen! Aktion weltoffenes Deutschland  
GESOP Dresden, Gesellschaft für die gemeindenahе Sozialpsychiatrische Versorgung  
Human Rights Watch  
Humanistische Union  
Human Rights Centre at the University of Potsdam  
Interessenvertretung Selbstbestimmt Leben  
Islamische Gemeinschaft in Deutschland  
Islamrat für die die Bundesrepublik  
Jesuiten-Flüchtlingsdienst  
Kindernothilfe  
Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess  
Kulturbüro Sachsen  
Lesben- und Schwulenverband in Deutschland  
Mobile Beratungsteams gegen Rassismus und Rechtsextremismus  
Münchener Flüchtlingsrat  
National Coalition für die Umsetzung der UN-Kinderrechtskonvention in Deutschland  
Nationale Armutskonferenz  
Nationaler Geistiger Rat der Baha'i  
Netzwerk für Demokratie und Courage  
Paritätischer Wohlstandsverband  
Pflege in Not  
Pro Asyl  
Bonner Initiative gegen Gewalt im Alter  
REFUGIO München  
RES publica  
Sächsischer Flüchtlingsrat  
Sozialverband VdK Deutschland  
Terre des femmes  
Verband Deutscher Sinti und Roma  
Verband Binationaler Familien  
Zentralrat der Muslime in Deutschland

**E. International organisation**

Mr. Gottfried Koefner, UNHCR Regional Representative for Austria, Germany and the Czech Republic.

## **A P P E N D I X   I I**

### **Comments by the Federal Government of Germany**

#### **Preliminary remarks**

Germany, which acceded to the Council of Europe on 13 July 1950, attaches the utmost importance to the preservation and protection of human rights and is committed to these ends at international level both on a bilateral scale and in the multilateral framework. In this context, promoting and implementing the international human rights standards, including those drawn up by the Council of Europe, is of crucial concern to the Federal Government.

Germany regards its first obligation in this connection as being to implement the required standards at domestic level. The European Convention for the Protection of Human Rights and Fundamental Freedoms is one of the universal values on which Germany's constitution, the Basic Law, is founded.

The work of the Commissioner for Human Rights is an indispensable part of the European system of human rights protection. The Federal Government therefore attached great importance to the visit of the Commissioner for Human Rights to Germany in October 2006.

It welcomes the completion of his very constructive, helpful report on Germany and thanks him for the opportunity to be able to comment on individual parts of the report.

In the Federal Government's view, the report drawn up by the Commissioner for Human Rights and its recommendations make an important contribution towards keeping the legal and factual aspects of the human rights protection mechanisms in Germany under constant review and further improving them where necessary.

The following comments are intended to supplement or respond to the report by the Commissioner for Human Rights where there is, in the Federal Government's view, a need for further clarification in addition to the Commissioner's remarks or where matters need to be placed in a wider domestic-policy context.

## **Comments**

The comments refer to individual passages in the Commissioner's report; the numbering corresponds to the numbering of the relevant sections and paragraphs of the report.

Comments and statements on individual recommendations can be found under the sections to which the recommendations refer.

## **National system for human rights protection (Report, nos. 7-52; recommendations, nos. 1-9)**

### **Nos. 37 and 38**

The Commissioner for Human Rights suggests that human rights training for police officers within the scope of further training should be further improved. He says this should become a compulsory component of in-service training and further education for the police. It should be noted that, although the topic human rights training is not compulsory – there being no real obligation to attend further-training courses at all – the healthy attendance at these events in practice shows that there is no need to introduce a formal obligation to attend these further-training courses.

The Commissioner for Human Rights also considers that human rights values must be reflected in the management and organizational structure of the police. Here it must be emphasized that in a democratic state based on the rule of law it goes without saying that the management and organizational structure of the police is oriented to principles of fundamental and human rights. The formulation which appears in the report could be misunderstood to suggest that deficits were found in this area, although no deficits whatsoever are specifically mentioned.

## **Prevention of discrimination (report, nos. 53-78; recommendations, nos. 10-16)**

### **No. 64 and recommendation no. 13**

The Commissioner recommends that the Federal Government specify the rules of procedure for applying the principle of equal pay for work of equal value between different sectors of employment, as the social partners would be bound by these more explicit regulations.

In the Federal Government's view, it must be assumed that the principle of equal pay is firmly enshrined in both international and German law: the framework is set in international law by Article 141 of the EC Treaty as well as various European directives,

in national law by Articles 3 (2) and (3) of the Basic Law and by Sections 1 and 2 (1) (2) of the General Equal Treatment Act. All sides, individual employers and the social partners, are already bound by these provisions, and it makes no difference whether wage discrimination results from a collective agreement, a workplace agreement or an individual contract, or whether it is direct or indirect. Numerous judgements by the European Court of Justice and the Federal Labour Court have already clarified the principles of job classification, and there is no need for further legislation: job evaluation studies and classification systems must fulfil the criteria developed under current law and can to that extent be examined. To go beyond that and oblige the social partners to use certain systems would not only be counterproductive but also incompatible with the system of free collective bargaining. Rather than undertaking further statutory specifications, it would be more to the purpose to ensure, through increased PR work, that all parties are fully aware of the legal situation and of their rights and obligations. To this end, the Federal Government published relevant guidelines back in 2002; they are currently being revised.

**No. 72**

With regard to the employment of persons with disabilities, the Federal Government considers that the report does not take adequate note of the positive trends to be seen in the system of employment quotas and compensation penalties: more employers are employing persons with disabilities (rather than paying the monthly compensation penalty instead).

The number of persons with severe disabilities in employment in Germany rose by two percent from 2003 to 2005. And the number of women with severe disabilities employed rose by no less than five percent. In 2005 a total of 920,000 persons with severe disabilities were in employment. Besides this, the number of employers who have an obligation to employ persons with severe disabilities, but who do not do so, has fallen by almost half since 2001. This is a positive development which should, in the Federal Government's opinion, be emphasized in this context.

**Nos. 72 to 74**

To supplement the Commissioner's remarks regarding employment opportunities for persons with disabilities in Germany, the Federal Government draws attention to the initiative "job – Jobs ohne Barrieren" (Jobs without barriers) of the Federal Ministry of Labour and Social Affairs, which already reinforces the message and provides information regarding the legal framework for promoting training and employment for persons with disabilities and suggests ways to apply it in an appropriate manner at

company level. The initiative is currently being evaluated (for the report to be presented in accordance with Section 160 (2) of Book IX of the Social Code); it will be continued taking due account of the results of this evaluation.

**Measures against racism and xenophobia  
(report, nos. 79-93; recommendations, nos. 17-22)**

**No. 90**

The police have uniform criteria for recording right-wing crimes with a xenophobic background. The data thus collected provides a reliable basis for analyzing the incidence of criminal acts and forecasting developments in this area. Such a uniform system of data collection cannot be guaranteed by NGOs.

**Protection of national minorities  
(report, nos. 94-108; recommendations, nos. 23-26)**

**Nos. 95 and 96 and recommendation no. 23**

With regard to the Commissioner's recommendation that the criteria for the personal scope of national minorities be applied in such a fashion as to ensure that there are no unnecessary inequalities especially as regards Roma/Sinti with or without German citizenship, the Federal Government would like to point out the following:

The Committee of Ministers did not follow the recommendation (mentioned in the report) of the Advisory Committee of the Framework Convention for the Protection of National Minorities (FCNM) on expanding the scope of application beyond the declaration made by Germany in its instrument of ratification (restricting the scope of application of the Convention). The Committee of Ministers decided only that "further dialogue on the possibilities to expand the scope of application (...) would be desirable".

The Federal Government maintains a constant, constructive dialogue with representatives of the national minorities. However, Germany regards the FCNM as an instrument for preserving the language and culture of the autochthonous minorities in Germany which have evolved to form part of the country's rich cultural landscape. The rights of Roma of foreign nationality are therefore determined in accordance with other fundamental and human rights as guaranteed, in particular, by the Basic Law and the European Human Rights Convention. These do not specify, however, that foreigners must be educated in their language of origin. Accordingly, the mother tongues spoken by migrants are expressly not included among the languages protected under the European Charter for Regional or Minority Languages.

The German Sinti emphatically reject state education in Romanes, and the German Roma have at least not called for it as yet.

**Nos. 99-100 and recommendation no. 24**

The Federal Government points out that Germany successfully proposed that the Council of Europe Committee of Experts DH-MIN consider these questions before there be any move to amend the factual or legal situation. From the German viewpoint, it must be remembered, independent of the reservations stemming from historical considerations, that data collection is only permissible where necessary and appropriate. However, even the question of whether it is appropriate seems doubtful, for instance when one recalls that the decision on belonging to a minority is a free one, and that the results of censuses in other countries clearly deviate substantially from the objective facts.

**Nos. 97-98 and 101-104 and recommendation no. 25**

The Commissioner recommends that the Federal Government take measures to improve the situation of Roma and Sinti throughout Germany at both Federal and Länder level. In the Federal Government's view, however, the advantage of federalism is precisely that it allows the needs of the German Sinti and Roma, dispersed in varying numbers throughout German territory, to be met in a targeted manner commensurate with their respective situations. Over and above this, federalism is part and parcel of Germany's legal and constitutional culture.

With regard to the over-representation of German Sinti and Roma at special schools mentioned in the report and their disadvantage on the labour market (which results in part from this), the Federal Government points out that the Länder are making substantial efforts to remedy the situation as regards the frequently inadequate compliance with the duty to attend school.

In response to the claims that there have been over 500 cases of alleged discrimination against Sinti and Roma, it must be said that the Federal Government is not aware of any current instances of discrimination from media reports concerning Sinti and Roma. The Federation and the Länder have taken care to ensure that the police authorities only volunteer information on the ethnic background of criminals and suspects where it is necessary to avert danger or help with investigation/prosecution. We refer here to Germany's third National Report concerning the European Charter for Regional or Minority Languages.

**Nos. 105-108 and recommendation no. 26**

With regard to the Commissioner's recommendation that the involvement of the Sorbian minority in decision-making regarding, for example, the preservation of a viable Sorbian school network, should be strengthened, the Federal Government draws attention to the fact that such involvement has to date been ensured in many different ways, but that despite such involvement school closures cannot be ruled out if proper teaching can no longer be delivered sustainably because of inadequate pupil numbers.

Nor can the disappearance of Sorbian place names from the catalogue of addresses used by the German postal service be attributed to inadequate involvement of the Sorbian communities or to a lack of commitment on the Federal Government's part. The Federal Government has to consider cost-benefit factors and the burden on the budget. Since minority-language versions of the catalogue of addresses used by the postal service are required neither by the Framework Convention for the Protection of National Minorities, nor the European Charter for Regional or Minority Languages, nor even directly by universal human rights, the question is raised in several quarters whether such catalogues of addresses, while in principle desirable, can – in the light of higher-ranking budgetary objectives – be justified in economic terms.

**Asylum and immigration**

**(report, nos. 122-164; recommendations, nos. 30-44)**

**No. 123**

The Federal Government points out that, even before the Immigration Act entered into force on 1 January 2005, both persecution emanating from non-state actors and persecution for gender-specific reasons could lead to the granting of refugee status, albeit not in all circumstances. In the wake of the extension of protection for refugees under the Immigration Act, the provisions of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive) have already been completely fulfilled.

**No. 124**

The Federal Government does not share the Commissioner's view that protection gaps may still exist as regards persecution on grounds of religion or membership of a particular social group.

Although public manifestation of religion is a protected concept according to Article 10 of the Qualification Directive, in order to qualify as an act of persecution within the meaning of the Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), Article 9 of the Directive requires in this area, too, "a severe violation of basic human rights". Accordingly, the Federal Government points out that not every interference with the freedom of religion meets that criterion. Refugee protection must be granted, however, if there is interference in the basic right of freedom of religion in the country of origin.

German asylum law already grants protection in cases of persecution on grounds of sexual orientation, i.e. also in the case of persecution of homosexuals. In the case of persons who left their country without having been persecuted, however, it must always be examined whether persecution is highly probable if they return to the country of origin. This may be answered in the negative if a person has in the past been able to practise his sexuality without incurring persecution. However, behaviour which would be illegal in Germany as well (e.g. paedophilia) is not protected.

**No. 125**

The Federal Government points out that Article 6 of the Qualification Directive, which deals with persecution actors, applies not only to refugee protection, but also to subsidiary protection within the meaning of the Qualification Directive, e.g. protection against torture. It provides that dangers emanating from non-state actors can also lead to the granting of subsidiary protection within the meaning of the Qualification Directive. This provision is already applied directly and being transposed into national law by the Act implementing European Union Directives on rights of residence and asylum.

**Nos. 126 and 127**

The Federal Government points out that the Federal Office for Migration and Refugees, which is responsible for implementing asylum procedures, is obliged to review decisions on the granting of refugee status only once, generally after three years, and – if the need for protection has ceased – to revoke refugee status. This does not, in the Federal Government's opinion, constitute "a frequent review of status".

**No. 128**

The Federal Government points out that alongside refugee status on the one hand and temporary suspension of deportation (tolerated status) on the other, there is also the possibility of granting a residence permit in accordance with Section 25 (3) of the Residence Act, e.g. if there is a substantial concrete danger to life, limb or liberty (cf. Section 60 (7) of the Residence Act).

There are no restrictions on access to healthcare for tolerated foreigners. Tolerated foreigners receive assistance under the Asylum Seekers Benefits Act under which subsistence benefits (food and accommodation ) and medical care in the case of acute illness and pain are certainly granted.

The Federal Government points out that tolerated persons in Germany generally enjoy freedom of movement throughout the Land in which they are habitually resident. As part of the ongoing legislative process with the Immigration Act, it is also intended to ease the spatial restrictions in cases where the foreigner wants to take up employment in another Land.

The Federal Government is also of the view that the report does not take adequate account of the reasons for which temporary suspension of deportation is ordered in practice:

In many cases the reason for ordering temporary suspension of deportation, besides the difficulties involved in a voluntary return to the country of origin, is the fact that a foreigner's identity has not been clarified and the person is not cooperating adequately in the process to establish identity or to procure the documents required for repatriation.

**No. 129**

In the Federal Government's view, the report unjustly assumes that in the case of longer-term temporary suspensions of deportation (the report expressly talks of tolerated status being applied "for several years"), the tolerated status can be revoked without notice leading to immediate deportation. This is not so. Even after the amendments to the Residence Act, Article 60a (5) sentence 4 of the Residence Act stipulates precisely that, if deportation has been suspended for more than one year, prior notice of at least one month must be served; such notice must be repeated if the suspension has been renewed for more than one year.

**No. 130**

The Federal Government does not agree with the assessment that the Immigration Act of 2004 has not benefited tolerated foreigners. The Immigration Act, with Section 25 (5) of the Residence Act, introduced a regulation under which tolerated persons can be granted residence permits. Up to 20% of tolerated foreigners have been able to obtain residence permits in this way.

According to information from the Central Aliens Register, there were 202,929 tolerated foreigners in Germany on 31 December 2004. On 30 May 2007 the figure was 161,539. The exact number of people who have obtained a residence permit pursuant to

Section 25 (5) of the Residence Act cannot yet be established from the Central Aliens Register because, under a transitional arrangement, the aliens authorities have to enter the data for 2005 into the Central Aliens Register retrospectively. To date, 43,507 residence permits granted under Section 25 (5) of the Residence Act have been registered (as at: 30 May 2007).

The evaluation of the Immigration Act suggests the following reasons why many tolerated foreigners have not been able to be granted residence permits under Section 25 (5) of the Residence Act: there were no legal or factual obstacles to voluntary departure; the persons concerned were prevented from leaving the country for reasons of their own fault, for instance by veiling or faking their identity, practising deception relating to their nationality, providing false information, failing to provide documents, losing their passport through their own fault or failing to cooperate.

The fact that the Standing Conference of the Ministers of the Interior reached a decision on right-to-stay regulations in November 2006 does not contradict this evaluation. The same applies to the regulation for old cases which is to be inserted into the Residence Act.

**Nos. 130 and 131 and recommendation no. 33**

The Federal Government considers that there is a need for the following clarification regarding the current legal situation:

The Immigration Act did not introduce an 18-month limit for temporary suspension of deportation either in respect of existing cases or with regard to new cases. Once a stay has been tolerated for 18 months it is no longer the case that the granting of a residence permit is at the discretion of the aliens authorities, rather a permit should as a rule be granted (see the first and second sentences of Section 25 (5) of the Residence Act). That applies, however, only if it is impossible for the foreigner to leave the country for a longer period of time through no fault of his or her own. In practice, however, precisely this is rarely the case. The report of the Federal Ministry of the Interior of July 2006 evaluating the Immigration Act comes to the conclusion that in the majority of cases it was not possible for a residence permit to be issued under Section 25 (5) of the Residence Act because the persons concerned either could leave the country voluntarily or were prevented from leaving the country for reasons of their own fault. Expectations of an increased number of residence permits being granted are based on the false assumption that the majority of those who are required to leave after a long period of stay are precluded from leaving voluntarily because of the resulting unreasonableness of such a departure or because of the human rights situation in their country of origin, and that they bear no responsibility for any repatriation or departure problems.

**Nos. 132 and 133**

The Federal Government points out that the training recommended by the Commissioner for the staff of the Federal Office for Migration and Refugees and for interpreters is already carried out on a regular basis.

**No. 134**

The Federal Government points out that Article 17 (3) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive) expressly states that Germany may, in accordance with the laws and regulations in force at the time the Directive was adopted, abide by its existing laws on whether unaccompanied minors aged 16 or older should have representation in pursuing their application.

With regard to the Commissioner's call that Germany's Declaration to the Convention on the Rights of the Child be withdrawn, the Federal Government states that the known reservations of the Länder about such a move still pertain. For reasons of principle, the Federal Government is not prepared to act on this matter against the express wishes of the Länder. It is the view of the Federal Government and the Länder that the Declaration does not undermine international standards of protection.

**Nos. 139 and 143**

The Federal Government points out that the rooms in the accommodation centre in question measure 12.92 square metres. The maximum capacity of the accommodation centre in the event of an unexpectedly high influx of refugees amounted on the date of the visit to 290 places. However, to take account of the greater space requirements of the residential group for unaccompanied refugee minors aged between 16 and 18, the occupancy of the accommodation centre was, in fact, lower. On the date of the visit 189 persons were accommodated in the centre.

The residential group for unaccompanied refugee minors was set up expressly at the request of the NGO in 2005. According both to the experience of the competent public authority and the assessment of the NGO, the accommodation centre is extremely popular with residents on account of its central location. Moreover, for a central inner-city location, the plot on which the accommodation centre is situated is extremely sizable, comprising 4300 square metres, and with its outdoor areas it offers residents the opportunity to pursue a diverse range of activities. The NGO which operates at the accommodation centre is financed to a considerable extent by funds from the Bavarian State budget.

**No. 143 and recommendation no. 38**

The Federal Government points out furthermore that the benefits in the event of illness which are accorded under Section 4 of the Asylum Seekers Benefits Act in cases of acute illness and pain by means of the necessary medical and dental treatment, provision of medication and dressings and for the purposes of convalescence, recovery or relief fully meet the requirements of Article 15 of Council Directive 2003/9/EC relating to necessary healthcare for asylum seekers. The Directive requires healthcare to include, at least, emergency care and essential treatment of illness. Other imperative benefits for safeguarding health may be granted over and above in accordance with Section 6 of the Asylum Seekers Benefits Act.

**Nos. 144 and 145**

The Federal Government is of the opinion that the report's remarks fail to take full account of the differentiated system of precautionary and preparatory detention contained in Section 62 of the Residence Act. The given impression that detention may be ordered in the case of foreigners who are "likely" to evade deportation, or that the "well-founded suspicion" that a rejected asylum-seeker would evade deportation was "probably used in too wide a sense as a ground for placing a foreigner in pre-deportation detention", fails to take into consideration the fact that pre-deportation detention is a preventive measure which can be imposed only under precisely stipulated legal conditions and only on the order of an independent judge. This procedure ought largely to exclude any suspicion of misuse with regard to the authorities requesting such detention.

**No. 149**

The Commissioner's demand that pre-deportation detention should only be applied when it is thoroughly justified and when it is clear that the deportation can in fact take place in the immediate future is, the Federal Government considers, already met under Section 62 (2) sentence 2 of the Residence Act and by observing the constitutional principle of proportionality.

**Nos. 162 and 164**

The Federal Government draws attention to the fact that the legal status of victims of trafficking in human beings is transposed into German law through the implementation of Council Directive 2004/81/EC. It is intended to introduce a period of reflection of one month during which victims can reach a decision on cooperation with the prosecuting authorities. In addition, victims may be granted a temporary residence permit. They will already receive benefits under the Asylum Seekers Benefits Act during this period of reflection. Granting a period of reflection makes it clear that the focus is initially on the victim. Only after the period of reflection is the stay dependent on cooperation with the prosecuting authorities.

The aliens authorities inform victims ex officio about the valid regulations, particularly as regards their status under the law on foreigners, as well as about victim support programmes and measures, including care from counselling experts.

**Counter-terrorism measures  
(report, nos. 165-194; recommendations, nos. 45-50)**

**No. 167**

The Federal Government points out that the US did not decide to release Mr Kurnaz until the summer of 2006. In the period in question following the questioning of Mr Kurnaz by German security authorities, only a small number of detainees were released from Guantánamo, including a man aged over 90 and a minor. There was no release of a larger group, as was allegedly discussed. Moreover, the questioning by the 1<sup>st</sup> Committee of Inquiry of the 16<sup>th</sup> legislative period of the German Bundestag did not find any proof for the claim that the US had earlier made an offer to the German authorities to release Mr Kurnaz.

**No. 172**

The Federal Government points out that, under the new guidelines issued by the Federal Government in March 2006, members of the German investigating agencies will in future no longer be involved in interrogations carried out by intelligence services abroad.

**No. 173**

The Federal Government points out that the assertion that the charges against Mr Zammar in Syria were partly based on information provided by German intelligence services cannot be confirmed. The Federal Government does not know on what evidence the charges against Mr Zammar were based.

**No. 177**

Supplementing the Commissioner's remarks, the Federal Government points out that the 1<sup>st</sup> Committee of Inquiry of the 16<sup>th</sup> legislative period of the German Bundestag found no confirmation that German authorities had early information of the detention of Mr El Masri prior to his release.

**No. 191**

The Federal Government draws attention to the fact that the Act on Joint Databases of 22 December 2006, to which the report refers, does not extend the powers of the Federal Police or the Federal Criminal Police Office. Not all police authorities and intelligence services can access the counterterrorism database. 38 Federal and Land authorities are

legally allowed to access the database. In addition, it is also possible to grant further police agencies of the Länder access under certain circumstances. Only three Federal Länder have made use of this possibility to date.

**Recommendation no. 46**

The Federal Government points out that pursuant to the constitution of the Federal Republic of Germany the prohibition on torture and inhuman or degrading treatment applies absolutely in Germany. This absolute prohibition on torture is also anchored in the Code of Criminal Procedure. Under Section 136a of the Code of Criminal Procedure, methods of examination which impair the accused's freedom to determine and to exercise his will shall be prohibited. This includes forms of treatment which in common linguistic parlance are described as torture. Statements obtained in violation of this prohibition may not be used, even if the accused has given his consent.